



STATE OF INDIANA

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March 5, 2010

Mr. Alec Kalla
8733 W. Summit Circle Drive
French Lick, IN 47432

*Re: Informal Inquiry 10-INF-2; Requests for Public Records of the Indiana
Department of Environmental Management*

Dear Mr. Kalla:

This is in response to your informal inquiry regarding the Indiana Department of Environmental Management ("IDEM"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Public Access Records Act ("APRA"), I.C. § 5-14-1 *et seq.*

BACKGROUND

According to your inquiry, you seek my opinion regarding issues related to your October 7, 2009, request for public records of IDEM. In response to that request, IDEM copied multiple records and mailed them to you on December 22, 2009, along with a bill for fifty-five dollars and eighty cents (\$55.80). The copies consist of emails to/from an IDEM permit writer, drafts of operating permits, and responses to notices of deficiency concerning a permit. You state that there "appears to be confusion" about what you requested from IDEM -- physical copies of records or electronic records. You ask the following related questions.

Question 1: *Is the time between 7 October and 21 or 22 December, 70 [sic] a reasonable or unreasonable time, as per [sic] your office's handbook, page 22, I believe, for an agency to take to comply with a request for access to public records?*

Answer: There are no prescribed timeframes when the records must be produced by a public agency. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. At the same time, section 7 of the

APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c).

The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*. In response to your inquiry, IDEM provides the following response through Lori Kyle Endris, its public records advisor:

IDEM's Central File Room (CFR) has four (4) employees, [sic] a Director, an Administrative Assistant and a Public Records Advisor, and a Clerical Assistant. The CFR fulfills public requests on a first come, first serve [sic] basis. On the same date, October 7, 2009, that Mr. Kalla's request was received and acknowledged, CFR Director Melissa Farrington contacted IDEM Office of Air Quality (OAQ) employee Dave Matousek to obtain the requested documents and communicated to Administrative Assistant, Sara Trobridge, to add Mr. Kalla's request to the CFR's spreadsheet. . . . On October 14, 2009, the CFR received documents responsive to Mr. Kalla's request. . . . On October 26, 2009, Melissa Farrington assigned Sara Trobridge to organize and tag each document to prepare the for review by Public Records Advisor, Lori Kyle Endris, who individually reviewed each document from November 2-3, 2009. On November 5, 2009, Melissa Farrington sent Dave Matousek a request for missing attachments. On December 7, 2009, Melissa Farrington assigned Sara Trobridge to assemble documents for delivery to Mr. Kalla, and his request was #4 on her list of assignments. The CFR sent Mr. Kalla his documents on December 21, 2009.

In addition to the small number of employees the CFR has to process its public records requests, state employees experienced four state holidays between the time of Mr. Kalla's request and its fulfillment. Moreover, immediately prior to Mr. Kalla's request, the CFR received three requests that involved high volumes of documents in response all of which had to be fulfilled prior to Mr. Kalla's and which appeared as #s 1-3 on Sara Trobridge's December 7, 2009 list of assignments.

It is IDEM's position that the time period for producing Mr. Kalla's records was reasonable given IDEM's available resources to produce public records.

Considering the limited staff available to work on public records requests, the number of other requests that were received prior to your request, and the voluminous records associated with yours and the other requests that IDEM was working on during the relevant time period, it is my opinion that IDEM has met its burden to demonstrate that the time it took to produce your records was reasonable.

Question 2: *If it is not [reasonable], how does taking that excessive an amount of time to deliver access to public records affect or modify a citizen's obligation to pay for copies of the records?*

Answer: Initially, I note that it is my opinion that the time period between your request and IDEM's production of records was not unreasonable (considering the circumstances). However, even if a public agency took an unreasonable amount of time to produce public records, the APRA does not provide an associated mechanism to negate a public agency's right (under section 8 of the APRA) to collect a reasonable fee for copies.

Question 3: *If a citizen requests information about, and/or access to, but not paper copies of, public records via IDEM's Virtual File Cabinet (internet access to records), but is provided by mail physical copies, is the citizen obligated to pay for copies?*

Answer: There appears to be a factual dispute between you and IDEM regarding the nature of your request. IDEM maintains that you requested paper copies of the relevant records. The public access counselor is not a finder of fact, so I express no opinion on whether or not you requested paper or electronic records. Regardless, if you requested paper copies of records, IDEM is permitted to charge you a copy fee under section 8 of the APRA. If you did not request copies, for obvious reasons you should not be charged for copy fees.

Question 4: *If IDEM created a digital copy in their Virtual File Cabinet, of a document which is a public record, so that the digital copy was available to the public online, and later that document became unavailable online to the public that even an IDEM employee, as well, was unable to gain access to the file online, but the record/document some time later yet becomes again available online in the Virtual File Cabinet, was a public record removed or damaged or destroyed?*

Answer: Again, there appears to be a factual dispute between you and IDEM because IDEM maintains that it has "no record that any of Mr. Kalla's requested records were removed from and then reappeared on IDEM's Virtual File Cabinet." However, it is my opinion that not publishing a record online on a temporary basis is probably not a violation of the APRA. The APRA obligates public agencies to permit inspection and copying upon receipt of a valid request. *See* I.C. § 5-14-3-3. Agencies that publish electronic versions of records that the public may access are permitted -- but not required -- to provide what the APRA has termed "Enhanced Access" under section 3.6. Because an agency is not required to provide enhanced access, however, its failure to do so is not a violation of the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor