

December 4, 2003

John N. Moore
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1300
Chicago, Illinois, 60601-2110

*Re: Formal Complaint 03-FC-124
Alleged Denial of Access to Public Records by the Indiana Department of
Transportation*

Dear Mr. Moore,

This is in response to your formal complaint, received on November 18, 2003. In it, you allege that Anne Mullin O'Connor, Chief Legal Counsel for the Indiana Department of Transportation ("INDOT"), violated the Indiana Access to Public Records Act ("APRA") (Indiana Code chapter 5-14-3). Specifically you allege that INDOT committed a denial of access to public records. Ms. O'Connor responded in writing on behalf of INDOT, and a copy of that response is enclosed for your reference. For the reasons set forth below, it is my opinion that INDOT did not violate the APRA.

BACKGROUND

By letter dated October 8, 2003, and addressed to Ms. O'Connor, Thomas Tokarski, President of Citizens for Appropriate Rural Roads, Inc. ("CARR") and Andrew Knott, Air & Energy Policy Director for Hoosier Environmental Council ("HEC") requested that "INDOT make available for inspection and copying all of the public records in INDOT's possession in response to the following request." The letter continues,

Please present an itemized cost for each of the following on Alternative 3C for proposed I-69 extension:

1. The bridge across the Patoka National Wildlife Refuge, including the cost to divert water off the main span of the bridge to the ends and into settling/filtration ponds, and the cost of those settling/filtration ponds.

2. Additional costs associated with the above cited bridge due to its construction in an earthquake zone.
3. Costs of the interchanges with the proposed Interstate I-69 at I-64 and I-465.
4. Straight-line construction costs, per mile, over level terrain.
5. Construction costs, per mile, over karst terrain.
6. Number of miles of karst terrain expected to be crossed.
7. Cost of forest mitigation per acre.
8. Number of acres of forest anticipated to be mitigated at 3:1 ratio.
9. Cost of upgrading SR-37, including frontage road costs.
10. Costs of construction on new terrain in Marion County.
11. Number and costs of proposed rest areas.
12. Costs per acre of undeveloped land in each county crossed. Please specify cost for each land type: forest, agricultural, residential, other.
13. Costs associated with blasting in areas where dimensional limestone is present.
14. Costs for procurement of dimensional limestone reserves.
15. Design and engineering costs.
16. Drainage costs.
17. Earthwork costs.
18. Relocation costs.
19. Contingency costs estimate.

The request continues.

Please present an itemized cost for each of the items on Alternative 1, including all optional routes, of the proposed I-69 extension.

1. Cost of interchange at I-64 with US-41 on proposed Alternative 1.
2. Cost per mile to upgrade existing SR-41, including frontage roads.
3. Cost of bypasses around Princeton, Fort Branch, Vincennes, and Farmersburg.
4. Cost per acre of undeveloped land in each county crossed. Please specify cost for each land type: forest, agricultural, residential, other.
5. Design and engineering costs.
6. Drainage costs.
7. Earthwork costs.
8. Relocation costs for all optional routes.
9. Contingency costs estimate.

By letter dated October 16, 2003, INDOT responded to the request. INDOT stated that the information requested “is deliberative and as such, is not required to be disclosed under IC 5-14-3-4(b)(6).” On November 14, 2003, you brought your formal complaint.¹

¹ The complaint was postmarked November 14, 2003, and is thus timely pursuant to Indiana Code section 5-14-5-7(b)(2).

By letter dated November 20, 2003, INDOT responded to your formal complaint. INDOT notes that “there is no explanation provided on the complaint form or attachments as to why the complainants disagree with the denial.” INDOT reasserts the deliberative materials exception. INDOT states:

Much of this information was released by [INDOT] as part of the Draft Environmental Impact Statement (EIS) for the I-69 Evansville to Indianapolis project and this information was specifically provided to CARR and HEC on September 9, 2002. Since the next step in the environmental process is the Final EIS that is currently being drafted, we acknowledged that the cost estimates are being deliberated upon for purposes of the Final document and that [INDOT] considers this information to be subject to the exception provided for deliberative material under the APRA. Essentially, this information is intra-agency deliberative material that is speculative and being communicated for the purposes of decision making.

Additional facts will be provided as necessary.

ANALYSIS

The public policy of the APRA states that “[p]roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” IC 5-14-3-1. Furthermore, “[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.” IC 5-14-3-1. Consistent with the public policy of the APRA, the general rule is that “[a]ny person may inspect and copy the public records of any public agency during the regular business hours of the agency.” However, Indiana Code section 5-14-3-4 sets forth a number of exceptions to the general rule. Specifically, “[r]ecords that are intra-agency or interagency advisory or deliberative material, . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making” are “excepted from” the general rule “at the discretion of a public agency.” IC 5-14-3-4(b)(6) (the “deliberative materials exception”).

INDOT does not dispute that it is a public agency or that the information requested is contained in public records. Therefore, the only issue presented is whether INDOT is justified to assert the deliberative materials exception at IC 5-14-3-4(b)(6). In my opinion INDOT has met its burden of proof for the nondisclosure of this public record.

In both its timely response to your records request and in response to your formal complaint, INDOT states that the information requested “is intra-agency deliberative material that is speculative and being communicated for the purposes of decision making.” Significantly, INDOT is currently engaged in drafting a final EIS and is deliberating cost estimates for that document. To the extent that the specific information you seek is part of these ongoing deliberations, it is properly nondisclosable at INDOT’s discretion. This was the basis for their

nondisclosure as previously communicated to you. Your complaint offers no suggestion or assertion that the cost information you seek is not, at present, deliberative. Therefore, subject to the limitation that INDOT must disclose "factual matters which are not inextricably linked with other non-disclosable materials," *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2003), it is my opinion that INDOT is justified in claiming the deliberative material's exception. It is my opinion that INDOT did not violate the APRA by denying access to the requested information.

CONCLUSION

Because the requested information is intra-agency deliberative material that is speculative and being communicated for the purposes of decision making, it is my opinion that INDOT was justified in claiming the deliberative materials exception at Indiana Code section 5-14-3-4(b)(6). It is therefore my opinion that INDOT did not violate the Access to Public Records Act.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Ms. Anne Mullin O'Connor, Chief Legal Counsel, Indiana Department of Transportation
Mr. Thomas Tokarski, President, Citizens for Appropriate Rural Roads
Mr. Andrew Knott, Air & Energy Policy Director, Hoosier Environmental Council