

September 22, 2005

Mr. Thomas G. Neltner  
1131 University Boulevard W., Apt. 1610  
Silver Spring, MD 20902

*Re: Formal Complaint 05-FC-175; Alleged Violation of the Access to Public Records Act by the Indiana Department of Environmental Management*

Dear Mr. Neltner:

This is in response to your formal complaint alleging that the Indiana Department of Environmental Management (“IDEM”) violated the Access to Public Records Act (“APRA”) by failing to provide you with all responsive records in a timely fashion.

#### BACKGROUND

Your record request followed announcements by IDEM of efforts to resolve outstanding enforcement cases of the agency. On June 6, IDEM issued a press release announcing that the Commissioner of IDEM had issued ten Commissioner’s Orders against entities where no resolution of the enforcement action appeared imminent. In the press release, IDEM stated that “[s]ince March, the new IDEM administration has followed through and resolved 90 cases. Another 20 cases are close to being settled.”

Through your associate Charles Logsdon, on June 13 you requested by e-mail of Matt Klein, Assistant Commissioner of IDEM the following information regarding “the 110 or so settlements that were announced on June 6<sup>th</sup>.” Stating that he would like to compare the original order to the final for these settlements, Mr. Logsdon asked whether both the original and final orders were to be found at IDEM’s file room. Mr. Logsdon also requested “a list of the sites or their ID’s”, if available. That same day, Mr. Klein telephoned you and suggested a meeting. Several informal discussions about the request ensued during June. On June 25, Mr. Logsdon sent a fax and an e-mail to Mr. Klein, asking for “all agreed orders and supporting documents for the approximately 110 settlements that were announced by Mr. Klein on June 6.” You specifically did not want the records regarding the Commissioner’s orders. Having no response

from IDEM to the fax and e-mail requests, Mr. Logsdon sent an identical request to Mr. Klein by fax on June 30. On July 3, you state that you sent an e-mail communication to Mr. Klein, asking for status on the production of records, and specifically asking for a “list of the 90 organizations that had settled and the 20 that were about to settle with IDEM as a result of IDEM’s new enforcement policy; and draft agreed orders that were given to the organizations more than two years ago as well as the more recent draft agreed orders and the final agreement.” This appears to be little more than a renewed request for the records you first sought on June 13.

On July 5, Mr. Klein sent you an e-mail and fax stating that the adopted agreed orders were ready. On July 6, you picked up the records. At the time you retrieved the documents, you noticed that only the final agreed orders were in the packet; the draft agreed orders were not included. Later that day, you sent an e-mail to Mr. Klein stating that not all requested documents were included in the packet.

On July 8, you and Mr. Klein spoke. At that time, Mr. Klein indicated he planned to provide the proposed agreed orders by Friday, July 15. There was also discussion regarding how to reconcile seemingly discrepant information regarding what the 90 settlements represented. Thereafter, more records were provided to you. By your timeline, IDEM made documents available on July 15 (which you retrieved on July 18), August 16, and August 17. In the documentation that you provided to me was a letter from IDEM to you indicating that records were also made available to you on July 20. In each letter subsequent to the July 6 production, IDEM acknowledges that it “continues to respond to your public records request.”

You filed your formal complaint with the Office of the Public Access Counselor on August 22. In your complaint, you state that “IDEM has not provided any documents related to the list of 90 resolved cases described in its June 6, 2005 press release despite more than ten requests. It has provided no explanation of its inability or refusal to provide the documents.” You also claim that IDEM has failed to respond to requests within the seven days prescribed in IC 5-14-3-9.

I sent a copy of your complaint to IDEM. In response to your complaint, I received a letter dated August 30, 2005. I also received a supplemental response dated September 15, 2005. In the first response, Hala Silvey, Chief of Compliance & Enforcement Section of IDEM contended that it was not accurate for you to state in your complaint that IDEM had not provided any documents related to the 90 resolved cases. IDEM also pointed out that at the time of your complaint, you had not received all the records that IDEM had made available to you (in particular, the 36 records made available on August 17 had not been retrieved); hence, it was premature for you to declare that you had not received all available records. IDEM also pointed out that IDEM was continuing to search for responsive records. IDEM invited you to specify more particularly any additional records you sought if it appeared that the ongoing record production was not resulting in responsive records. In its September 15 supplemental response, IDEM stated that it had timely responded to your request, where it had verbally responded on June 13, 2005, the day it received your request. It also asserted that the July 5 date for its first production of records was within a reasonable period of time to produce records, particularly in light of the magnitude of records that you had requested. Finally, IDEM was interested in

amicably resolving the matter and was seeking to communicate with you regarding its continued production of documents.

## ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A request for records must be stated with reasonable particularity. IC 5-14-3-3(a)(1). An agency that receives a request for records via U.S. Mail or facsimile is required to respond to the request within seven (7) days of receiving the request. IC 5-14-3-9(b). This office has opined that requests received by e-mail should be responded to within seven days. If a request for records is made in writing or by facsimile and the agency denies the request, the denial is required to be in writing. IC 5-14-3-9(c).

Here, IDEM responded to your request within 24 hours by telephoning you. Had IDEM told you on June 13 that it would deny you records, its verbal denial would have failed to meet the requirements of the APRA, since any denial of access must be in writing. IC 5-14-3-9(c). However, you stop short of asserting that IDEM expressed an intention to deny you the records during the June 13 telephone call, and IDEM's actions since then evince an intention to disclose records, even if production has been sporadic or untimely. Hence, I do not believe that IDEM violated IC 5-14-3-9.

The APRA does not prescribe any time in which an agency must produce its records. This office has stated that an agency must produce responsive records within a reasonable time, under all the facts and circumstances. From the gist of your complaint, and from your letters to IDEM dated September 12 and September 13, I conclude that you believe that IDEM is withholding a list of the 90 settled cases referred to in IDEM's press release. Not only do those letters specifically request the list or state that the list is still outstanding, but the statement in your complaint that IDEM has not provided "any documents related to the list of 90 resolved cases..." seems fair only when interpreted as a request for a list, since you admit throughout your timeline that you have received many pages of records *relating* to the settled cases.

Hence, the central issue is whether IDEM has been forthcoming with the list of 90 cases, as well as some of the draft and final agreed orders relating to those cases and yet to be produced. Your request for the list no doubt would help you to resolve the question of how IDEM arrived at the figure of 90 resolved cases, since the records you have received thus far, in your estimation, do not reveal 90 resolved cases.

A public agency is not required to create a list, or any record, where none exists at the time a record is requested, unless applicable law requires that the agency create such a record. You appear to acknowledge that IDEM may not have such a list, as you ask IDEM in your September 12 letter to confirm whether such a list exists. This office has often stated that an agency should clearly answer the question of whether a requested record exists; in the absence of such clear communication, the requester understandably would continue to demand the record or believe it is being withheld. From the record before me, IDEM has not stated whether it has

compiled such a list, and if it has, whether it intends to produce it or deny it. To my knowledge, there would be no exemption that would apply to such a list; if IDEM has compiled a list of the 90 settled cases, it should produce it. Failure to produce a list, if it exists, would be a violation of the APRA.

With respect to the remainder of the draft and final agreed orders for the 90 resolved cases, I express doubt that the agency has met its burden to show that it has produced the records within a reasonable timeframe. Nowhere in its complaint responses has it explained or offered justification as to why it has taken more than ten weeks (and will continue to take more time) to produce records as clearly ascertainable as draft and final agreed orders for the remainder of the 90 settled cases. When a public agency seeks to explain the length of time it has taken to produce records, I would expect that the agency would explain whether there are staff shortages, difficulties locating responsive records, or other circumstances that explain a delay. I agree with IDEM that its first production on July 5 was probably reasonable, but IDEM's conclusory statement that it considers its continuing production to be reasonable in light of the magnitude of the request falls short of supplying facts which explain the difficulties encountered by the agency. Information such as the number of pages in a typical order, the difficulty in locating the files, and the like would be required of IDEM if you were to file a complaint in court alleging a denial of the records. *See IC 5-14-3-9(e)*.

As I often do in other public records disputes, I would offer to you and IDEM my office's services to mediate the dispute over the ongoing production of responsive records. In any event, IDEM should, in my opinion, give you a clear understanding of what records remain to be disclosed and when the remaining records will be available (or its best estimate).

#### CONCLUSION

For the foregoing reasons, I find that IDEM responded to your request for records in a timely manner, but has not either produced the list that you seek or indicated that no list exists. Also, IDEM has not met the reasonableness standard for producing records, particularly where at least some responsive records have yet to be produced.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Hala Silvey