

November 28, 2005

Sent Via Facsimile

Tim Maloney
c/o Leah B. Silverthorn
1915 West 18th Street, Suite A
Indianapolis, IN 46202

Re: Formal Complaint 05-FC-227; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Maloney:

This is in response to your formal complaint alleging that the Indiana Department of Transportation (“INDOT”) violated the Access to Public Records Act by failing to either provide requested records or deny your request for records with a statement of the exemption that authorizes the INDOT to withhold the records.

BACKGROUND

On August 25, 2005, you sent your five-part request for public records to the INDOT. On August 31, 2005, Michelle Hilary, Attorney for the INDOT sent you a letter acknowledging receipt of your request and stating that the INDOT would try to produce records “as quickly and completely as possible.” She also stated that if the INDOT denies disclosure of a record or records, INDOT would cite the specific exemption that authorizes it to withhold the record, pursuant to IC 5-14-3-9(c).

After you made a telephone call to Ms. Hilary on September 27, Ms. Hilary told you that she intended to meet with Mark Ahern, INDOT’s chief legal counsel on Friday, September 30 to determine which documents were exempt from disclosure. She informed you that all documents available for disclosure would be released on Friday, September 30.

Although you left another message with Ms. Hilary inquiring about status, you allege that you received no further communication from the INDOT as of October 27, 2005, which prompted you to file your formal complaint with the Office of the Public Access Counselor.

I sent a copy of your complaint to Ms. Hilary. She responded with the November 14 letter that I enclose for your reference. She also gave me a copy of the November 10 letter that she sent to you, setting forth which documents would be made available for inspection and copying. The INDOT claimed exemptions for requests #2 and #3, denying you records 1) of any and all INDOT or independent studies, reports or other documents since 2000 evaluating the feasibility of the I-69 Evansville to Indianapolis project as a toll road, and 2) any and all traffic volume projections for the I-60 Evansville to Indianapolis project prepared since the completion of the 2003 Final Impact Statement. The basis for the exemption of the two records was the “deliberative materials exemption” pursuant to IC 5-14-3-4(b)(6).

In her November 14 letter, Ms. Hilary did not take issue with your version of events, but wrote to say that part of INDOT’s delay in making a response is the fact that during the month of September and earlier October, the INDOT Planning Division was preparing for and announcing the Governor’s Major Moves transportation program. Many of the documents requested by you on behalf of the Hoosier Environmental Council were “tied to the” Major Moves program and are held by the Planning Division. Up until final announcement of the Major Moves transportation program, “INDOT was holding those documents as deliberative and speculative materials.” Hence, Ms. Hilary stated, “with the final announcement, those documents are now available for public review.” Ms. Hilary also was required to consult with INDOT engineers to determine whether you could receive a copy of the actual statewide model, which would satisfy your request for traffic information. This latter information is run using TransCAD programming, which INDOT was not willing to provide free of charge. In summary, Ms. Hilary stated that with so many departments to coordinate with, the INDOT could not provide an instant response to a request for records.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a). A public agency that receives a request for records via U.S. Mail is required to respond within seven (7) days, or the request is deemed denied. IC 5-14-3-9(b). If a request is initially made in writing, the public agency may deny the request if the denial is in writing, and the denial includes 1) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and 2) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

Your complaint does not take issue with the timeliness of the INDOT’s response, and indeed, I find that the INDOT’s written response of August 31 was timely under the APRA. There is no specific time within which a public agency is required to actually produce the records. The Office of the Public Access Counselor has stated that records must be produced within a reasonable time, under all the facts and circumstances. Several factors are taken into account when determining whether an agency has produced records within a reasonable period

of time. These factors include whether the public agency has received a large request for records or the records that are responsive are voluminous, whether the records require legal analysis to determine their disclosability, or whether the records are aged and stored off-site, to name a few. A public agency may regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 5-14-3-7(a). However, this provision does not operate to deny to any person the right to inspect and copy a public record under IC 5-14-3-3. IC 5-14-3-7(c).

Although INDOT has stated that the Planning Division was readying a new transportation program, the INDOT provides little in the way of justification for a lapse of eleven weeks before providing its November 10 substantive response to your request for records and for making some records available to you. More helpful would have been specific information concerning staff shortages or other pressures on the agency that would severely hamper the agency's ability to search for and provide documents. The preamble to the APRA states that "providing persons with the 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.

Perhaps more troubling than the delay is the fact that the INDOT did not make efforts to keep you apprised of the progress the INDOT was making in fulfilling your request. This office has often advised public agencies to keep requesters informed regarding the status of a records request, and to not wait to disclose all records at once. For example, the INDOT may have been able to provide documents responsive to your request #4, "any and all comments received from local and state elected or appointed officials in response to INDOT's May 2005 legislative survey requesting input on priority road projects" before November 10. Likewise, it appears that your request #5 for "any and all documents concerning the INDOT Planning Oversight Committee scoring of the I-69 Evansville to Indianapolis project" may have been available before other records you requested that required legal analysis to determine whether the agency would disclose them.

With respect to requests for toll feasibility studies and traffic volume projections, the INDOT has claimed an exemption as "deliberative material" pursuant to IC 5-14-3-4(b)(6). Under the APRA, a public agency may withhold:

"Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making."

IC 5-14-3-4(b)(6).

The APRA places on the public agency the burden of proof for the nondisclosure of a public record. IC 5-14-3-1. Hence, in order for the INDOT to sustain its burden for the denial of the records, it must show that the records are: 1) intra-agency or interagency advisory or deliberative material; 2) are expressions of opinion or are of a speculative nature; and 3) are

communicated for the purpose of decision making. Many records of a public agency are communicated for purposes of decision making, but that reason alone would not make records exempt under the deliberative materials exception. The records must also be intra-agency or interagency, and be expressions of opinion or of a speculative nature. In *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), the Indiana Court of Appeals held that not all material related to an investigation of wrongdoing on the part of I.U. Coach Bobby Knight are necessarily speculative or expressions of opinion. Moreover, the Court of Appeals held that factual matters which are not inextricably linked with other nondisclosable materials should not be protected from disclosure, because the APRA provides that public agencies are required to separate nondisclosable information in a record and disclose the remainder of the record, under IC 5-14-3-6(a). *Id. at 914.*

I do not have information at this time that would lead me to opine that the records the INDOT claims as deliberative are not deliberative. However, one part of the INDOT complaint response letter of November 14 compels me to offer additional guidance. In the November 14 letter, Ms. Hilary states that until the final announcement of the Major Moves transportation program, INDOT was holding certain documents as deliberative; with the final announcement, those documents are now available for public review. Ms. Hilary does not specifically identify which documents were related to the Major Moves program. To be sure, a public agency may decide to not disclose deliberative material when a request is received, but release it at a future time as part of the discretion it is permitted to exercise pursuant to IC 5-14-3-4(b). However, a public agency may not delay its response to a request for records, or delay disclosing a record until a time suitable to the public agency, unless the public agency can sustain its burden of proving that the record or records meet all the elements of the deliberative materials exemption at the time the request for the record is received.

The INDOT also stated in its complaint response that in response to your request for traffic estimates, the “actual statewide model” operating on INDOT’s local area network would require “three CDs for installation and require TransCAD, a travel demand modeling software package to run the model.” The INDOT stated that because of the cost to INDOT of the TransCAD software, and the likelihood that providing a copy would violate a licensing agreement with the software vendor, the INDOT was not willing to hand over this software to you. Instead, the INDOT was considering allowing you to view the model in its offices.

A public agency is not required to make available computer programs, computer codes, or other software that are owned by the public agency or entrusted to it, pursuant to IC 5-14-3-4(b)(11). Since you did not specifically request a copy of the software, the INDOT did not violate the APRA by not citing this exemption in its November 10 response.

CONCLUSION

For the foregoing reasons, I find that the time in which the INDOT issued its first substantive letter and produced records was not reasonable under the facts presented to me. I also find that the INDOT has the burden of showing that the records it withheld as deliberative material meet the three elements of the deliberative materials exception. Finally, the INDOT is

not required to provide a copy of proprietary software to you in order to provide you with access to the statewide model that is operating on the INDOT's local area network.

Sincerely,

Karen Davis
Public Access Counselor

cc: Michelle Hilary