

September 4, 2007

J.V. Cox
5077 South State Road 63
Hillsdale, Indiana 47854

Re: Formal Complaint 07-FC-230; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Cox:

This is in response to your formal complaint alleging the Indiana Department of Transportation (“Department”) violated the Access to Public Records Act (“APRA”) (Ind. Code §5-14-3) by not responding to your request for records. A copy of the Department’s response is enclosed for your reference. I find that the Department did sufficiently initially respond to your request but should have followed up with a denial of access when it decided to withhold the records from disclosure under the section 4(b)(6) exception. I further find the Department is appropriately applying the section 4(b)(6) exception to the requested records.

BACKGROUND

In your complaint you allege that on July 23, 2007 you requested records from the Department. Specifically you requested from Doug Gendron of the Crawfordsville District Office records related to complaints filed with the Department regarding your Highway 63 driveway use. You filed your complaint with this office on August 2 alleging the Department has not responded to your request.

The Department responded to your complaint by letter dated August 21 from Jennifer Jansen, attorney for the Department. Ms. Jansen provides further information regarding the matter, explaining that the substantive issue at hand is your use of your driveway for commercial purposes. There is a process through the Department for obtaining a permit to use a residential driveway for commercial purposes. When you were at the Department’s Crawfordsville District Office to discuss your pending application, Mr. Gendron mentioned to you that the Department had received complaints regarding your commercial use of your driveway. You indicated you wanted to know who had called to complain about the business, the dates of their calls, and the nature of their complaints. In response, Mr. Gendron said he was not certain that he could provide the information and would inquire as to whether the information could be provided. He

also indicated he would follow up with you. Mr. Gendron submitted the question to the Department's legal division later that day.

Ms. Jansen further asserts you requested a list of all complaints filed and the pertinent related information. Since the Department does not keep a list, she asserts the Department is not required to create a list in response to your request. Further, Ms. Jansen asserts that the records created by the Department regarding the complaints are in the form of handwritten notes taken by employees of the Department and are intra-agency deliberative material (expressions of opinion or speculative in nature and communicated for the purpose of decision making).

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." Ind. Code §5-14-3-1. The Department is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2.

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is made orally, the public agency must respond within 24 business hours. I.C. §5-14-3-9(a). A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency.

If a request is made orally, it may be denied orally. I.C. §5-14-3-9(c).

At the discretion of the agency, records may be exempt from disclosure when they are intra-agency or interagency advisory or deliberative material that are expressions of opinion or are of a speculative nature and are communicated for the purpose of decision making. I.C. §5-14-3-4(b)(6).

Here you asked the Department for a list of all complaints regarding the use of your driveway. The Department asserts it does not have a list of those complaints. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. The Department is not required to create a list of complaints in response to your request.

In the case that you seek other information related to the complaints, the Department indicates those records are in the form of handwritten notes made by employees of the Department. That the notes are handwritten does not exempt them from the definition of public

record listed in I.C. §5-14-3-2. But Ms. Jansen asserts the records are excepted from disclosure under I.C. §5-14-3-4(b)(6) as intra-agency deliberative material. The notes regarding the complaints are opinions or speculative statements, and the information was communicated for the purposes of decision making, specifically to for use in determining whether to grant or deny your permit application. As such, I agree with the Department that these records can be withheld from disclosure at the discretion of the agency. I.C. §5-14-3-4(b)(6).

Regarding the Department's response to your request, the Department contends Mr. Gendron's immediate reply to your request that he did not know whether he could disclose the information and needed to find out is an appropriate response. Under the APRA, an agency must respond to a request made orally within 24 business hours. I.C. §5-14-3-9(a). So if you made the request at 8:30 a.m., the Department had a duty to respond by 8:30 a.m. the next business day.¹ Here Mr. Gendron responded immediately to your request, so the response was well within the required time. When, however, the Department made the determination to withhold the records from disclosure, it had a duty to tell you it was denying you access. That denial could have been made orally or in writing. I.C. §5-14-3-9(c).

CONCLUSION

For the foregoing reasons, I find that the Department did sufficiently initially respond to your request but should have followed up with a denial of access when it decided to withhold the records from disclosure under the section 4(b)(6) exception. I further find the Department is appropriately applying the section 4(b)(6) exception to the requested records.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Jennifer Jansen, Indiana Department of Transportation

¹ Previous Public Access Counselors have opined that the 24 hour response required by the APRA means 24 business hours. Like other previous counselors, I initially interpreted that to mean 24 hours of operation, or roughly three business days. I understand now that the first Public Access Counselor, Counselor O'Connor, interpreted 24 hours as the next business day. I subscribe to that interpretation. This means a public agency must respond to a request submitted orally by the same time the next business day.