

April 16, 2007

Sent Via Facsimile

Ms. Marcia J. Oddi
1319 N. Alabama Street
Indianapolis, IN 46202

Re: Formal Complaint 07-FC-70; Alleged Violation of the Access to Public Records Act by the Indiana Department of Environmental Management

Dear Ms. Oddi:

This is in response to your formal complaint alleging that the Indiana Department of Environmental Management (“IDEM”) violated the Access to Public Records Act by refusing to provide a copy of certain IDEM documents by “batching” the Microsoft Word documents onto a disk, and by charging an excessive fee to provide the copy that includes the cost of removing metadata from the MS Word documents.

BACKGROUND

You have been requesting information from IDEM periodically. Specifically, you have asked to receive copies of the Notices of Violation (NOVs) and Agreed Orders (AOs) for each month. The IDEM has provided the NOVs and AOs on its website for some time. You allege that IDEM has more recently not been updating these documents on its website in a timely manner. Consequently, you have asked to receive copies on a disk of the documents in the format in which they are created, MS Word.

You have received some of the documents on disk as a result of your requests. In December 2006, you were given a CD with several months of the documents, but were required to pay for the staff at IDEM to perform a “sweep” of the documents to remove the metadata. You had indicated to IDEM that you wished to continue to receive CDs with copies of the updated documents, until such time as IDEM upgraded the website to provide better access to the records, including more timely records. In the meantime, IDEM has been attempting to update its

website in a more timely fashion. IDEM states that it now posts documents produced in a month by the middle of the following month.

In January 2007, you requested the digital documents. You were put off until you were told in early March that the January documents were available on the IDEM webpage, or that hard copies could be retrieved in the IDEM public file room. You believe that this is a denial of access under IC 5-14-3-3(d), which provides that a public agency shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records if the medium requested is compatible with the agency's data storage system.

Providing the documents in digital format is the most efficacious method for the agency and the user; the batched documents could be e-mailed or loaded to a CD. Also, you say that there are a number of significant questions that can be answered only by access to the digital version of the NOV's and AOs. These include what kind of violations IDEM is devoting its resources to pursuing, has this emphasis changed over time, and what is the average penalty amount for such a violation, among other questions.

You state that IDEM's March 7 response that the January 2007 enforcement records are available on the internet is inadequate. The requester would have to conduct a search for, and then manually download, each document individually. Furthermore, IDEM's online resource is always behind, sometimes by many months.

I sent a copy of your complaint to IDEM. IDEM counsel Robert Keene immediately sent a March 16, 2007 letter posing several questions for my guidance. Those questions are:

- Who decides which software format will be used to provide requested records electronically, the person making the request or the agency?
- Does the "reasonable effort" required of an agency to provide records in a requester "medium" also apply to a request for electronic records in a requested software format such as MS Word?
- Is it reasonable to require the agency to expend staff time to make records available in MS Word when they are available on the web in HTML format within fifteen days of the end of the month? To require that IDEM provide additional formats for documents when it has already devoted significant resources to providing a "virtual file cabinet" would detract from the efficiencies gained by making the records available on the web.

IDEM also provided an additional response in its April 2 letter, arguing again that IDEM has made the documents available in HTML format on the web, and this is sufficient under the APRA. Providing the documents on the web requires IDEM to convert the documents to HTML format to accommodate the formatting required for compliance with the ADA. When IDEM does provide the documents on a disk in MS Word format, IDEM is allowed to remove metadata, and is permitted to charge its direct cost to remove embedded, privileged information. This information results from changes made from the time the documents are created by case managers and circulated to agency counsels and policy makers, many of whom add substantive comments to the draft documents. These comments remain embedded in the document and can

be accessed unless the document is “swept” to remove the metadata. IDEM is entitled to charge its direct cost under section 6 and section 8 of the APRA.

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). If a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if the denial is in writing and it contains a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

Except as provided in subsection (e), a public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system. IC 5-14-3-3(d).

A similar issue arose in a complaint filed against the Allen County prosecuting attorney's office in 2002. In *Opinion of the Public Access Counselor 02-FC-23*, the agency determined it would make the data available in a .pdf format, because it believed that to provide it in a way that would allow the requester to manipulate the data, the agency would violate the statute that requires an agency to protect its records from loss, mutilation, or alteration, under IC 5-14-3-7. Counselor Anne Mullin O'Connor determined that IC 5-14-3-7 would not *require* the agency to provide the records in .pdf format. She also found that section 3(d) did not address the question of whether the agency was required to provide data in the format designated by the requester, only the medium on which it was produced, which must be compatible with the agency's system.

Ms. O'Connor stated that the APRA places the responsibility for making a determination on the production of this information in the hands of the public agency, not the requester. Ms. O'Connor observed that “the value of receiving information in electronic form would be greatly diminished if a requester were not able to manipulate the data.” Recognizing that supplying digital records in a .pdf format was tantamount to receiving a paper record, Ms. O'Connor recommended that the agency supply the information in a user-friendly format in order to ensure that the policy and purpose of the APRA is effectuated.

In this complaint, the situation is different from that in *02-FC-23*. Here, the record is available on the web in html format, which can be easily copied and pasted into and stored as a Word document. While it is probably easier and better for your purposes to receive a disk containing batched Word documents, you are not unable to accomplish this same effect using your own efforts, as I understand matters. Although you have argued that certain questions can be answered only by receiving the documents in MS Word format, you have not explained why this is so. Hence, I cannot find that IDEM has failed to make reasonable efforts to provide a copy of disclosable public records by posting them on its website, so long as the IDEM continues to post them in a reasonable timeframe.

Similarly, you have not provided me with specific allegations concerning the failure to provide timely access to the records since January 2007. Although previously IDEM was significantly behind in posting records to the web, that situation has improved. However, you still allege that even with timely posting, the records remain out-of-date. However, you do not specify how long the delay is.

Finally, with respect to sweeping the documents of metadata, you have objected to being charged the agency's direct cost for removing information from MS Word documents. A public agency may charge a person who makes a request for disclosable information the agency's direct cost of reprogramming a computer system if:

(1) the disclosable information is stored on a computer tape, computer disc, or a similar or analogous record system; and

(2) the public agency is required to reprogram the computer system to separate the disclosable information from nondisclosable information.

IC 5-14-3-6(c).

Although this Office has stated that public agencies are entitled to some deference with respect to their determination whether a computer system must be reprogrammed in order to provide the information, *See Opinion of the Public Access Counselor 02-FC-23*, this discretion is not limitless. IDEM would have to show that performing the sweep of the MS Word documents for metadata is "reprogramming" the computer system. Because any user of MS Word can perform the sweep of any MS Word document using the free software available at Microsoft's website, I doubt whether IDEM could justify charging its direct cost for labor involved in removing metadata. Moreover, section 6(c) allows such direct cost charge for removing nondisclosable information. Whether the metadata in a particular document is nondisclosable has yet to be determined, since IDEM provides no specific exemption that would apply except to suggest deliberative material or attorney work product.

Also, I find no authority for IDEM to charge its direct cost for the labor to perform the "sweep" in IC 5-14-3-8(g), which provides for the agency's direct cost of supplying the information on a disk. This is because removing the metadata is not required to provide the documents on a disk. An agency does not have to remove metadata in order for an MS Word document to be copied to a disk.

In any case, it is my opinion that IDEM has provided copies of records in a digital format on its website, and therefore has made reasonable efforts to provide copies of records it maintains in its computers, as required under IC 5-14-3-3(d). This opinion is subject to the "reasonable time for production" that is the requirement for a public agency to produce copies of documents. Your complaint does not set forth specific allegations of unreasonableness with respect to the time that IDEM has posted its opinions after January 2007.

CONCLUSION

For the foregoing reasons, I find that IDEM has not violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Robert B. Keene