



# STATE OF INDIANA

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January 19, 2011

Mr. Zachary P. Elliot  
o/b/o Citizens Action Coalition of Indiana  
603 E. Washington St., Suite 502  
Indianapolis, IN 46204

*Re: Formal Complaint 10-FC-319; Alleged Violation of the Access to  
Public Records Act by the Indiana Utility Regulatory Commission*

Dear Mr. Elliot:

This advisory opinion is in response to your formal complaint alleging the Indiana Utility Regulatory Commission (“IURC”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* IURC Assistant General Counsel DeAnna Poon’s response is enclosed for your reference.

## BACKGROUND

You filed this complaint on behalf of the Citizens Action Coalition of Indiana (“CAC”). In the complaint, you allege that on November 10, 2010, the CAC submitted a records request to the IURC requesting “e-mail communications between various parties.”<sup>1</sup> Eight of the ten enumerated requests were for emails sent between September

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<sup>1</sup> Specifically, your request sought: (1) All emails between former IURC Chairman David Lott Hardy and former IURC Executive Director Michael Reed from September 1, 2006 through December 31, 2007; (2) All emails between former IURC Chairman David Hardy and ALJ Loraine Seyfried from January 1, 2010 to the date of this request; (3) All emails between former IURC Chairman David Hardy and General Counsel for Duke Energy Indiana Kelley Karn from September 1, 2006 through December 31, 2007; (4) All emails between former IURC Chairman David Lott Hardy and former President of Duke Energy Indiana Kay Pashos from September 1, 2006 through December 31, 2007; (5) All emails between former IURC General Counsel Scott Storms and former IURC Executive Director Mike Reed from September 1, 2006 through December 31, 2007; (6) All emails between former IURC General Counsel Scott Storms and ALJ Loraine Seyfried from January 1, 2010 to present; (7) All emails between former IURC General Counsel Scott Storms and General Counsel for Duke Energy Indiana Kelley Karn from September 1, 2006 through December 31, 2007; (8) All emails between former IURC General Counsel Scott Storms and General Counsel for Duke Energy Indiana Kay Pashos from September 1, 2006 through December 31, 2007; (9) All emails between former IURC Executive Director Michael Reed and General Counsel for Duke Energy Indiana Kelley Karn from September 1, 2006 through December 31, 2007; and (10) All emails between former IURC Executive Director Michael Reed and former President of Duke Energy Indiana Kay Pashos from September 1, 2006 through December 31, 2007.

1, 2006, and December 31, 2007. You acknowledge that emails sent during 2006 and 2007 are not on the IURC's server and must be restored by the Indiana Office of Technology ("IOT"). The other two items, however, sought emails sent from January of 2010 to the present, which you believe IURC maintains on its own server. You argue that a reasonable period of time lapsed between your November 10, 2010, request and the filing of your formal complaint on December 20, 2010.

In response to your complaint, Ms. Poon states that the IURC sent CAC an initial response on November 23, 2010. In that response, the IURC stated that it was searching for responsive records. On December 7th, CAC sent IURC an email requesting an estimated date of production. Ms. Poon responded the same day and stated that the emails have been pulled but required review prior to release. She estimated that her review would take another week or two. However, she states that while one to two weeks seemed a reasonable time to review records at the time, the IURC has received ten additional public records requests since December 7, 2010 that required an initial response, and IURC's general counsel requires time to review the records prior to release.

Ms. Poon adds that the CAC contacted the IURC again on January 3, 2011, requesting a status update. Ms. Poon responded on January 4th. She stated that she was in the process of printing the emails and, after that, would need time to review them for non-disclosable content, redact any confidential information, and then produce copies. Ms. Poon cited to the portion of CAC's request that sought emails between Mike Reed and David Hardy for the timeframe of September 1, 2006, through December 31, 2007: she pulled and printed emails responsive to that portion of your request for 14 hours during the week prior to January 3rd, but claims that during that time she was only able to print about three-fifths of the responsive emails. The stack of responsive records, double-sided, was six inches tall at that time. Ms. Poon cited to section 7 of the APRA and noted that responding to records requests is only part of her and IURC General Counsel Doug Webber's duties, which include providing internal legal advice for all IURC departments, promulgating administrative rules, drafting contracts, reviewing affiliated contracts, reviewing jurisdiction withdrawal requests, and other duties. She claims that "[p]rioritizing production of [responsive] records over our other duties would be a material interference with the regular discharge of our functions and duties as prohibited by IC 5-14-3-7(a)."

## 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." I.C. § 5-14-3-1. The IURC is 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 IURC's public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

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 delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. It appears that the IURC initially responded to your November 10th request on November 23rd, which is beyond the seven-day period that the APRA prescribes for responding to written requests. If the IURC failed to respond to your facsimiled request within seven days of receiving it, the APRA deems your request denied. That said, the IURC responded to you on November 23rd and informed you at that time that the agency would locate responsive records and provide you with disclosable information.

The issue here is whether the IURC violated the APRA by failing to actually produce responsive records between the date of your request, November 10th, and the date of your complaint, December 20th. The APRA provides no firm deadlines for the production of public records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*.

Here, the IURC cites to the voluminous nature of your requests, the fact that emails had to be procured from IOT, the numerous other public records requests that IURC has received while your request has been pending, and the other duties of Ms. Poon and Mr. Webber that require their attention. It is also noteworthy that Ms. Poon states that partially fulfilling only one of your ten enumerated requests took nearly 14 hours. I understand that your instant complaint concerns emails sent during 2010, but it does not appear that you narrowed the scope of your request to those two items until December 7, 2010, or three days before you filed this complaint. Under such circumstances, it is my opinion that IURC has not acted unreasonably. Under the APRA, a public agency shall “regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.” I.C. § 5-14-3-7(a). *See also Op. of the Public Access Counselor 09-FC-115* (two months was not an unreasonable production time where agency director and records request handler recently assumed the duties of another position and needed time to review and redact confidential information); *Op. of the Public Access Counselor 04-FC-81* (not unreasonable for agency to take two months to produce personnel records and policies where other staffing changes occurred at the agency and responding employee was new to the position); *see also Op. of the Public Access Counselor 07-FC-327* (three months was not an unreasonable amount of time to respond to seven requests with approximately 1000 pages

of responsive documents; 34 days was not unreasonable amount of time to produce three-page document considering number of other pending requests).

That said, in my opinion it would be unreasonable for the IURC to delay producing responsive records beyond February 18, 2011, which is approximately one month from now. Moreover, I would encourage the IURC to release to you any responsive, disclosable records as they become available.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the IURC should have initially responded to your written request within seven days in accordance with section 9 of the APRA. The IURC did not otherwise violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack  
Public Access Counselor

cc: DeAnna L. Poon