



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

May 25, 2011

Mr. William A. Boyd
8301 Forward Pass Road
Indianapolis, IN 46217

Re: Formal Complaint 11-FC-109; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Boyd:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Transportation (“INDOT”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* INDOT’s response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that INDOT “has been unresponsive to FOIA [public records] requests submitted January 8, 2011 (2 requests) and January 25, (3 requests).” You hand-delivered the requests to INDOT’s office. You claim that you have made “[s]everal phone calls . . . to obtain the information,” but, as of April 25th, you have only received a response to the January 8th request, which you view as incomplete.

In response to your complaint, INDOT Staff Attorney Gabe Paul claims that INDOT was responsive to your request under the circumstances. He states that INDOT responded to one of your two January 8th requests via letters dated March 2nd, April 4th, and May 23rd, 2011. INDOT is still reviewing its records for responsiveness to your second January 8th letter. As to your January 25th requests, INDOT partially responded by producing records concerning a completed property transaction for the I-69 project, but withheld documents concerning pending property transactions for the project based on the so-called deliberative materials exception, which is found in subsection 4(b)(6) of the APRA. Amy Miller, INDOT’s public records manager, responded to another January 25th request for meeting minutes and agenda by informing you that such records do not exist. INDOT has no record of a third request from you dated January 25th. Mr. Paul argues that INDOT responded to your requests within a reasonable amount of time considering the scope of your request and INDOT’s obligation to regulate any material

interference with the regular discharge of the functions or duties of the public agency or public employees under section 7 of the APRA. Mr. Paul notes that INDOT has been the target of “an unprecedented amount of litigation and other aggressive action challenging the I-69 project during the first five months of 2011,” which required employee attention and a balancing of those duties with INDOT’s responsibilities to respond to public records requests.

ANALYSIS

The public policy of the APRA states, “[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. INDOT 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 INDOT’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Initially, I note that it is somewhat difficult to opine specifically on the propriety or impropriety of INDOT’s responses to your requests due to the fact that INDOT is still searching for responsive records and its review of such records is ongoing. Thus, the first issue in this matter is whether INDOT violated the APRA by failing to actually produce all responsive, non-confidential records between the date of your requests, January 8th and January 25th, and the date of your complaint, April 25, 2011. 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, Mr. Paul cites to the breadth of your requests, such as the January 8th requests that sought access to fourteen different categories of documents. In addition, Mr. Paul contends that INDOT’s response was timely in light of INDOT’s duties to manage a flood of litigation in addition to its essential functions and duties. Mr. Paul further notes that INDOT partially responded to your requests via letters on March 2nd, April 4th, and May 23rd. Under such circumstances, it is my opinion that INDOT did not act unreasonably. Under the APRA, a public agency is required to “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). Moreover, this office has consistently advised agencies to release portions of voluminous requests as records become available rather than waiting until the response is completely prepared. It appears that INDOT released partial responses on both March 2nd and April 4th in accordance with this guidance. That said, I would expect that INDOT could provide a complete response to all of these requests by no later than July 1, 2011. A delay beyond that date would, in my opinion, be unreasonable.

As to your some of your specific concerns regarding INDOT's responses so far, it appears that INDOT did not provide you access to records in response to item numbers 1, 4, and 14 on your January 8th request because such records do not exist (according to Ms. Miller's March 2nd response to you). If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy...").

INDOT withheld documents pertaining to pending property transactions under the "deliberative material" exception to the APRA, which applies to records that are "intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making." I.C. § 5-14-3-4-(b)(6). Based on Mr. Paul's description of the records at issue as deliberative in nature because of their relation to INDOT's decisions as to whether -- and how -- to acquire various properties for the project, it appears that such records fall within the deliberative materials exception. It is unclear, however, whether the records contain any factual information that is severable from the deliberative material. The APRA requires public agencies to separate and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. I.C. § 5-14-3-6(a). In *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), the Indiana Court of Appeals held that Ind. Code § 5-14-3-6(a) requires an agency to separate disclosable information from the nondisclosable information where the two types of information are not "inextricably linked." *Id.* at 914. Thus, if any of the records at issue here contain both factual information and deliberative material, the APRA permits INDOT to withhold the factual material only if it is inextricably linked with the deliberative material. Otherwise, INDOT should redact the deliberative material and produce the remainder of the record.

I trust that INDOT will either release all remaining responsive, non-confidential records to you as soon as possible or cite to a basis in section 4 for withholding such records. *See* I.C. § 5-14-3-9. To the extent that INDOT fails to provide you with access

to records following the issuance of an advisory opinion from this office and you believe such denial is in violation of the APRA, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that INDOT acted reasonably under the circumstances by partially responding to your multiple requests while also regulating any material interference with INDOT employees' essential duties and functions. I trust that INDOT will either fully respond to your requests by July 1st or cite to an exception in the APRA that permits withholding any unreleased responsive records.

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: Gabe Paul