



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

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

December 28, 2011

Tim Maloney
Hoosier Environmental Council
3951 N. Meridian St.
Suite 100
Indianapolis, Indiana 46208

Re: Formal Complaint 11-FC-295; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Maloney:

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 § 5-14-3-3 *et seq.* Gabe Paul, Attorney, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege on September 26, 2011, you submitted a written records request to INDOT. Amy Miller responded to your request on the same date, acknowledging its receipt. As of November 28, 2011, the date you filed your formal complaint with the Public Access Counselor's Office, you have not received any records responsive to your request or a denial from the INDOT.

In response to your formal complaint, Mr. Paul advised that your requests consisted of the following:

- (a) The Annual Financial Plan updates for Section 2 and Section 3 regarding INDOT's I-69 project;
- (b) Any and all letters, emails, memos, or other correspondence related to, as well as the contract(s) for, turtle collection along the path of I-69, specifically for Section 2, 3, and 4; and
- (c) Any and all reports, memos, emails, or other documents related to the inspections of bridge pilings for the I-60 East Fork White River Bridge, and for the I-69 Pakota River Bridge.

As to (a), INDOT has not completed the annual update to the original plans, although it intends to have the updates for Section 2 and 3 completed in the near future. Mr. Paul advised that your request for records pursuant to (a) was denied, citing I.C. § 5-14-3-4(b)(6), as the records are deliberative materials that contain opinions with respect to the financing of construction projects and were communicated for the purposes of decision making. As to (b), INDOT has provided that it has no documents that are responsive to your request. In regards to (c), Mr. Paul stated that all records that were responsive to your request were provided to you on December 22, 2011. Certain documents were withheld, again citing to the deliberative materials exception found under I.C. § 5-14-3-4(b)(6). Mr. Paul maintains that the records were provided to you in a reasonable period of time, in light of the broad nature of your request, the age of the records, the fact that the records were required to be reviewed prior to disclosure, and the unprecedented amount of litigation in regards to the I-69 project.

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.” *See* I.C. § 5-14-3-1. INDOT is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the INDOT’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include 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. *See* I.C. § 5-14-3-9(c). 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. Here, INDOT responded to your request with the timelines provided by the APRA.

As to the records that INDOT has denied you access to in response to your requests made under (a) and (c), the APRA excepts from disclosure, among others, the following:

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. I.C. § 5-14-3-4(b)(6).

When a record contains both disclosable and nondisclosable information and an agency receives a request for access to the record, the agency shall “separate the material that may be disclosed and make it available for inspection and copying.” See I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. See I.C. § 5-14-3-1.

The Indiana Court of Appeals addressed a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

However, *section 6 of APRA* requires a public agency to separate discloseable from non-discloseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is nondiscloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.

Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other nondiscloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id.* at 913-14.

To the extent that the records you requested contain information that is not an expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, APRA provides that the information shall be disclosed. Here, INDOT has provided that the records requested under (a) and (c) fall under the deliberative materials exception as the records consist of expressions of opinion communicated for the purpose of a decision making. Therefore, it is my opinion that INDOT has met its burden in citing to I.C. § 5-14-3-4(b)(6) and did not act contrary to the APRA as to items listed in (a) and (c) of your request.

Generally, 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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. Here, INDOT has provided that it does not have any records responsive to your request found in (b); as such it did not act contrary to the APRA by failing to provide records that it does not maintain.

The APRA does not prescribe timeframes for the actual production of 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 of the request. 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 APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. See I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. See I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. See I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. See *Opinion of the Public Access Counselor 02-FC-45*.

Here, your requests were submitted to INDOT on September 26, 2011, with all records responsive to the request being provided on December 22, 2011. INDOT has provided that it responded in a reasonable amount of time to your request when considering its broad nature, the age of the records, the fact that the records were required to be reviewed prior to disclosure, and the unprecedented amount of litigation in regards to the I-69 project. I would note that your requests under (b) and (c) were quite broad, in that you were seeking all letters, emails, memos, reports, or any other documents related to specific parts of the I-69 project. INDOT would have been required to not only search for the requested records from various personnel, it was also required to review each record prior to its disclosure. Additionally, INDOT has provided that that the demands placed upon it in responding to the voluminous amounts of I-69 litigation and the regular discharge of its duties of the agency were additional factors in the amount of time required to respond to your request. In light of these factors, it is my opinion that INDOT responded to your request in a reasonable period of time.

However, I would note that this office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. See *Opinions of the Public Access Counselor 06-FC-184*;

08-FC-56; 11-FC-260. I would encourage all public agencies in responding to broad record requests to communicate and/or be responsive to inquiries from the requestor regarding the status of the request. Here, it would appear that after initially acknowledging the receipt of your request, there was no further communication until the records were ultimately disclosed on December 22, 2011. Although it is my opinion that INDOT's actions in this regard did not violate the letter of the APRA, I would strongly encourage INDOT to conduct its future actions accordingly when receiving and responding to similarly broad natured requests.

CONCLUSION

For the foregoing reasons, it is my opinion that INDOT did not act contrary to the APRA in response to your request.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Gabe Paul