



STATE OF INDIANA

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September 28, 2016

Mr. Ken Davidson
7407 Montana Avenue
Hammond, Indiana 46323

Re: Formal Complaint 16-FC-209; Alleged Violation of the Access to Public Records Act by the Northwest Indiana Regional Development Authority

Dear Mr. Davidson:

This advisory opinion is in response to your formal complaint alleging the Northwest Regional Development Authority ("NWRDA") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. Mr. David Hollenbeck, Esq., Legal Counsel, responded to your complaint. Her response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on August 19, 2016.

BACKGROUND

Your complaint dated August 19, 2016, alleges the Northwest Regional Development Authority violated the Access to Public Records Act by not fulfilling your records request. On or about August 12, 2016, you requested a copy of an environmental impact statement from the NWRDA. The executive assistant to the director acknowledged your request and stated they would reply within a reasonable time. You contend seven (7) days is more than enough time to produce the study. The NWRDA responded to your complaint by arguing that your complaint was premature and it did not yet have an opportunity within what is still considered a reasonable time. Additionally, there is a question as to what party has custody of the record, as well as if the information is considered deliberative material.

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 Indiana Code § 5-14-3-1*. The Northwest Regional Development Authority is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy the NWRDA's disclosable

public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a).*

I interpret your complaints to preemptively seek a statement from my office as to when a document should be released pursuant to a complaint. A public agency should use the “reasonable time” standard as guidance to mean as expeditious and efficient as practical under the circumstances. Unless it is a document which is unequivocally disclosable and readily available – budgets, ratified meeting minutes, executed contracts, etc., -a reasonable time is generally longer than seven (7) days. In most cases, it is not months on end, as you suggest from past experience, but public access is usual not immediate.

It appears as if you are requesting a singular non-historical document, but I am not aware of its length. There is also some question as to whether it has been released to the NWRDA in final form or whether it is deliberative material. Determining all of these considerations may factor into the timeliness of a response.

RECOMMENDATIONS

While I do not believe the NWRDA has violated the timeliness element of your request, I will take the opportunity to make some recommendations. When a public agency commissions a private party to develop a document such as an environmental study, the study belongs to the public agency. It may be deliberative material or intellectual property of the vendor (trade secret), but the public agency owns it and bears the burden of either disclosing the document or identifying an exception to disclosure.

Moreover, the deliberative material exemption should be invoked judiciously and only when necessary to truly protect a public employee’s, official’s or contractor’s mental impressions and decision-making process. It should not be applied broadly or generally, but discretion should be exercised in good faith and on a case-by-case basis. Furthermore, deliberative materials do not include facts, figures and ultimate decisions or conclusions, but rather they are speculations, ideas, opinions and recommendations.

While I am not familiar with the document in question, I urge the NWRDA to be mindful of how and why any exemption to disclosure should be invoked. Additionally, I encourage all public agencies to be as timely and efficient as possible in fulfilling public records requests.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

Cc: Mr. David Hollenbeck, Esq.