STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

July 30, 2008

William Miller
9391 East State Road 64
Oakland City, Indiana 47660-8675

Jennifer Jansen
Indiana Department of Transportation
100 North Senate Avenue; Room N730
Indianapolis, Indiana 46204-2216

Re: Informal Inquiry 08-INF-22 and Informal Inquiry 08-INF-29 regarding Indiana Department of Transportation records

Dear Mr. Miller and Ms. Jansen:

This is in response to your informal inquiries received June 26, 2008 and July 18, 2008. You both write regarding records maintained by the Indiana Department of Transportation ("Department") and access to some of those records which Mr. Miller has requested pursuant to the Access to Public Records Act ("APRA")(Ind. Code 5-14-3). Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

In June 2008, Mr. Miller submitted to the Department a request for access to records; specifically, he sought "the Parcel Number along with the property owner(s) names for all the parcels not yet acquired for the project from the north end of I-164 to the north end of N2 of Section 1: I-69 Evansville to Indianapolis Tier 2 Studies." The Department responded to the request by letter dated June 25. The Department denied access to the records based on the deliberative materials exception found at I.C. § 5-14-3-4(b)(6). Mr. Miller submitted Informal Inquiry 08-INF-22 on June 26, inquiring whether the request was appropriately denied. Mr. Miller contends that aerial maps of the project area have been available via the Internet for some time.

My office invited the Department to respond to the inquiry. In response, the Department submitted Informal Inquiry 08-INF-29, received by this office on July 18. The Department indicates it has received two requests, including Mr. Miller's, for similar information and inquires how to proceed. The Department contends that at the time it denied Mr. Miller access to the records based on the deliberative materials exception the

Department staff believed this was an appropriate denial. The Department indicates that after further investigation in preparing the response to Mr. Miller's inquiry, the Department is no longer certain that the deliberative materials exception applies.

The Department further indicates that early in its investigation of the inquiry, the Department staff believed the information requested was protected from disclosure under state and federal law pursuant to 49 CFR 24.0 and I.C. § 5-14-3-4(a)(3). The Department believed it was required to keep the information confidential pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("Uniform Act") and as such was required to keep the records confidential pursuant to I.C. § 5-14-3-4(a)(3). The Department contacted the Federal Highway Administration ("FHWA") and concluded after consultation with the FHWA that the information is publicly available through other sources and as such the Department would not run afoul of the Uniform Act by disclosing the information.

The Department contends, though, that because Mr. Miller has requested information which comprises very small parts of many records, Mr. Miller has impliedly requested a list. As the Department was considering its response to the inquiry, it received another request for records, this one from Tim Maloney. While the Department has no questions regarding the first portion of Mr. Maloney's request, in the second portion Mr. Maloney seeks "a list, or copies of other records or information in INDOT or its contractors' possession, with the names and addresses of all landowners of record, within the right of way for Section 1 of the I-69 Evansville to Indianapolis Highway."

The Department indicates it does not maintain a list as requested by Mr. Miller or Mr. Maloney. Instead, the information both seek is contained within an electronic storage system, called LRS, which stores the information both seek in addition to other information, some of which may not be disclosable. The Department has the capability in this instance to program and run a query in the LRS that generates a report akin to the lists requested. The Department inquires how it should handle the requests in light of I.C. § 5-14-3-3(f), which provides that an agency is not required to create a list if no such list exists, and I.C. § 5-14-3-3(d), which requires an agency to make reasonable efforts to satisfy a request for information maintained in an electronic date storage system.

The Department contends that while it is able to generate reports responsive to the requests, doing so would become burdensome if the Department received requests on a regular basis. Further, the Department indicates that because of the general sensitivity in the public perception to protection of personal information, the Department would feel compelled to alert landowners to the fact that their names and addresses or parcel numbers were released pursuant to a public records request under the APRA.

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

The Department has dispensed with the issue whether the information requested is disclosable and has indicated its position that it will not run afoul of the Uniform Act, or I presume any other federal law or state statute, by disclosing the information. The two questions left to address are the following:

1. How the Department should handle the requests in light of I.C. § 5-14-3-3(f), which provides that an agency is not required to create a list if no such list exists, and I.C. § 5-14-3-3(d), which requires an agency to make reasonable efforts to satisfy a request for information maintained in an electronic date storage system

2. Whether the APRA addresses the Department's concerns about the general sensitivity in the public perception to protection of personal information

As to the second issue, the APRA does not contain a privacy provision. Former Counselor O'Connor addressed this issue in *Opinion of the Public Access Counselor 01-FC-26*:

> Under the APRA, the General Assembly has made determinations as to what information must not or may not be disclosed, and in some cases, those determinations were made in the interest of protecting individuals' personal privacy. While it is always a compelling argument that a public record may affect the author's personal privacy, there are no general statutory exceptions under the APRA that would permit the City to deny access to public records on this basis.
> *Id*., available at http://www.in.gov/pac/advisory/files/2001fc26.pdf

While I appreciate the privacy concerns the Department conveys regarding the release of landowners' personal information, it is my opinion nothing in the APRA allows the Department base any decision to withhold this information on the basis of these privacy concerns which are not specifically addressed in statute.

The other issue presented here is how the Department should handle the requests in light of I.C. § 5-14-3-3(f) and I.C. § 5-14-3-3(d).

> (d) 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. This subsection does not apply to an electronic map.
>
> (f) Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses) it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law. . .
> I.C. § 5-14-3-3.

Subsection (d) requires the Department to make reasonable efforts to provide to a requester disclosable data maintained in an electronic storage system, so long as the format requested is compatible with the Department's data storage system. Here, I do not believe the requesters have identified a particular format in which they prefer to receive the information. The Department indicates that the information requested is disclosable pursuant to the APRA. The APRA does not identify what constitutes a reasonable effort for purposes of this subsection. Certainly a simple process involving burning a CD or printing out a number of pages would be reasonable.

Here, though, it is my understanding that to provide the specific information requested the Department would need to write a program and run a query to pinpoint only the requested information. This issue has been addressed by former public access counselor Karen Davis in *Opinion of the Public Access Counselor 07-FC-143*, which involved a request to the Indiana Department of Workforce Development for summary information about certain decisions:

> A public agency is not required to create or compile a record that does not already exist. This is because the APRA requires that a public agency disclose a public record, which is defined as any material that is "created, received, retained, maintained, or filed by or with a public agency." IC 5-14-3-2(m). Where paper records are requested, the fact that a public agency is not required to create or compile information is easily understood. However, where records or information are stored in an electronic database that may be manipulated and sorted, the public agency must make "reasonable efforts" to provide a copy of the data. . . It is also my opinion that the DWD does not have to create reports from its data that do not already exist.
> *Id*., available at http://www.in.gov/pac/advisory/files/07-FC-143.pdf.

The issue is further addressed in *Opinion of the Public Access Counselor 07-FC-63*, which involved a request for a report related to grades of students:

> [W]here records or information are stored in an electronic database that may be manipulated and sorted, the public agency must make "reasonable efforts" to provide a copy of the data. The data are "public records" to be sure. However, the issue raised by your complaint is whether the School is required to generate reports that are sorted in a certain way, where no such report has been generated and retained by the School.
>
> I do not read the Access to Public Records Act to require a public agency to sort or compile data within the database in a specified way at a person's request. A report that has not already been created by the public agency is not required to be compiled electronically merely because a computer program would allow the public agency to do so. Rather, all disclosable data could be provided to the person upon request on a disk, and the person could sort or analyze the data as he or she sees fit.
>
> . . .
>
> I read the School's response to state that the School has not generated a report that contains this specific sorting of information. If this is true, then it is my opinion that the School is not required to generate a specific report sorting the data in the way that you request. However, the School would be required to make reasonable efforts to provide a copy of all disclosable data stored in the database. The School is entitled to charge a fee that is the direct cost of supplying the information on a disk. *See* IC 5-14-3-8(g). In addition, if the School must reprogram the computer to separate nondisclosable data (the students' names) from disclosable data, the School may charge you a fee that is the School's direct cost to reprogram the computer. *See* IC 5-14-3-6(c). "Direct cost" is defined in IC 5-14-3-2(c).
> *Id.*, available at http://www.in.gov/pac/advisory/files/07-FC-63.pdf.

The present issue is similar to those addressed in Opinions *07-FC-143* and *07-FC-63*. As in those cases, the requesters here seek information in the form of a list or report which has not been generated. Here, the requests are for lists of names and addresses of landowners. I.C. § 5-14-3-3(f) provides that a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute.

Based on previous opinions from this office and on I.C. § 5-14-3-3(f), it is my opinion the Department is not required to create lists in response to the requests submitted by Mr. Miller or Mr. Maloney. To the extent the requesters seek a copy of the entire electronic database maintained by the Department, the Department would be required to make reasonable efforts to provide a copy in the format requested, so long as the data requested is disclosable under the APRA. I do not further address this issue here

since it is not an issue raised by either party, but I do understand that the database may contain some nondisclosable data.

CONCLUSION

For the foregoing reasons, it is my opinion the Department is not required to create a list of names and addresses of landowners to fulfill a request for access to records where the list has not already been created by the Department.

Best regards,

Heather Willis Neal

Heather Willis Neal
Public Access Counselor