



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

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April 15, 2013

Ryan Sabalow  
*Indianapolis Star*  
307 N. Pennsylvania St.  
Indianapolis, Indiana 46206

*Re: Informal Inquiry 13-INF-18; Indiana Department of Transportation*

Dear Mr. Sabalow:

This informal opinion is in response to your inquiry regarding the timeliness of the Indiana Department of Transportation's ("Department") response to your request for records. Clark L. Snyder responded in writing on behalf of the Department. His response is enclosed for your reference. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

## BACKGROUND

On or about January 22, 2013, you submitted a request to the Department for a digital file of properties purchased by the State for the Interstate 69 ("I-69") expansion project that included price, acreages, and other details. You provide that the Department acknowledged the receipt of your request in a timely fashion but as of March 20, 2013 has yet to provide any records in response to your request.

You believe that the Department has failed to provide all records in response to your request in a reasonable period of time as required under APRA. You note that in prior similar requests submitted to the Department, the agency was able to respond and provide the requested records/information within a single day. As applicable to your January 22, 2013 request, there were two primary differences in that you sought acreage amounts for every I-69 parcel, not just properties in Davies County, and that you also requested parcel numbers for all properties. When your Davies County request was fulfilled, the Department informed you that the additional information was available, so there can be no question of access to the information by the Department or that the information is not kept in digital form. You further note that Department officials have not returned your phone calls, emails, or written correspondence since February 3, 2013, the date a story highlighting land purchases made by the Department was published in the *Indianapolis Star*.

In response to your inquiry, Ms. Snyder advised that due to the voluminous nature of your requests, the Department has had to commit extensive time and staff resources to collect and review the records for completeness. Some of the records responsive to your request have already been disclosed. The Department intends to make additional documents available by April 12, 2013.

The Department acknowledged the receipt of your request on the day after its receipt. The Department advised at that time it would not be able to meet your requested deadline of 2 p.m. the following day and would need additional time to process your request. As to your statement that the Department had produced records in a single day in response to a similar request, Mr. Snyder advised that the Department had been researching and discussing the I-69 land purchases with you since your initial inquiry on December 11, 2012. The list of Davies County properties had already been produced prior to the request. In addition to working on your January 22, 2013 request, you submitted additional requests on March 1, 2013. Mr. Snyder noted that the Department has already provided hundreds of pages of public records, conducted an hour-long interview, and responded to dozens of your questions. The Department in responding to a similar request for a list of all properties it had purchased along I-69 in October 2012 had provided said records on January 9, 2013, which follows the timeline for production of records in response to your request. Following inquiries submitted by the *Indianapolis Star*, Inspector General, and the Federal Highway Administration, the Department worked to confirm the accuracy of the I-69 purchases in its land records system because a new system was brought online during the time this information was entered. More than 1,000 records were compared against the parcel files and the Department wanted to ensure the accuracy and completeness of the updated records prior to disclosure. In response to the Department's failure to respond to your inquiries, the Department advised that the Inspector General is looking into the I-69 purchases and the Governor's office has responded to your inquiries that it would not comment on any ongoing investigation.

#### 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. The Department 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 Department'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). A response from the public agency could be an acknowledgement that the request has been received and include information

regarding how or when the agency intends to comply. Here, you submitted your written request for records on January 21, 2013 to which the Department responded and acknowledged in writing the receipt of your request on January 22, 2013. As such, it is my opinion that the Department complied with section 9(b) of the APRA in response to your request.

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. 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*. 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-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

Initially I would note that many of the issues involved here could have been avoided had the Department simply responded to the inquiries as to the status of the January 22, 2013 request. Although not required by the letter of the law, our office has consistently encouraged agencies to be responsive to inquiries from the requestor regarding the status of the request, especially in dealing with larger requests. *See Opinions of the Public Access Counselor 11-FC-260; 12-FC-327; 12-FC-371*. This does not require an agency to provide daily updates; however the fact that an agency has ignored all such requests is a factor in determining whether it has acted reasonably under the statute. While the Department noted in its response other agencies who were reviewing the I-69 land purchases, it has not addressed why it failed to respond to your inquiries regarding the status of the January 22, 2013 records request since February 3, 2013, the date in which the story regarding the Department appeared in the *Indianapolis Star*.

It cannot be denied that your January 22, 2013 request that was submitted was broad and that you submitted additional requests on March 1, 2013. In response to a previous request for information for I-69 properties purchased in Davies County, the Department provided such information to you within one day. The Department has noted that it was able to efficiently respond to your previous request for Davies County

information as the agency had generated the information prior to your request. As applicable to your more expansive January 22, 2013 request for all properties purchased along I-69, the Department in its response advised that it had already responded to a similar request in October 2012 and produced all records on January 9, 2013. Thus, at the time of your January 22, 2013 request, the records that would be considered responsive to your request had already been collected. Further, there has been no allegation that the Department was required to redact any information prior to disclosure, which is generally a very time-consuming process for requests of this nature. The Department does provide that it had to verify the accuracy of the records prior to disclosure, which required the comparison of more than 1,000 records against the parcel files.

The Department has provided that it intends to make additional documents responsive to your request available by April 12, 2013, approximately 80 days after your original request. It is not apparent whether the anticipated production will complete the Department's response to your January 22, 2013 request. As noted *supra*, the Department has the burden to demonstrate that all records were provided in a reasonable period of time. While I do acknowledge the vast nature of your January 22, 2013 request and that the Department has attempted to make periodic disclosures in response, it is my opinion that the Department has not met its burden to demonstrate that it complied with the requirements of section 3(b) of the APRA in providing all records in response to your January 22, 2013 request in a reasonable period of time.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" at the end.

Joseph B. Hoage  
Public Access Counselor

cc: Clark Snyder