

April 21, 2004

Mr. Warren G. Baird
55785 500 West
Atlanta, Indiana 46031

*Re: Formal Complaint 04-FC-50; Alleged Denial of Access to Public Records
by the Indiana Department of Natural Resources*

Dear Mr. Baird:

This is in response to your formal complaint alleging that the Indiana Department of Natural Resources (DNR) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when it failed to produce records responsive to your record request within a reasonable time of receipt of that request. A copy of the DNR's response to your complaint is enclosed for your reference. For the reasons set forth below, I find that the DNR did not violate the APRA.

BACKGROUND

On March 12, 2004, you sent a written request for records to the DNR by electronic mail. The request sought the minutes of a meeting of the State Soil Conservation Board. The body of the request sought a copy of the meeting minutes for the meeting occurring on March 9, 2004, only three days before, but the subject line indicated that you were requesting minutes from a meeting in February. On March 15, 2004, the DNR responded in writing seeking clarification of your request and noting that the minutes for the March 9, 2004, were not yet written (or even started). Later that evening, you responded to clarify that you were seeking the minutes for the meeting occurring on March 9, 2004. You requested that the minutes be sent "as soon as possible."

On March 19, 2004, 10 days after the meeting at issue, and four days after receiving the DNR's response to your request seeking clarification and stating that the

minutes for that meeting were not yet written, you submitted this complaint against the DNR. Specifically, you assert that you are entitled to draft minutes within one week of a meeting. In response, the DNR notes that it sent you a copy of the draft minutes on April 8, 2004, by United States Mail. The DNR goes on to describe the process it utilizes in preparing and submitting minutes for approval by the Soil Conservation Board, and in making the approved minutes available to the general public. Finally, the DNR notes its business practices and acknowledges the attendant delay in creating and producing the draft minutes in response to your specific request.

ANALYSIS

A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request does not mean that the public agency must expressly decline to produce or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. When a public record request is made in writing and delivered to the public agency by mail (including electronic mail) or facsimile, the public agency is required to respond to that request within seven (7) days of receipt of the request. IC 5-14-3-9(b).

Here, the electronic mail record establishes that the DNR received the written request and responded on March 15, 2003, within three days of that request. The DNR responded by seeking clarification of an ambiguity in the request. This was appropriate and in compliance with the APRA. *See* IC 5-14-3-3(a)(1). The DNR's response was timely.¹

Your complaint challenges the timeliness of the production of the record ultimately created and responsive to your request. I decline to find the production of record untimely under these facts.

As an initial point, I note that the DNR was not required by the APRA or the Open Door Law to create the record requested. The Open Door Law, which governs meetings of the Soil Conservation Board, does not require that a governing body prepare "minutes" of its meetings. Rather, that statute requires only that the governing body prepare a "memoranda" of the meeting, and that memoranda need only contain certain limited information regarding the meeting. IC 5-14-1.5-4(b) (memoranda must include the date, time and place of the meeting, the members present and absent, the general substance of matters discussed, a record of any votes taken, and any items required under specific statutes not applicable to all meetings). The statute does not require that the memoranda be made available within any specific period of time, only that it be made

¹ The DNR's response further indicated that the record you were seeking did not yet exist. That is to say, the request did not seek a public record of the public agency. IC 5-14-3-2 (defining "public record" as a record created or maintained by the public agency). The DNR's response was, in that sense, a complete response in compliance with the APRA.

available within a reasonable period of time after the meeting to inform the public of the governing body's proceedings. IC 5-14-1.5-4(c).

It is not clear from either your complaint or from DNR's response whether the DNR creates a separate memoranda or whether it complies with the section 4 memoranda requirement by including the required information in the narrative minutes of its meetings. Regardless, I find that the time for production was not unreasonable.

As noted above, a timely response to a record request does not mean that the public agency must produce the responsive records within that time. Rather, production or inspection of the records must only occur within a reasonable time of the request. There are practical reasons for such a rule. A public agency may be able to produce public records immediately in some cases, but more time may be required for production when records are not in a central repository, are archived off-site, include information that may require counsel or other review for confidentiality, or include disclosable and nondisclosable information that the public agency must separate for purposes of producing what is disclosable. In a circumstance such as the instant one where the record (meeting minutes) has yet to be created, factors related to the business functions of the office and duties of the staff responsible for that production as well as the nature and circumstances of the meeting at issue may affect resolution of that question. At bottom, interpreting the public access statutes (Indiana Code 5-14-3-9 and Indiana Code 5-14-1.5-4(c)) to require public agencies to produce records within a specific period of time would have the effect, in some cases, of requiring public agencies to stop activity on all other matters in order to provide the records requested. While providing information is an essential function of public agencies, the APRA also specifically provides that public agencies shall regulate any material interference with the regular functions or duties of their offices. IC 5-14-3-1; IC 5-14-3-7(a).

Here, the draft minutes were not prepared at the time you made your request only three days after the meeting at issue. In my opinion, the DNR's failure to have the minutes prepared within three days of the meeting was not unreasonable. Neither can I agree with the bright line you would advocate for production of meeting minutes within a week of the meeting at issue. I readily agree with you that the timely release of meeting minutes is important for the public's understanding of the governing body's business, but I also do not find it improbable or unreasonable that draft meeting minutes would not be available within a week after the meeting. As noted above, public agencies and governing bodies have many duties and responsibilities as part of public service, and resources available to those entities are scarce. Such was the case here as indicated by the DNR's response. I am no more inclined to impose a specific date for production than was the Indiana General Assembly when it enacted the statutes under which you made your request and brought this complaint. This is especially appropriate where the APRA requires only an acknowledgment of a request submitted by mail within seven days of receipt of the request. Finally, I cannot conclude that the ultimate production was unreasonably delayed where that production occurred almost a full week prior to the next

Formal Complaint 04-FC-50

April 21, 2004

Page 4

meeting of the Soil Conservation Board, providing opportunity to inform your understanding of that governing body's business.

CONCLUSION

For the reasons set forth above, I find that the DNR did not violate the APRA by failing to produce the requested record within a reasonable period of time.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Gregory Biberdorf
Ms. Janet Parsanko