



# STATE OF INDIANA

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December 31, 2009

Mr. Phil Sever, Esq.  
Sever Storey, LLP  
770 3<sup>rd</sup> Ave. SW  
Carmel, IN 46032

*Re: Formal Complaint 09-FC-284; Alleged Violation of the Access to  
Public Records Act by the Indiana Department of Transportation*

Dear Mr. Sever:

This is in response to your formal complaint alleging the Indiana Department of Transportation (“INDOT”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* A copy of INDOT’s response to your complaint is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that you hand-delivered a written request for access to public records to INDOT. As of November 30, 2009, the date of your complaint, you had not received a response from INDOT. You argue that INDOT’s failure to respond violated the APRA.

Amy Miller, program director for INDOT, responded on the agency’s behalf. Ms. Miller states that she sent you an acknowledgement letter via the United States Postal Service. She notes that INDOT has had some “issues with our mail here in central office,” and that she re-sent her acknowledgment to you on December 3, 2009.

On December 16<sup>th</sup>, we received your addendum to your complaint noting that you received INDOT’s correspondence. You note that the letter was dated November 20, 2009, but the envelope containing the letter was dated December 4<sup>th</sup>. As of December 16, 2009, you had not received any additional correspondence or response to your request. You also note that you plan to pursue litigation against INDOT to “force compliance” with the APRA.

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

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). 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. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). A response from the public agency could simply be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, INDOT claims that it responded to you within the applicable time period, but the request did not reach you due to mailing “issues.” When INDOT resent its response on December 3<sup>rd</sup>, you received it. Thus, there seems to be some dispute as to when INDOT actually responded to your request. Because I do not sit as a finder of fact, I express no opinion regarding the date of INDOT’s response. If INDOT failed to respond within seven (7) days of its receipt of your request, it violated the APRA. *See Opinion of the Public Access Counselor 06-FC-77* (“I find only that if the Board failed to issue a response within 24 hours, it violated the Access to Public Records Act.”).

With regard to INDOT’s failure to provide you with the records you have requested, it appears that INDOT has not denied your request. There are no prescribed timeframes when the records must be produced by a public agency. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. 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. 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. 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. 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. *Opinion of the Public Access Counselor 02-FC-45*. Because I have no information regarding the reason(s) for INDOT’s delay in producing the records, it is my opinion that INDOT has not yet met that burden. If INDOT neither produces your documents nor informs you of the reason(s) for such delay, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

## CONCLUSION

For the foregoing reasons, it is my opinion that if INDOT failed to respond to your request within seven (7) days, INDOT violated the APRA. Moreover, it is my opinion that INDOT has not yet shown that its delay in producing public records is reasonable.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack  
Public Access Counselor

cc: Amy Miller, Indiana Department of Transportation