



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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June 13, 2011

Mr. Cory Schouten  
*Indianapolis Business Journal*  
41 East Washington Street  
Indianapolis, IN 46204

*Re: Formal Complaint 11-FC-115; Alleged Violation of the Access to Public Records Act by the Office of the Governor*

Dear Mr. Schouten:

This advisory opinion is in response to your formal complaint alleging the Office of the Governor ("Office") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*. The Office's response to your complaint is enclosed for your reference.

## BACKGROUND

According to your complaint, the Office failed to respond within 24 hours to a records request you hand-delivered on May 6, 2011. Your request sought access to "the daily calendar for Gov. Mitch Daniels and the log of public records requests received by the Indiana Office of the Governor." You claim that "[t]he Office did not respond in any fashion to the request." You filed this complaint on May 12, 2011.

On behalf of the Office, Associate General Counsel Sebastian Smelko responded to your complaint on May 27, 2011. Mr. Smelko argues that the Office did not violate the APRA with respect to your May 6th request because it had already responded to an earlier request from you for the same documents. You previously emailed a request for the Governor's calendar and the records request log to Jane Jankowski, the Governor's Press Secretary, on April 11th at 10:55 a.m. At 5:03 p.m. that same day, Mr. Smelko acknowledged your request via a return email. In his response, Mr. Smelko's wrote that the Office was working to identify and gather the records listed in your request and would contact you within a reasonable period of time regarding the Office's progress in fulfilling the request.

On April 22nd, which Mr. Smelko notes was Good Friday and an official State holiday, you contacted the Office again via email for an update about your request. The

following Tuesday, April 26th, Mr. Smelko replied and informed you that the Office was continuing to work on your request while also managing the end of the State's legislative session.

Mr. Smelko acknowledges that you hand-delivered another request to Ms. Jankowski on Friday, May 6th. However, he states that your May 6th request listed the same records that you sought in your original April 11th request: the Governor's calendar and the log of records requests. Mr. Smelko claims that the Office was not obligated to respond to your May 6th request within 24 hours because the Office already responded to it on April 11th. On both April 11th and April 26th, the Office assured you that it was working to fulfill your request and would contact you again within a reasonable amount of time. Mr. Smelko argues that the Office acted reasonably in its response to your request because, at that time, the Office was managing the end of the General Assembly's legislative session, which required the timely review of all legislative enrolled acts for action by the Governor.

On June 9th, you submitted an addendum to your complaint in which you request that I "set a precedent for the manner in which public agencies comply with the Access to Public Records Act" by suggesting that public agencies estimate the length of time it will take to produce public records.<sup>1</sup> You also take issue with the substance of the Office's May 27th response to your complaint, which included the 844 pages of records responsive to your request. The substantive arguments and allegations regarding the May 27th response, however, were not included in your original complaint. Accordingly, this advisory opinion is limited to the issue presented therein: specifically, whether or not the Office violated the APRA by failing to respond to your May 6th request within 24 hours.

## 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 Office is 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 the Office's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

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<sup>1</sup> Previous public access counselors and I have encouraged both public agencies and requesters to communicate regarding expected production timeframes. See, *Informal Inquiry of September 24, 2007*, available at <http://www.in.gov/pac/informal/files/ThomasPurpusAndersonCommunitySchools092407.pdf>. However, nothing in the APRA requires that public agencies provide estimated production dates in their responses to records requests. When an agency receives a request, the APRA requires merely that (1) the public agency respond within either seven days or 24 hours, depending on the nature of the request; and (2) if a request is made in writing and an agency denies the request, the agency deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(a) - (c). The public access counselor is duty-bound to "interpret the public access laws upon . . . request," I.C. § 5-14-4-10(6), but the counselor has no authority to "set a precedent" that does not already exist in the APRA or elsewhere in Indiana law.

Here, you argue that the Office violated the APRA by failing to permit you to inspect and copy records within 24 hours of your May 6th hand-delivered request. The APRA does require that if a 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). However, the public access counselor has consistently advised that a response from the public agency need not be a physical production of records; it could simply be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. *See, e.g., Op. of the Public Access Counselor 05-FC-135* (Counselor Davis, opining that “[t]he requirement that a response be issued within 24 hours does not mean that the records must be produced within that time.”).

In 2001, Counselor O’Connor issued an advisory opinion in response to facts similar to the instant matter. *See Op. of the Public Access Counselor 01-FC-50*, available at <http://www.in.gov/pac/advisory/files/2001fc50.pdf>. In that case, the requester delivered two separate but identical requests to two officials within the same public agency. The requester later filed a complaint alleging that the agency violated the APRA by failing to respond to one of those requests. Counselor O’Connor determined that:

[The public official who received one of the requests] called you within the twenty-four (24) hour period to advise you that he would provide a written response to your request. It appears, therefore, that you did in fact receive a response to your public records requests. Since these requests were identical, it is my opinion that the response by [the public official] satisfied the requirement that the public agency respond under Indiana Code section 5-14-3-9(a) within twenty-four (24) hours after a request has been received. It is also my opinion that you were not denied access in violation of the APRA merely because you received only one response to two identical public records requests delivered upon the same public agency.

*Id.* I concurred with this reasoning in an opinion I issued last year, *Op. of the Public Access Counselor 10-FC-86*. Consequently, it is my opinion that because the Office responded to your April 11th request in a timely manner, it was not obligated to issue another response to your May 6th hand-delivered request for the same records within 24 hours.

As far as the time it took for the Office to actually release your records, the APRA does not prescribe timeframes for the physical production of records. *Op. of the Public Access Counselor 01-FC-56*. Contemporaneously with its response to your complaint, the Office produced 844 pages of responsive records in satisfaction of your request. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the relevant facts and circumstances. *Id.* Moreover, 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). Accordingly, section 7 of the APRA obligated the Office to work toward the fulfillment of your request without neglecting the discharge of its other functions and duties: specifically, the managing of the end of the legislative session and

reviewing -- as well as acting upon -- bills enacted by the General Assembly. Under such circumstances, it is my opinion that the Office acted reasonably by acknowledging your request on April 11th and informing you that it would respond further within a reasonable amount of time, and by ultimately producing the 844 pages of responsive records on May 27th. *See, e.g., Op. of the Public Access Counselor 07-FC-327* (three months was not an unreasonable amount of time to produce approximately 1000 pages of responsive documents; 34 days was not unreasonable amount of time to produce three-page document to same requester considering number of other pending requests).

#### CONCLUSION

For the foregoing reasons, it is my opinion that because the Office had already responded to your April 11th request, the Office did not violate the APRA by failing to respond within 24 hours to the duplicative request that you hand-delivered on May 6th.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, stylized initial "A".

Andrew J. Kossack  
Public Access Counselor

cc: J. Sebastian Smelko