



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 3, 2011

Mr. Eddie Hager
1530 West Alabama Street
New Castle, Indiana 47362

Re: Formal Complaint 11-FC-248; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Hager:

This advisory opinion 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.* Gabriel Paul and Katie Hilderbrand responded on behalf of INDOT. Their responses are enclosed for your reference.

BACKGROUND

In your complaint, you allege that you requested a copy of a report that was completed for the Garner Street Project ("Project") in New Castle, Indiana, referred to as the Phase One Study ("Study"). You provide you have made this request of INDOT, the Greenfield Office, and the City of New Castle ("City"). You made your initial request of INDOT with Katie Hilderbrand with the Greenfield District on July 15, 2011. As of September 26, 2011, the date you filed your complaint with the Public Access Counselor's Office, you have yet to receive any records responsive your request from INDOT.

In response to your formal complaint, Ms. Hilderbrand provided that you first made contact with INDOT's Greenfield Customer Service in mid-July regarding the Project. At that time, you expressed your concerns regarding whether the Project was meeting all the applicable environmental requirements; however, you did not make a records request for the Study at that time. The only involvement INDOT had with the Project was oversight to ensure the project is meeting all state and federal guidelines for federal funding. The Local Public Agency ("LPA") is financially and managerially responsible for the Project, all of which was communicated to you on July 28, 2011.

After speaking with local officials regarding your concerns, Ms. Hilderbrand advises that you again contacted INDOT for further assistance. In response to your inquiry, INDOT contacted the Environmental Scoping Manager at the Greenfield District

to speak with you regarding your concerns. You continued to have an ongoing exchange with the Environmental Scoping Manger from July 28, 2011 through August 15, 2011.

On August 15, 2011, INDOT's Environmental Policy Manager, in response to your concerns, made a visit to the Project and was unable to identify many of the concerns that you had expressed. At this time, the Policy Manager again informed you that it was the responsibility of the LPA to ensure the environmental requirements were being met.

On August 29, 2011, you made your initial request for the Study with INDOT. Katie Hilderbrand indicated that the LPA would have the documents that you were seeking, not INDOT. When you were unable to receive the study from LPA, you made a formal public records request to the INDOT Public Records Coordinator. Mr. Paul advised that all records responsive to your request were provided to you as of September 26, 2011. Ms. Hilderbrand has indicated that you have received the documents from INDOT that were sent on September 26, 2011 and were not satisfied with the response it provided.

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. INDOT 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 INDOT'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 information regarding how or when the agency intends to comply. When a request is made in writing and the agency denies the request, the agency must also deny the request in writing and must 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. *See* I.C. § 5-14-3-9(c). I am unable to discern from your formal complaint and INDOT's responses whether your request was made in person or in writing; thus I am unable to issue an opinion as to section 9 of the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. 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. *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*.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. Here, you provide that you made your first request to INDOT for the Study on July 15, 2011 with Katie Hilderbrand. INDOT maintains that your first request for the Study did not occur until August 29, 2011. INDOT advised that all records responsive to your request were provided to you on September 26, 2011, which did not include a copy of the Study, as INDOT has never maintained a copy.

Under the circumstances provided, if your initial records request occurred on July 15, 2011, it is my opinion that INDOT violated the APRA by not providing documents responsive to your request until September 26, 2011. However, if your first request was not made until August 29, 2011, it is my opinion that INDOT has not acted unreasonably in response to your request. Under the APRA, a public agency shall “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). *See also Opinion of the Public Access Counselor 09-FC-115* (two months was not an unreasonable production time where agency director and records request handler recently assumed the duties of another position and needed time to review and redact confidential information); *see also Opinion of the Public Access Counselor 07-FC-327* (three months was not an unreasonable amount of time to respond to seven requests with approximately 1000 pages of responsive documents; 34 days was not unreasonable amount of time to produce three-page document considering number of other pending requests); *see also Opinion of the Public Access Counselor 11-FC-72* (four months was not an unreasonable amount of time to respond to thirteen expansive requests when the City made multiple disclosures of records pursuant to the request during the time period, all while handling a separate request which resulted in the production of over three-thousand pages of documents). Not only does INDOT have to collect the records in response to your request; the APRA *requires* it 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).

Here, INDOT has maintained that it had a continuous dialogue with you regarding your concerns with the Project, beginning in mid-July 2011. Once INDOT confirmed that your concerns were in regards to an LPA project, it informed you that the LPA or the City would have a copy of the Study. INDOT was unable to provide you with the Study

due to it never maintained a copy of it. INDOT had provided that it has now produced all records responsive to your request. As such, I do not believe the City took an unreasonable amount of time to collect, review, and reproduce the records.

If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. Here, INDOT has indicated that the LPA or the City would maintain a copy of the Study. If you have made similar requests of the LPA and the City and are unsatisfied with the responses that have been given, I would encourage you to file a formal complaint with the Public Access Counselor’s Office against those respective public agencies.

CONCLUSION

For the foregoing reasons, it is my opinion that if INDOT received your records request on July 15, 2011 and did not respond until September 29, 2011, it acted contrary to the requirements of the APRA. However, if it did not receive your request until August 29, 2011, it did not violate the APRA. As INDOT has never maintained a copy of the Study, it did not violate the APRA in not providing a copy to you in response to your request.

Best regards,

A handwritten signature in black ink, appearing to read 'Joe Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Gabriel Paul, Katie Hilderbrand