



# STATE OF INDIANA

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August 27, 2012

Aileen Vasquez and Marvin Miller  
Indiana Association of the Deaf  
12077 Sunrise Circle  
Fishers, Indiana 46038

*Re: Formal Complaint 12-FC-224; Alleged Violation of the Access to Public Records Act by the Office of the Governor*

Dear Ms. Vazquez and Mr. Miller:

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

## BACKGROUND

In your formal complaint, you allege that on June 1, 2011, you submitted a written request for records to the Governor's Office. On June 6, 2011, the Governor's Office responded in writing to your request, acknowledging its receipt. Since the Governor's Office response on June 6, 2011, you provide that you have received no further communication or records in response to your request.

In response to your formal complaint, Mr. Smelko acknowledged the receipt of your request by the Governor's Office on June 1, 2011 and its written response on June 6, 2011. After identifying all records that were responsive to your request, the Governor's Office provided all records, minus those withheld pursuant to I.C. § 5-14-3-4(b)(6), to Mr. Miller at P.O. Box 551024, Indianapolis, Indiana 46205. Until the receipt of your formal complaint, the Governor's Office was unaware that you had never received the records and Mr. Smelko advised that he has no knowledge of any recent communication from the Indiana Association of the Deaf ("IAD") regarding this issue. During this time period, several staff members of the Governor's Office have been in contact with members of the IAD, but the issue of the receipt of records was never raised.

In response to the formal complaint, Mr. Smelko discovered a second letter dated July 12, 2011, where a separate mailing address was provided as the appropriate location to submit the records. The original disclosure of records was sent to the P.O. Box, as Mr.

Smelko was unaware of the separate mailing address. Mr. Smelko takes full responsibility for his lack of knowledge regarding the July 12, 2011 correspondence and apologized for the oversight. Enclosed you will find all records that are responsive to your June 6, 2011 request.

#### 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 Governor’s Office 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 Governor’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 twenty-four 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 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. Here, the Governor’s Office responded in writing to your written request within seven days of its receipt. As such, it is my opinion that the Governor’s Office complied with the requirements of Section 9 of the APRA in responding to your request.

Effective July 1, 2012, 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 factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA 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 edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. 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.*

The Governor's Office provided that all records that were responsive to your request were provided to the P.O. Box that was listed in your original request, minus those exempt from disclosure pursuant to I.C. § 5-14-3-4(b)(6). You have indicated that since the submission of your original request, you have yet to receive any records. In researching the issue in response to your formal complaint, Mr. Smelko advised that he discovered a second letter, where you provided a separate mailing address for the records to be sent. In previously producing the records, Mr. Smelko was unaware that you had submitted a new address and apologized for the oversight. The parties disagree to the extent that inquiries were submitted to Governor's Office regarding the status of the records request. As the Governor's Office does not dispute that it was in receipt of your subsequent correspondence that provided a new address for the records to be submitted to, according to the letter of the APRA, it is my opinion that the Governor's Office failed to produce all records in a timely manner as required by section 3 of the ARPA. However, it is evident from the Governor's response that the failure to submit the records to the subsequent address was inadvertent; it was unaware that you had never received the original disclosure; and had the original production of records been submitted to the appropriate address, no violation of the APRA would have occurred. Regardless, enclosed you will find a copy of all records that were previously provided, which I trust is in satisfaction of your formal complaint.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Governor's Office failed to provide in a timely manner all records that were responsive to your request as required by section 3 of the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: J. Sebastian Smelko