



# STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR  
LUKE H. BRITT

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](http://www.IN.gov/pac)

October 15, 2014

Mr. Jon Laramore  
C/o Faegre Baker Daniels LLP on behalf of Spirited Sales, LLC  
300 N. Meridian St.  
Indianapolis, IN 46204

*Re: Formal Complaint 14-FC-205; Alleged Violation of the Access to Public Records Act ("APRA") by the Indiana Alcohol and Tobacco Commission*

Dear Mr. Laramore,

This advisory opinion is in response to your formal complaint alleging the Indiana Alcohol and Tobacco Commission ("ATC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* Mr. David Rothenberg, Executive Secretary has responded on behalf of the ATC. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 11 2014.

## BACKGROUND

Your complaint dated September 11, 2014, alleges the Indiana Alcohol and Tobacco Commission violated the Access to Public Records Act by not providing records responsive to your request in a timely manner in violation of Ind. Code § 5-14-3-3(b).

On or about April 3, 2014, you made a number of public records requests to the ATC seeking documentation related to your client's application for a liquor wholesaler's permit. At issue in the present case are the emails requested pursuant to the April 3, 2014 request. There does not seem to be a dispute that the number of emails generated from the inquiry could be a substantial sum. There appears to be as many as 19 different senders and recipients named.

On August 1, 2014, you proposed to the ATC that an outside document management vendor could be contracted to assist in expediting the retrieval of documents. This is due in part to State of Indiana's in-house Office of Technology's difficulty in efficiently producing the documentation. Apparently, the State of Indiana, Office of the Attorney General uses similar technology as the vendor to aid in their retrieval of emails.

ATC has not yet utilized this option and in their response to your formal complaint they allege they have considered using the same technology as the Office of the Attorney General. The claim, however, the search yielded some 30,000 records, which also need to be reviewed and potentially redacted if an APRA exception to disclosure were to apply to some of the communication. They reiterate your request has not been denied, but delayed due to the voluminous nature of the request. They are still treating the request as pending and will produce the documents as they become available.

## 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 Ind. Code § 5-14-3-1. The Indiana Alcohol and Tobacco Commission is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the ATC’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

An agency has a reasonable amount of time to produce documents pursuant to a request. See Ind. Code § 5-14-3-3(b). I have often stated that a reasonable amount of time depends on several factors including size and complexity of the request, size of the public agency and the agency’s technological search capabilities.

In the current instance, it appears the ATC has been cooperative with you in producing non-email documentation and has worked with you in narrowing down the size of your email request to meet practical specificity considerations.

ATC has not claimed they are inundated with other public access requests, nor have they alleged they lack the workforce or resources to devote time and labor to the retrieval. I am familiar with the logistical challenges faced by the Indiana Office of Technology (IOT) and it is indeed accurate IOT must search each individual account as described.

In the past, I have found five (5) months have been reasonable when an agency has claimed a backlog of requests pursuant to a unique set of circumstances (see *Opinion of the Public Access Counselor 14-FC-15*). However, in this case I do not see a unique set of circumstances presented. ATC knew of the email request on April 3, 2014 and have

had an opportunity to narrow the scope in the timeframe presented. In the meantime, the agency could have been retrieving records, reviewing, and delivering them in a piecemeal manner. Instead, no emails have been produced. I applaud the ATC for being diligent in delivering the non-email documentation; however, knowing the logistical challenges faced by IOT, they could have initiated the email search process sooner.

I agree with ATC an agency does not have to avail itself of an outside document manager vendor in order to assist with the retrieval of documents. This kind of enhanced access is not contemplated by the APRA, nor do I believe the spirit of transparency taken from a liberal reading of the statute lends itself to such a conclusion. The logistics of such an endeavor would be substantial if executed as described. It appears the ATC has made a good faith effort to work with the Office of the Attorney General to potentially utilize their resources. I encourage them to continue to explore this option.

### **CONCLUSION**

It is the Opinion of the Public Access Counselor the Indiana Alcohol and Tobacco Commission has not violated the Access to Public Records Act, however, faced with the challenges associated with retrieving electronic records, they should have began their retrieval process sooner. Five months is quite simply too long to commence a search. Because a portion of the response has been fulfilled satisfactorily, the ATC has satisfied its burden to partially produce documents as they become available. The ATC should immediately begin to retrieve and produce the email portion of the request post haste. Consistent with my prior opinions, the emails should be produced as they become available and the ATC should not wait to give them to you until they all retrieved and reviewed.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline that extends to the left and then curves back under the signature.

Luke H. Britt  
Public Access Counselor

Cc: Mr. David Rothenberg