



STATE OF INDIANA

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May 29, 2014

Mr. David B. Vornehm
C/o Drewry, Simmons, Vornehm, LLP on behalf of Calumet Civil Contractors
Carmel City Center
736 Hanover Place, Ste. 200
Carmel, IN 46032

Re: Formal Complaint 14-FC-95; Alleged Violation of the Access to Public Records Act ("APRA") by the Indiana Department of Transportation

Dear Mr. Vornehm,

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.* INDOT has responded via Ms. Lynn M. Butcher, Esq., Director of Litigation and Appeals. Her 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 April 28, 2014.

BACKGROUND

Your complaint dated April 24, 2014, alleges the Indiana Department of Transportation ("INDOT") violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On October 1, 2012, your colleague Matthew Schafer of Drewry Simmons Vornehm, LLP, made a request to INDOT for documents on behalf of your firm's client, Calumet Civil Contractors. The request was acknowledged on October 10, 2012 by INDOT's Program Director of Public Records. On November 15, 2012, the request was partially satisfied. Further documents were made available on January 31, 2013.

As a number of requested documents still were not made available, on July 12, 2013 a request was made by another colleague, Andrew Briscoe of Drewry Simmons Vornehm, LLP, for these omitted documents. This request was acknowledged by INDOT on July 22, 2013. This request was partially fulfilled on September 16, 2013, by allowing you to view a number of the documents in the INDOT - Seymour District conference room.

During the visit, parties discussed the absence of documents. On September 18, 2013, you followed up on the discussion with INDOT's Seymour District Communications Director; however, no response was received. You also followed up with the Program Director of Public Records on the same date, informing her that the "Call in List", backup calculations, internal INDOT correspondence, and "hand written field books, notes or diaries" were not provided during the September 16, 2013 visit. No response was received from the Director of Public Records.

On December 19, 2013, you made a Public Records request on behalf of Calumet Civil Contractors, Inc., requesting a number of documents you stated were omitted from the previous requests. INDOT's Director of Public Records acknowledged your request on December 23, 2013. You followed up on this request on January 14, 2014, and on February 10, 2014, INDOT responded it was still working on the request. You followed up again on February 24, 2014, asking for an update; INDOT responded "The information is being reviewed... attorney workload is pretty busy".

INDOT responded to your formal complaint via counsel on May 12, 2014. In regard to the October 1, 2012 request, INDOT asserts the Program Director of Public Records, in her acknowledgement, "expressly stated that certain documents would not be produced, pursuant to applicable provisions of the Access to Public Records Act". INDOT's response argues because there was nothing further from your colleague Mr. Schafer following his inspection of the documents in January 2013, they considered the request satisfied. INDOT admits withholding certain non-disclosable documents, however, they assert their omission of any document under his request is a result of his lack of reasonable particularity; the "Call in" report Mr. Schafer requested does not exist; and a number of requested documents are deliberative, and therefore non-disclosable.

Regarding the July 12, 2013 request, INDOT asserts, in its acknowledgement, "[INDOT] again indicated certain documents would not be produced, pursuant to the applicable provisions of the Access to Public Records Act". Further, it asserts "[m]any of the 'additional' documents requested by Mr. Briscoe were the same records withheld as non-disclosable in response to the October, 2012 request", and his request again lacked reasonable particularity and sought deliberative materials.

Speaking to your December 19, 2013 request, INDOT asserts, in its acknowledgement, it "again indicated certain documents would not be produced". Again, INDOT suggests the request lacked reasonable particularity; satisfying your request for all reports available from the SiteManager program requires INDOT to create reports; and certain requested documents are deliberative. INDOT does state, however, they are continuing to work on satisfying the satisfying the request in part.

DISCUSSION

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 Department of Transportation 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 INDOT’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).

As an initial matter, INDOT raises an argument in its response suggesting you may not have standing to file a formal complaint as you and your firm are representing a named party. I disagree. When evaluating a formal complaint, I will accept a grievance based on basic attorney-client and agency-principal relationships. It is my Opinion you have standing in regard to this issue.

INDOT does not address the timeliness issue of your complaint as required by Ind. Code § 5-14-5-7. A complainant has thirty days from the denial of the public access request to file a grievance with the Public Access Counselor. The ongoing dissatisfaction with INDOT’s responsiveness is apparent well before thirty days prior to the filing of your complaint. Communication between INDOT and your firm regarding these records has been strung along for over a year and a half. So while I am not entirely compelled by INDOT’s response and believe you have been prejudiced by their lack of forthright communication as explained below, I cannot treat this as an adversarial formal complaint because of the timeliness issue. I will use this forum instead as an instructional exercise and make recommendations accordingly.

Outlined in the Background portion of this Opinion is merely a cursory factual framework of the ongoing history of these requests since October 2013. The requests themselves are much more involved and detailed, but the timeline illustrates the issue at hand.

Based upon its response, I can reasonably conclude some of INDOT’s arguments may have merit. There may be deliberative materials among your requests which may be withheld at INDOT’s discretion under Ind. Code § 5-14-3-4(b)(6). There may also be requests which are not reasonably particular as contemplated by Ind. Code § 5-14-3-3(a)(1). I do not take exception with INDOT’s substantive arguments, but I cannot condone the method in which these arguments were communicated to you.

Consider Ind. Code § 5-14-3-9(d):

if a request initially is made in writing, by facsimile, or through enhanced access...a public agency may deny the request if:

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:
 - (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and
 - (B) the name and the title or position of the person responsible for the denial.

INDOT's response seems to argue the acknowledgement of the receipt of your request also serves as a preemptive potential denial because certain discretionary and confidential exceptions to the APRA were listed. From the materials provided to me by both parties, I have no indication the records were ever denied at all. In fact, the last communication you received before filing your formal complaint indicated: "The information is being reviewed... attorney workload is pretty busy... will keep you posted."¹ The response by INDOT was merely a boilerplate acknowledgement the request had been received and information regarding how or when INDOT intended to comply.

There is nothing wrong with a boilerplate acknowledgement of a public records request. Often it is necessary to have this stock language at hand to quickly respond to a request. But the acknowledgement in this case does not satisfy Ind. Code § 5-14-3-9(d) merely because it outlines exceptions which *could* apply. A written denial explaining the justification for the denial of each record (or set of records) based on the APRA should be disclosed to the requestor in an itemized fashion.

A public agency shall make all efforts to produce records pursuant to a request within a reasonable amount of time. See Ind. Code § 5-14-3-3(b). I have no reason to doubt INDOT has a backlog of public records requests and their legal department is likely as busy as any public agency in the state. A reasonable time varies from agency to agency and every situation is different. Voluminous records requests will naturally take longer to satisfy. Your request appears significantly complex and may very well be quite large. But I am not necessarily convinced INDOT has made best efforts to produce records to you consistent with the Access to Public Records Act.

It is my sincere hope this matter is not irreparable. INDOT has indicated it is working on the retrieval of an important part of your request (e.g. the "as-built plans") and they have produced other records in the meantime. A formal complaint or a PAC Advisory Opinion should not serve as a catalyst for production of documents, but it is my anticipation INDOT will take my suggestion to either release the records in a timely fashion or else provide specific justification for withholding each record or set of records.

Regards,

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Lynn Butcher, Esq.

¹ See email dated February 27, 2014 from Amy Miller to David Vornehm