



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
HEATHER NEAL

Indiana Government Center South  
402 West Washington Street, Room W460  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

August 22, 2008

Brian Sweeney  
PO Box 40031  
Indianapolis, Indiana 46240

*Re: Informal Inquiry 08-INF-31 regarding the Indiana Department of Natural Resources*

Dear Mr. Sweeney:

This is in response to your informal inquiry dated July 31, 2008 which I received August 4, 2008. You write to inquire about records you have requested from the Indiana Department of Natural Resources ("Department") pursuant to the Access to Public Records Act ("APRA") (Ind. Code 5-14-3). You allege that you requested records from the Department by letter dated November 7, 2007 and have not received from the Department any records responsive to the request. Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

## BACKGROUND

You allege you submitted to the Department on October 19, 2007 a request for access to the operator agreement for the Atterbury Shooting Range. On October 30 you received a copy of the license and concession agreement for the operation of the Atterbury Fish and Wildlife Area. You further allege that on November 7, 2007 you submitted a new request to the Department whereby you requested copies of records referenced in the agreement you received. You allege that despite several telephone discussions and electronic mail message ("email") exchanges, you have not yet received any records you requested by the November 7 letter.

The Department responded to the inquiry by letter dated August 18, 2008 from Adam Warnke, Deputy Director – General Counsel for the Department. Mr. Warnke agrees the Department received the October request and provided twenty-one pages of records on or about October 30, 2007. Mr. Warnke indicates the Department has not yet received the \$2.10 for copying fees which the Department is allowed to charge pursuant to I.C. § 5-14-3-8(c). Mr. Warnke further agrees the Department received your November 7 request for additional records. He contends the Department does not maintain any records responsive to the request.

Mr. Warnke agrees that the two of you had numerous telephone discussions and email exchanges. He recalls, but does not maintain any records to support the recollection, that he offered to make available for inspection the entire file regarding the Atterbury Shooting Range but that you declined the offer. Mr. Warnke further indicates he recalls that at some time after your March 11, 2008 email to him, he notified you by telephone that the Department does not maintain any records responsive to your request. Mr. Warnke has provided a copy of an August 15, 2008 letter to you confirming this.

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

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). 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. I.C. § 5-14-3-9(b).

Here, there is no question the Department responded to your October request within the time period prescribed by the APRA. *See* I.C. § 5-14-3-9(b). While the APRA requires an agency to provide access to inspect and copy records, the APRA provides that an agency is only required to provide one copy of a record. *See* I.C. § 5-14-3-8(e). As such, if your second request was for the same records as the first request, the Department would not be obligated to provide additional copies. Here, though, since your request was for different records, the Department was required to respond to the request within the time period provided in I.C. § 5-14-3-9(b). The APRA does not require a response, even to a written request, to be made in writing unless the agency is denying access to the record(s). *See* I.C. § 5-14-3-9(c). While it is clear many discussions and email exchanges took place between you and Mr. Warnke, it is unclear whether the initial response, whether by telephone, email, or writing, was made within seven days of the Department's receipt of the request. If the initial response was not made within seven days of receipt, the response was untimely under the APRA. *See* I.C. § 5-14-3-9(b).

The Department indicates that you have requested records which do not exist. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. As such, the Department is not required to create records you requested if they do not exist. I cannot find an agency took an unreasonable amount of time to produce records if indeed those records are not maintained by the agency. The Department's solution to provide you access to inspect all records it maintains related to

the Atterbury Shooting Range goes beyond what is required by the APRA since the file likely contains records outside your request. When an agency does not maintain records responsive to a request, it is generally my advice that the agency offer to allow the requester to come to the office to inspect any related records to determine whether any of those records contain information the requester might find helpful or useful.

Regarding the copy fees charged to you by the Department, I.C. § 5-14-3-8(c) allows a state agency to charge a fee of \$.10 per page for copies. While I.C. § 5-14-3-8(e) allows an agency to charge the fee in advance of providing the copies, I understand that here the Department sent you the copies of records responsive to your October request without requiring advance payment. I trust you are preparing to remit to the Department the amount of \$2.10 for the copies of those twenty-one pages.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Department's response to the November request was untimely if it was not made within seven days of receipt of the request. It is also my opinion the Department is not required to create records responsive to your request if it does not already maintain such records.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Adam Warnke, Indiana Department of Natural Resources