



# 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) 234-0906  
Fax: (317) 233-3091  
1-800-228-6013  
www.IN.gov/pac

October 26, 2012

Mr. Richard VanRheenen  
2500 One American Square  
Indianapolis, Indiana 46282

*Re: Informal Inquiry 12-INF-38; Production of Records*

Dear Mr. VanRheenen:

This is in response to your informal inquiry regarding the completeness of the Indiana Department of Transportation's ("Department") production of records in response to your request made pursuant to the Access to Public Records Act ("APRA"). Pursuant to Ind. Code § 5-14-3-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the APRA, I.C. § 5-14-3-1 *et seq.*

## BACKGROUND

On September 7, 2012, you submitted an informal inquiry to the Public Access Counselor's Office regarding the Department's lack of response to your request for records. On July 9, 2012, you submitted a written request for records to the Department. On July 10, 2012, Amy Miller responded in writing to your written request on behalf of the Department. On August 9, 2012, you submitted a written inquiry to the Department regarding the status of your request. On August 10, 2012, Ms. Miller responded in writing to your inquiry and provided that the agency was still gathering the requested information. On September 7, 2012, after still not hearing back from the Department, you submitted your informal inquiry. You provide that pursuant to I.C. § 5-14-3-9(b), the Department's response was due within seven (7) days of receipt of your request. You advised that the volume of the documents requested was not exceptional by any means and as the Department had not produced any records in over two months in response to your request, it has violated the APRA.

On September 12, 2012, you advised that the Department had now produced records that were responsive to your request. You provided that you were going to review the documents to determine whether the response was complete; at which point you would be in contact with our office regarding your informal inquiry. On October 3, 2012, you stated in written correspondence that you were not confident that all records had been produced. You asked that the Department verify whether it fully responded to your July 9, 2012 request. At that time, our office informed the Department that it would

have until October 19, 2012 to provide any response to your inquiry. On October 17, 2012, Ms. Miller advised that the Department had fully responded to your request and that it maintained no further records.

## 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 Department 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 Surveyor’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 simply be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, you submitted a written request for records to the Department on July 9, 2012 to which the Department responded in writing on July 10, 2012. You thereafter submitted an inquiry regarding the status of your request on August 9, 2012, to which the Department responded in writing on August 10, 2012. As such, it is my opinion that the Department did not violate section 9(b) of the APRA in response to your written request.

Beyond the time periods contemplated under section 9 of the APRA, section 3(b) of the APRA provides that 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.*

Here, you requested records in association with certain bid information received by the Department pursuant to Bid # 800-12-113. Specific parts of your request only sought materials for a five-day period in May. I would agree with your assessment that the number of records to be produced in response to your request was not broad. Approximately sixty-four days passed before the Department produced any records that were responsive. Further, the Department produced all records that were responsive to your request approximately five (5) days after being notified of the filing of your informal inquiry. As noted *supra*, the burden lies with the Department to demonstrate that it complied with the requirements of section 3(b). While I would applaud the Department in responding immediately to your inquiry regarding the status of your request, it is my opinion that it did not meet its burden to demonstrate that it produced all records in a reasonable period of time. However, as the Department has now produced all records that were responsive to your request, I trust that this is in satisfaction of your inquiry.

As to your inquiry regarding the completeness of the Department's response, I would note that 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.* In your October 3, 2012, you stated that you were not confident that all records had been produced. In response, Ms. Miller advised that the Department had produced all records that are responsive to your request. From the information that is before me, there is no indication that the Department has denied your request in any aspect. As such, *if* the Department has now produced all records that are responsive to your request, it is my opinion that it complied with the APRA (emphasis added).

If I can be of additional assistance, please do not hesitate to contact me.

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: Amy Miller