

October 25, 2007

The Honorable William Crawford  
Indiana House of Representatives  
PO Box 18446  
Indianapolis, Indiana 46218

*Re: Your informal complaint against the Indiana Department of Administration*

Dear Representative Crawford:

This is in response to your informal complaint/inquiry dated May 24, 2006. I apologize for the delay in the response. Upon my appointment by Governor Daniels effective July 1 of this year, I found a backlog of informal inquiries. I am currently endeavoring to address those inquiries and issue an opinion in each matter pursuant to Indiana Code §5-14-4-10(5). Your inquiry concerns information you have requested from the Indiana Department of Administration (“IDOA”) relating to minority and women business enterprise (“M/WBE”) participation.

#### BACKGROUND

You filed a complaint with this office on May 24, 2006. Because your complaint was untimely filed under Ind. Code §5-14-5-7(a) (requiring a complaint to be filed with the counselor not later than thirty days after the denial of access), the previous counselor converted it to an informal inquiry to be answered pursuant to I.C. §5-14-4-10(5). In your complaint, you alleged you requested from the IDOA information relating to minority and business enterprise participation in state contracts. The timeline as you outlined it, and as I understand it has progressed since your complaint, is as follows:

*January 5, 2006:* You sent a letter to the IDOA requesting a list of state contracts valued at one million dollars or more, the name of the company listed on each contract, the contact person for the contract, a description of the contract, and the start and end date of the contract.

*January 12, 2006:* The IDOA provided the requested information in the format requested.

*January 12-16, 2006:* Your assistant spoke with Elizabeth Barrett of the IDOA and requested the information provided be expanded to include a listing, in dollars, of

M/WBE participation in all active state contracts for the year 2005 valued at one million dollars or more.

*January 26, 2006:* The IDOA indicated the data had not been systematically tracked by past administrations but the IDOA was working to make systematic improvements and was anticipating the release of the state disparity study in the summer.

*February 8, 2006:* You sent a letter to the IDOA indicating the response was unacceptable, that the information was previously provided by past administrations, and that the data should be readily available. You asked the IDOA to re-evaluate and send you the requested information. You enclosed a form companies are required to complete listing M/WBE participation.

*February 10, 2006:* The IDOA indicated it would incorporate the information you provided into its continuing records search.

*February 20, 2006:* The IDOA indicated the information you had been provided in the past was not specific to state contracts. Because there were no clearly defined procedures in the past, the data collection approach previously employed was discontinued in October 2004. The IDOA indicated improvements were being made to the data collection system and most of the information you requested would be available in the state disparity study. The IDOA indicated it was employing an extensive manual data collection process for the rest of 2005 and 2006 until a new electronic system was in place.

*May 24, 2006:* You filed your complaint with the office of the public access counselor.

*May 26, 2006:* Counselor Karen Davis sent a notice of your complaint to Susan Gard of the IDOA and Office of the Attorney General.

*June 2, 2006:* Ms. Gard sent an electronic mail message to Ms. Barret as well as Commissioner Carrie Henderson and Davina Patterson of the IDOA and to Counselor Davis regarding a brief meeting she had with Counselor Davis; the IDOA was asked to provide Counselor Davis some background information on the situation.

*June 5, 2006:* Ms. Barrett provided Counselor Davis with the only statutory reference to M/WBE data collection:

(b) The deputy commissioner shall do the following:

(5) Require all state agencies, separate bodies corporate and politic, and state educational institutions to report on planned and actual participation of minority and women's business enterprises in contracts awarded by state agencies. The commissioner may exclude from the reports uncertified minority and women's business enterprises.

I.C. §4-13-16.5-3(b)(5).

*June 12, 2006:* Ms. Barrett sent an electronic mail message to Counselor Davis, inquiring whether she needed any further information.

*July 13, 2006:* Ms. Barrett sent an electronic mail message to Counselor Davis, providing a copy of the disparity study. Ms. Barrett indicated she had forwarded a copy to you on June 29 and was unsure what else the IDOA might do to respond to your request.

*August 2, 2006:* You sent a letter to Counselor Davis inquiring as to the status of this complaint.

January 12, 2007: Ms. Barrett sent an electronic mail message to Counselor Davis inquiring as to the status of the complaint and requesting a copy of any opinion written by Counselor Davis.

## ANALYSIS

The public policy of the Access to Public Records Act (“APRA”)(Ind. Code 5-14-3) 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.

Indiana Code §5-14-3-3(a) provides that any person may *inspect and copy* the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2, *emphasis added*. If a person is entitled to a copy of a public record under this chapter and the public agency has reasonable access to a machine capable of reproducing the public record, the public agency must provide at least one copy of the public record to the person. I.C. §5-14-3-8(e).

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.

It is my belief the issue here involves miscommunication on some level. You have asserted to the IDOA that you have in the past received the information you have requested. But the IDOA asserts that the information was not consistently tracked by past administrations. The miscommunication, I believe, lies in the difference between the information you have received in the past and the information as it is and has been available at the IDOA. Former Commissioner Goode outlines this difference in his February 20, 2006 letter to you:

“(T)he participation information you were provided in the past by the Governor’s Commission on Minority and Women’s Business Enterprises was not specific to state contracts. This was recently confirmed in a review of the commission’s meeting minutes. The M/WBE participation numbers that were formerly submitted to the Governor’s Commission included information from only 10 of 125 purchasing units, as only 10 units were required to complete quarterly participation reports at that time. Because there were no clearly defined procedures for creating these reports, and the information collected was inconsistent across agencies and over time, this approach was discontinued in October 2004.”

The Commissioner went on to say the IDOA was working on a true electronic solution to collect data and generate reports directly from the database. He further indicated that a manual review of each M/WBE Commitment Form may not accurately reflect actual minority and women’s business project participation because the tracking system for purchase order participation did not track the commitment form include with proposals. Furthermore, the

commitment form is specific to subcontractors and does not provide for data collection for certified prime contractors. He indicated the IDOA was working toward a tracking solution to track both subcontractors and M/WBE certified prime contractors.

Because the APRA does not require a public agency to create records pursuant to a request for access to inspect and copy records when those records do not exist, the IDOA did not violate the APRA by not creating a document containing the information you requested. The APRA does, though, require the public agency to provide a requester access to inspect and copy records of a public agency which have been created and are maintained by or filed by or with the agency, so long as no exception to disclosure is present. I.C. §5-14-3-3(a). I do not understand the IDOA to be claiming a statutory exemption to disclosure. Rather, the IDOA has indicated the information you request does not exist in a specific record. While it is my opinion you do have the right to request copies of all related M/WBE records, I believe the IDOA has indicated that if you choose to inspect those records, you likely will still be unable to obtain accurate information as you have requested it.

Since the information you seek has not historically been maintained by the IDOA in the format you requested, the question then is whether the IDOA is required to maintain the information. While I.C. §4-13-16.5-3(b)(5) requires the IDOA to require agencies to report on planned and actual participation of M/WBEs in contracts awarded by state agencies, the statute does not indicate that the IDOA is to compile the information in any specific format or maintain any further information other than those reports issued by the agencies. Furthermore, it appears that in the past not all agencies were required to submit reports.

So while it seems both you and the IDOA agree that ensuring compliance is extremely difficult without measurable data, I find no statutory authority requiring the IDOA to have maintained that measurable data. It is my understanding the IDOA is endeavoring toward that end. As to your present complaint, I find not statutory authority requiring the IDOA to have maintained the information you requested.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Elizabeth Barrett, Indiana Department of Administration  
Commissioner Carrie Henderson, Indiana Department of Administration