

May 10, 2006

*Sent Via Facsimile*

Jennifer Wagner  
Communications Director  
Indiana Democratic Party  
One North Capitol  
Suite 200  
Indianapolis, IN 46204

*Re: Informal Inquiry Response; Clarification Regarding Requests for Records of the Governor's Office and the Indiana Department of Transportation*

Dear Ms. Wagner:

On behalf of the Indiana Democratic Party ("Party"), you have requested clarification from the Office of the Public Access Counselor concerning the Access to Public Records Act. I received your request for an opinion on or about March 30, 2006. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

You raise three issues with respect to the Access to Public Records Act. I restate and summarize your questions as follows:

- Whether the Office of the Governor has provided records within a reasonable period of time under the Access to Public Records Act following the Party's request of November 14, 2005;
- Whether the Indiana Department of Transportation has provided records within a reasonable period of time following the Party's request of November 14, 2005;
- Whether the Indiana Department of Transportation has responded timely to the Party's March 17, 2006 hand-delivered request for records.

## BACKGROUND

On November 14, 2005, the Party delivered requests for records to various agencies, including the Governor's Office and the Indiana Department of Transportation. The Party asked for e-mail messages sent to or from three members of the Governor's staff, Mark Lubbers, Jane Jankowski, and Harry Gonso. For Mark Lubbers, the Governor's senior adviser, you requested messages from January 17, 2005 through January 31, 2005, and August 1, 2005 through August 15, 2005. For Jane Jankowski, the Governor's Press Secretary, you requested messages from January 10, 2005 through January 24, 2005, June 20, 2005 through July 4, 2005, and October 24, 2005 through October 31, 2005. For Harry Gonso, the Governor's Chief of Staff, you requested messages from March 7, 2005 through March 14, 2005, and October 24, 2005 through October 31, 2005.

From the Indiana Department of Transportation ("INDOT"), you delivered a request on November 14, 2005 for all e-mail messages delivered to or sent from INDOT Commissioner Tom Sharp via state e-mail servers between the dates of August 1, 2005 and August 31, 2005, and all e-mail messages delivered to or sent from INDOT Administrative Assistant Gayle Ream via state e-mail servers between the dates of August 1, 2005 and August 31, 2005. On March 17, 2006, you requested all toll road feasibility studies performed by INDOT between January 1, 1990 and December 31, 1992, with respect to the Interstate 69 extension from Indianapolis to Evansville.

All the above requests were hand-delivered to the respective agencies. Other facts pertinent to the issues will be set out below.

## ANALYSIS

It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code 5-14-3-1. Providing persons with the 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. IC 5-14-3-1.

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). IC 5-14-3-3(a). If a public agency receives a request via hand-delivery, the agency is required to respond within 24 hours, or the request is deemed denied. IC 5-14-3-9(a). A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 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. IC 5-14-3-7(c). The public access counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration

of 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 are necessary to determine whether the agency has produced records within a reasonable timeframe.

Public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention schedules under Indiana Code 5-15; public records not subject to Indiana Code 5-15 may be destroyed in the ordinary course of business. IC 5-14-3-4(e). A public record includes electronic mail. *See* IC 5-14-3-2(m). Under IC 5-15-5.1-1, “records” subject to records retention include

“all documentation of the informational, communicative or decisionmaking processes of state government, its agencies and subdivisions made or received by any agency of state government or its employees in connection with the transaction of public business or government functions, which documentation is created, received, retained, maintained, or filed by that agency or its successors as evidence of its activities or because of the informational value of the data in the documentation and which is generated on:

...

(3) magnetic or machine readable media; or

(4) any other materials regardless of form or characteristics.”

IC 5-15-5.1-1 (defining “record”).

Hence, electronic mail made or received by an agency of state government or its employees in connection with the transaction of public business or government functions is required to be maintained under IC 5-15 in accordance with a record retention schedule. A public agency is required to protect public records from loss, alteration, mutilation, or destruction. IC 5-14-3-7(a).

### *Governor’s Office*

You have asked whether the records that you requested from the Governor’s Office on November 14, 2005 have been produced within a reasonable time. I requested and received from the Governor’s office a response to your specific allegations, dated April 12, 2006. In addition, the Governor’s Office wrote you a letter of the same date telling you of the status of your request. Mr. Philip Wickizer, Associate Counsel, has provided these responses. In his responses, Mr. Wickizer explained that the compilation and review of a thousand or more e-mail documents has been ongoing and is expected to continue to take a significant amount of time. During the legislative session and its aftermath, the legal staff that could be devoted to the task of reviewing the e-mails was handling analysis of bills as well as other duties. However, the Governor’s Office was then willing to provide you with a copy of the Mark Lubbers contract and invoices without further delay. The Governor’s Office had intended to provide all the documents that you requested at one time. In view of your complaint to my office, Mr. Wickizer has agreed to release portions of your request that have been reviewed and are ready for disclosure.

It has been the oft-repeated advice of my office that when a public agency is compiling voluminous records that will take several weeks or months to identify, compile, and review, the public agency should do two things: 1) communicate at reasonable intervals with the requester regarding the status of the request; and 2) produce without delay records that can more easily be identified and reviewed (if legal review is even needed). In the case of the Mark Lubbers contract and invoices, these records should have and could have been produced long before April 12. The lapse of nearly five months from the date the request was received until the date the contract and invoices were provided is not reasonable under the APRA, in my opinion.

The reasonableness of the time in which the Governor's Office has yet to produce the e-mails is another matter, but not entirely reasonable under the circumstances as well. Although the time in which legal staff could devote to the review of the e-mails, coming during the legislative session and its aftermath, is understandably curtailed, when the effort is viewed in light of the APRA's requirement that providing persons with information is an essential function and an integral part of the routine duties of public officials and employees, the lapse of five months during which *no* e-mails have been produced is unreasonable.

The problem occurs when the public agency views a records request as a whole that cannot be segregated according to the ease with which *some* of the records may be identified as responsive and reviewed for disclosability. Producing some of the e-mails during the protracted review process often eases the mind of the requester and shows good faith commitment to disclosure. Often, the genuine commitment to openness by the public agency is obscured when records are long delayed. I strongly urge the Governor's Office to consider making some of the e-mails available without delay, prior to other e-mails for which legal review and the redaction process itself may continue to be a prolonged effort. I also recommend that the Governor's Office provide the Party with updates at reasonable intervals.

#### *Indiana Department of Transportation*

You allege two issues with respect to INDOT. First, you allege that INDOT's production of e-mails has been unreasonable, given that the Party hand-delivered the request on November 14, 2005. Second, you allege that the Party has not received any response to the March 17 request for toll road feasibility studies.

INDOT responded to your informal complaint via letters dated April 17, 2006. In response to your complaint regarding the timeliness of production of the e-mails of Tom Sharp and Gayle Ream, INDOT stated that Mr. Sharp does not retain e-mails and has no e-mails in any file that would be responsive to the request. INDOT stated that "He simply does not retain e-mails." For Gayle Ream's messages, INDOT located thirty-one pages of e-mails sent or received during the month of August 2005. No explanation was proffered for the delay of five months in locating Ms. Ream's e-mails or in determining that Mr. Sharp deletes his e-mails, making them unavailable.

In response to your allegation that INDOT has not responded timely to the Party's March 17 request, INDOT wrote that after a thorough search, INDOT has no records of any toll road feasibility studies performed from January 1, 1990 to December 31, 1992 with respect to the

Interstate 69 extension. INDOT did not dispute or explain the delay in responding to the March 17 request.

INDOT violated the Access to Public Records Act when it failed to respond to the Party's March 17 hand-delivered request for the feasibility studies within 24 hours of receipt. The APRA requires only that a public agency acknowledge receipt of a record; hence, even if INDOT needed additional time to perform a search, this did not excuse INDOT's failure to issue a response within 24 hours of receiving the Party's request for records.

In addition, INDOT failed to timely produce Gayle Ream's e-mails, or to explain that Mr. Sharp's e-mails had been deleted. Five months was more than adequate time to locate and retrieve the thirty-one e-mails; INDOT does not offer any explanation for this inordinate delay. The matter regarding Mr. Sharp's e-mails is troubling for three reasons. First, it took INDOT five months to conclude that no August 2005 e-mails were available because Mr. Sharp deletes his e-mail. Second, the e-mails may have been destroyed prior to the time in which they could have been destroyed. Third, INDOT has not stated when Mr. Sharp deleted the e-mails; deleting them after November 14, when the agency had received a records request for the e-mails, could not be excused by a public official's habit of maintaining his e-mail inbox. INDOT does not contend that the e-mails were not required to be retained under a records retention schedule. This is not surprising, since the request was for a month of e-mails of the commissioner of a state agency; some of the messages surely met the definition of a "record" in IC 5-15 as records documenting the "informational, communicative or decisionmaking processes of state government." It is likely that some messages would be required to be maintained longer than five months after Mr. Sharp's receipt or sending of the message.<sup>1</sup> Hence, to the extent that some of the e-mails were required to be retained, and are no longer retrievable, INDOT violated IC 5-14-3-7(a).

However, my investigation revealed that e-mail from August 2005 is likely to be stored on a server or on tapes maintained by the Indiana Office of Technology. Depending upon when the e-mails were deleted by Mr. Sharp, some or all of the messages could be currently maintained on the server or on tape. Again, INDOT's response has not addressed whether it had attempted to retrieve these messages. INDOT should investigate whether any of Mr. Sharp's e-mails from August 2005 are stored on the state server, and produce them for you or identify which messages are exempt, as soon as possible.

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<sup>1</sup> For example, general correspondence is required to be maintained for three years under INDOT's own record retention schedule, available at [http://www.state.in.us/serv/icpr\\_retention](http://www.state.in.us/serv/icpr_retention). Correspondence with other agencies and legislative matters are required to be maintained for three years. See [http://www.state.in.us/serv/icpr\\_retention](http://www.state.in.us/serv/icpr_retention). Because I do not know the nature of Mr. Sharp's e-mails during this time, it is impossible to determine to what retention schedule the e-mails pertain, if any.

I hope this guidance is of assistance to you.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Phil Wickizer  
Mark G. Ahearn