

February 23, 2006

Sent Via Electronic Mail and U.S. Mail

Daniel L. O'Vadka
3831 W. 100 N
Peru, IN 46970

Re: Formal Complaint 06-FC-22; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. O'Vadka:

This is in response to your formal complaint alleging that the Indiana Department of Transportation ("INDOT") violated the Access to Public Records Act ("APRA") by failing to give you certain records.

BACKGROUND

You allege that after several requests for records that you sent INDOT in early December, 2005, you delivered on December 27, 2005 an in-person request for records, upon which you base this complaint. Your request for records generally involved the Peru Municipal Airport. Your request contained multiple parts. You allege that an INDOT attorney, Steve Pugliese, called you to seek clarification on December 30, 2005. You were told that INDOT would get back with you in several weeks. You complain that INDOT has not replied in writing as to what, when, or whether they will comply with your requests. You further complain that INDOT gives you only what the agency wants to, and tells you that either INDOT has already provided you the documents, INDOT has provided everything that it has, or that you need to obtain the documents from another agency.

I sent a copy of your complaint to INDOT. I received a responsive letter from Michelle Hilary, Administrator for INDOT. Ms. Hilary states that your misunderstanding of INDOT's limited role in municipal airport development has resulted in the present complaint. She enclosed a copy of a February 10 letter that she had sent to you with respect to your requests of December 27 and your December 16 request. The latter request was essentially a complaint about the matters involving the Peru Municipal Airport, but a small part of the twelve page e-

mailed letter is a “request for legal opinions regarding INDOT’s authority to perform certain actions along with requests for explanation of INDOT’s actions or non-actions.” It appears from the February 10 letter that INDOT is making some records available to you, is still identifying other records, and needs further clarification for some of your requests. In addition, for some of the records you seek, INDOT indicates that it does not maintain responsive records. Since filing your complaint, you received the February 10 letter from INDOT, which you say was postmarked February 15. You sent me an e-mail indicating your response to the INDOT February 10 letter. You continue to affirm that INDOT must have the records you seek. You also supply clarification of some of your requests. Additional facts will be developed as necessary.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the regular business hours of the public agency, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A request must identify the record requested with reasonable particularity. IC 5-14-3-3(a)(1). A public agency that receives an in-person request for a record must respond within 24 hours, or the request is deemed denied. IC 5-14-3-9(a).

A public agency may deny a written request for a record if the public agency issues a written denial and states the exemption or exemptions that authorize the agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c). If a public agency does not maintain a record, it should clearly indicate that the agency does not possess the record. The agency is not required to create a record that it is not required to create in order to satisfy a request for records.

The APRA concerns disclosure of records that a public agency maintains. APRA does not require that a public agency answer questions regarding the legal basis or grounds for a public agency’s actions or inactions. *See Opinion of the Public Access Counselor 05-FC-89.*

INDOT did not timely respond to your in-person request for records dated December 27, 2005. If you hand-delivered the request to INDOT’s offices on Tuesday, December 27, Mr. Pugliese’s telephone call of Friday, December 30 was past the twenty-four hours required for response to a request for records served via hand-delivery. That call appears from the record to be the first response that INDOT made to your December 27 request.

With respect to the balance of your complaint, you contend that INDOT has been non-responsive, in that INDOT has omitted records that you believe INDOT maintains, told you that it has already provided records, or has told you that you must obtain some of the records from other sources.

I have reviewed the February 10 response of Ms. Hilary. Nothing about the response appears on its face to be in violation of the Access to Public Records Act. To the extent that you believe that INDOT is not being forthcoming with documents that it maintains, your remedy is to file a lawsuit in circuit or superior court to compel INDOT to disclose specific records. *See IC 5-14-3-9(e).*

With respect to responses of INDOT that you will have to procure documents from other agencies such as the Peru Municipal Airport or the county recorder, in each case INDOT clearly states it does not maintain the records. INDOT is under no obligation to procure records from other public agencies. INDOT also seeks clarification with respect to some of your requests. INDOT has fulfilled its obligation to seek clarification when it has determined that your request is not stated with reasonable particularity.

In your response to INDOT's letter of February 10, you provide some clarification of the requests; this should be helpful to INDOT as it continues to identify responsive records. To INDOT's invitation that you and your wife tell INDOT what dates you would be available to review documents, you responded "We find nothing in the law requiring us to furnish you with a list of times that we would be available to view these documents."

The APRA states that records must be available for inspection and copying during the regular business hours of the agency. IC 5-14-3-3(a). A public agency shall protect public records from loss, alteration, mutilation, or destruction, and 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). In addition to its duty to regulate any material interference with the regular discharge of an agency's functions or duties, an agency may have practical considerations that prevent it from offering a person the right to inspect a large number of records at any time that the agency is open for business. Therefore, INDOT's request that you submit dates when you will be available to inspect the records would, in my opinion, facilitate disclosure, not impede it.

With respect to the December 16 request, you continue to maintain that INDOT has been wholly unresponsive to this request. However, the letter contains questions regarding INDOT's legal basis for its actions or non-actions. INDOT is drafting a response to your letter, but portions of the December 16 letter that contain requests for records, not opinions, have already been provided to you, according to INDOT. However, INDOT assured me that they will make these records available again.

Aside from the tardy response to the December 27 request, I do not find any violations of the Access to Public Records Act in INDOT's production of records or responses to your requests of December 16 or December 27, 2005.

Sincerely,

Karen Davis
Public Access Counselor

cc: Michelle Hilary