

May 18, 2006

Mr. Thomas Frailey
2658 South State Road 2
Valparaiso, IN 46385

Re: Formal Complaint 06-FC-71; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Frailey:

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

BACKGROUND

You filed your formal complaint with the Office of the Public Access Counselor on April 18, 2006. You allege that on behalf of the Indiana-Illinois-Iowa Federation for Fair Contracting, you made three written requests to INDOT for certified payrolls. The first request, dated December 7, 2005, requested certified payrolls for INDOT Contract R 26999 for Critser Companies. The second letter, sent December 12, 2005, requested certified payrolls for INDOT Contract R 27383, again for Critser Companies. You stated that you received only one responsive letter dated December 22, 2005, acknowledging receipt of the December 7 letter. You allege that you have received no letter acknowledging receipt of the December 12 letter, or any correspondence from INDOT since then. In your third letter to INDOT, dated March 24, 2006, you informed INDOT that it had failed to respond to your requests, and stated your belief that the time within which INDOT should have produced the records was not reasonable.

I sent a copy of your complaint to INDOT. I received a response from Mike Monahan, Deputy Commissioner for LaPorte District. He enclosed copies of pertinent correspondence. He stated that two acknowledgement letters were sent on December 22, 2005, in response to your December requests. Following investigation, INDOT sent you a letter dated January 9, 2006, explaining that no certified payrolls were submitted for either contract, and why. Hence, INDOT did not have the payroll records that you requested. I enclose a copy of all correspondence for your reference.

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." Ind. Code § 5-14-3-

1. INDOT is clearly a public agency for the purpose of the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of INDOT during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana code section 5-14-3-4. IC 5-14-3-3(a).

It is the responsibility of the public agency to respond to requests for public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. While this response has not been defined under the APRA, what is contemplated is a communication to the requestor. For example, a public agency may respond that the request has been received, whether there are any records that will be produced, that the records requested are confidential or otherwise nondisclosable, or that the public agency needs more time to compile the records requested. A response may also provide the records requested, or notify the requestor that the public records requested are available for his or her inspection.

A public agency is required to make a response to a written request that has been mailed within seven (7) days after it is received; the failure to do so constitutes a denial under the APRA. IC 5-14-3-9(b). Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court of the county in which the denial took place to compel the public agency to disclose the public records requested. IC 5-14-3-9(e).

The documentation supplied by INDOT shows that INDOT received your December 7 letter on December 12. INDOT received your December 12 letter on December 16. Because you mailed your requests, INDOT was required to respond to the first letter no later than December 19. A letter sent by December 23 would have been a timely response to the second request. INDOT supplied me with two letters demonstrating that INDOT responded to both your requests on the same day, December 22. It appears, then, that the response to your first request was tardy under the APRA. The response to the second request was timely.

The responsive letters indicated that Ms. Shawna Whitehead was forwarding your requests to the appropriate personnel. She also stated that all disclosable information would be available to you.

It appears that the next communication was a letter from INDOT of January 9, 2006. That letter enclosed two letters from Superior Construction Co., Inc., the general contractor for the referenced contracts. Those letters indicated that Superior had not submitted certified payrolls to INDOT for the contracts because for Contract R-27383, Critser Company was an off-site material supplier to which the prevailing wage law does not apply. For Contract R-26999, Critser Company performed no work on that project.

Hence, INDOT has sent you a letter and documentation that INDOT does not maintain any responsive records, and why. You told me that you did not receive the January 9 letter. I note that the inside address of the letter shows it was addressed to you at the correct address of your foundation, except for one minor error in the zip code (60466 should have read 60446). The December 22 letter bears the correct address in every respect, yet you state you did not receive it.

I cannot explain why you did not receive the January 9 or December 22 letters, but it appears that INDOT did inform you three months before you filed your complaint that the certified payrolls were not maintained by INDOT. In addition, the letter stating that INDOT had no responsive records, and why, was sent within a reasonable period of time after INDOT received your requests.

Except for the late response by three days to your December 7 request which was a violation of the Access to Public Records Act, I find that INDOT did not violate the Access to Public Records Act in any other respect.

CONCLUSION

For the foregoing reasons, I find that the response of the Indiana Department of Transportation to your first request was not timely, but otherwise, INDOT did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mike Monahan