

May 24, 2006

Subhen Ghosh
16 Whisperwood Ct.
Brownsburg, IN 46112

Re: Formal Complaint 06-FC-75; Alleged Violation of the Access to Public Records Act by the Indiana Department of Environmental Management

Dear Mr. Ghosh:

This is in response to your formal complaint alleging that the Indiana Department of Environmental Management (“IDEM”) violated the Access to Public Records Act (“APRA”) by failing to respond to your Request for Production served March 22, 2006. I do not find that the IDEM violated the Access to Public Records Act.

BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor on April 25, 2006. You complain that the IDEM did not respond to a request that was served by facsimile and first class mail on March 22, 2006. The request, a copy of which you enclosed, was dated March 17, 2006, and contained a heading called “Request for Production.” In the opening paragraph, you state that “Pursuant to IC 5-14-3 & 1.5...and other all applicable statutes & rules” (sic), you requested that Branch Chief Debbie Dubenetzky produce copies of the specified documents within 5 working days. The documents that you requested were listed in 10 separate paragraphs. Many of the requests were for “any and all” documents that meet a particular description or subject matter.

I sent a copy of your formal complaint to the IDEM. Ms. Linda Runkle, Assistant Commissioner in the Office of Legal Counsel responded by letter, a copy of which I enclose for your reference. Ms. Runkle stated, in summary, that you were suspended from your position with the IDEM on February 2, 2006 for 30 days pending dismissal. During the period of your suspension, you filed a merit complaint. Your merit complaint was denied at the agency level and the state personnel department level. You filed a timely appeal to the State Employee

Appeals Commission (“SEAC”) on March 24, 2006. That appeal is pending as of the date of Ms. Runkle’s letter, May 10.

After filing the first step of your merit complaint, you filed a “Preliminary Request for Production” dated March 2 to Commissioner Tom Easterly, Ms. Runkle reported. The IDEM responded on March 9. You subsequently submitted four separate requests for production of documents, requests for admission, and interrogatories to the IDEM. One such request was the Request for Production to Debbie Dubenetzky that is the subject of this complaint. Ms. Runkle informed me that by letter dated February 17, 2006, Commissioner Easterly was informed that you were represented by legal counsel, William Harrington. Mr. Harrington entered his appearance in the SEAC matter on March 30, 2006. Sometime prior to an April 17 prehearing conference in the matter, Bob Keene, the IDEM legal counsel, spoke with Mr. Harrington by telephone. Mr. Harrington advised the IDEM that the IDEM did not have to respond to the pending requests for production of documents, requests for admission, and interrogatories unless Mr. Harrington made those requests on your behalf. This telephone conversation was followed by a May 1 letter from Mr. Keene to Mr. Harrington confirming this discussion. I spoke with Mr. Harrington by telephone and he confirmed this conversation, and told me that the call took place on or about April 11, 2006, according to his diary records. In view of the Keene/Harrington conversation, the IDEM believed it had no further obligation to respond to your various requests, including the March 17 request to Debbie Dubenetzky.

Ms. Runkle provided the documents comprising your requests for production, requests for admission, and interrogatories. Your March 2 Preliminary Request for Production to Mr. Easterly begins: “In view of the pending merit complaint, and pursuant to all applicable statutes, I am requesting that you produce the following documents within five working days...” The response of the IDEM to this request was issued on March 9, and stated in detail what records would be provided, and requesting that some of your requests be identified with more particularity.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A public agency that receives a request for a record via U.S. Mail or facsimile is required to respond within seven (7) calendar days, or the request is deemed denied. IC 5-14-3-9(b). There are no specific timeframes for producing documents under the APRA. This office has stated that records should be produced within a reasonable time under the facts and circumstances.

There are no formal requirements in the APRA for submitting a request for a record or framing a record request, except that the person requesting the record must identify the record requested with reasonable particularity. IC 5-14-3-3(a)(1). In addition, the public agency may require that the request be in writing on or in a form provided by the agency. IC 5-14-3-3(a)(2).

Under Ind. Trial Rule 34, a party may serve a request to produce and permit the party making the request to inspect and copy any designated documents in the possession, custody or control of the party upon whom the request is served. The request may be served without leave

of court after commencement of the action. T.R. 34(A). The party on whom the request is served shall serve a written response within a period designated in the request, not less than thirty (30) days after service of the request, or within a shorter or longer time as the court may allow. T.R. 34(B). The Administrative Orders and Procedures Act (“AOPA”) provides for discovery in connection with an AOPA proceeding. *See generally* IC 4-21.5-3. The AOPA applies to SEAC proceedings. IC 4-21.5-2-5(4) version b.

There is nothing in the APRA that would prevent a person who is engaged in litigation against the public agency from requesting a public record in a less formal manner. I have stated several times that a public agency may not deny a person a record by requiring the person to utilize formal discovery procedures to request records when the formal discovery procedures are available to the person. A person who is entitled to utilize discovery because of a pending administrative matter or court litigation may request records from a public agency under the APRA, in addition to, or in lieu of, formal discovery.

However, the issue presented in your complaint is whether the IDEM violated the Access to Public Records Act when it failed to respond to your Request for Production. The IDEM explained that once it learned from your attorney Mr. Harrington that it was not required to produce records unless and until he conducted discovery on your behalf, the IDEM believed it had no further obligation to respond. I do not disagree with this conclusion: because your attorney indicated that the IDEM was not required to produce documents in response to your requests, whether the requests were propounded under the APRA or the formal discovery rules, the IDEM was not obliged to produce those documents, in my opinion.

However, the response of IDEM to your complaint may not supply a rationale for failing to respond to the March 17 Dubenetzky request within seven days of March 22 when IDEM would have received the request. This is because it appears that the time for response, March 29, predated Mr. Harrington’s direction to IDEM not to respond or produce documents, which occurred on April 11.

The issue presented in your complaint is whether the IDEM had a responsibility to respond under the APRA to a Request for Production. It is my opinion that, while the APRA does not contain formal requirements for framing a record request, if the person propounding the request for a record frames the request in terms of the formal discovery rules to which the request applies, the public agency is not required to issue a response under IC 5-14-3-9(b). To opine otherwise would require that a public agency always regard a discovery request under the APRA. Such an interpretation would require that every public agency in Indiana issue a seven-day responsive letter to any Request for Production of Documents, whether submitted by an attorney or a layperson, and whether the related matter is filed in a court of law or filed with an administrative agency. I do not believe that the APRA requires such a broad interpretation. Nor does the APRA, a law of general applicability, supersede the Indiana Trial Rules or other applicable statute or rule pertaining to discovery.

In this matter, your March 17 Request for Production stated that it was pursuant to IC 5-14-3 [the APRA] and IC 5-14-1.5 [the Open Door Law, which governs the right to attend, observe, and record a meeting]. You designated in your request that the IDEM produce the

copies of records within five working days. This designation appears to be consistent with Trial Rule 34, but is not within the APRA's response timeframe of seven days. In addition, a response under the APRA may be only an acknowledgement that the record request has been received by the agency; the APRA does not require that the records be produced within the time designated in a request. Moreover, formal service of a response under T.R. 34(B) is required; under the APRA, no service formalities need be observed.

This guidance should not be construed too broadly. I mean to state by this opinion only that a request that is titled "Request for Production" or similar language, when litigation is pending and discovery may be utilized, may be regarded by the public agency as a discovery request, and the public agency may handle it under T.R. 34 or any other specific statute that governs court or agency administrative proceedings. It is *not* my opinion that a request containing broad descriptions of records would allow a public agency to not respond under the APRA. Also, this opinion is intended to state only when the response times under IC 5-14-3-9(a) or (b) must be met when a person utilizes discovery procedures. This opinion is not meant to limit other rights addressed in the APRA, such as what records must be provided by the public agency or what exemptions may be asserted. I opine only that, while no formal designation need be made on a record request under the APRA, when a litigant who may conduct discovery *does* designate a request as one conducted under discovery, i.e., as a "Request for Production" or "Request for Production of Documents," the request may be regarded by the agency as one made under the rules of discovery under the Indiana Trial Rules or any applicable statute or rule. Nothing in the APRA would prevent a person from requesting records under the APRA from a public agency in addition to a discovery request.

Here, it is not clear that your Request for Production was conducted pursuant to any right you could exercise under discovery, because your request was filed two days before your SEAC appeal was filed. Hence, it is my opinion that *if* you could have conducted discovery under any statute or rule when you filed your Request for Production, because you called your records request a "Request for Production" it was not incumbent on the IDEM to regard your request as a public records request to which it was required to respond under IC 5-14-3-9(b).

CONCLUSION

For the foregoing reasons, I do not find that the IDEM violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Linda Runkle
William Harrington