



STATE OF INDIANA

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September 9, 2010

Ms. Stacy Dreher
Biersdorf & Associates
33 S. 6th St., Suite 4100
Minneapolis, MN 55402

Re: Formal Complaint 10-FC-173; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Ms. Dreher:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Transportation ("INDOT") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A copy of INDOT's response is enclosed for your reference.

BACKGROUND

According to your complaint, on or around September 24, 2008, you sent a request to INDOT seeking information on several INDOT projects. The request sought right-of-way ("ROW") and construction dates, types of properties affected by construction and property acquisition, and schematic or ROW plans, or any map showing before and after ROW lines. You state that you received an acknowledgment letter in response to your request, but you did not receive any of the requested information until July 1, 2009. On that date, INDOT provided you with construction, ROW dates and final design dates. INDOT failed to provide ROW or schematic plans or any map showing the before and after ROW lines. You claim that several projects at issue were in the property acquisition phase. As such, you believe a layout or map detailing the before and after ROW lines should have been publicly available.

In response to the alleged failure by INDOT to provide you with the information you sought, you initiated contact with the records department to obtain the information. You state that the records department provided you with the requested information and continued to provide relevant information from the fall of 2008 through the spring of 2009. On April 14, 2009, you sent a request to the records supervisor, Janie Marks, requesting copies of the schedule, real estate schedule, and ROW plans for the "US 24 Fort to Port Phase II Project." You claim that Ms. Marks' response to that request was to

inform you that “our new Commissioner had put out a new policy that we cannot provide any information for projects that have not been let. I am forwarding this request to our Program Director in our Local Service Center, Amy Miller, to see what, if any, information we can give you.” You claim that you did not receive your documents once the request was forwarded to Ms. Miller, and you did not receive a letter denying your request.

Subsequent to your April 14, 2009, request, you sent to requests to INDOT on May 20, 2010. Those requests sought access to “the final layout or documents clearly showing the right of way required for the Margaret Avenue Project, and for Des. Number 0400117: US 31 from I-465 to SR38.” You received an acknowledgement but have not yet received a denial letter or the documents you requested. Your last attempt to obtain the information from Ms. Miller was on July 15, 2010. At that time, Ms. Miller’s response was, “I have an e-mail into my contact...will let you know.”

My office forwarded a copy of your complaints to INDOT. Ms. Miller responded on behalf of the agency. Ms. Miller states that INDOT has provided you with “various website links . . . to locate [your] requested information.” With regard to the amount of time that INDOT has taken to respond to your requests, Ms. Miller states that for requests like yours, INDOT usually must compile information from several different sources in various parts of the state, which can be time consuming. She claims that the publicly available information that is posted on the websites is the only information that would have been disclosable during the course of the project. She further states that INDOT does not release plans for contracts until the public hearing stage of the project, and does not release information about parcels that may or may not be considered for acquisition under the deliberative exception to the APRA found at Ind. Code § 5-14-3-4(b)(6). She notes that INDOT is required by statute to release information on all parcels INDOT has secured on a road project, and that INDOT would be happy to provide you with a copy of that information if you so desire.

ANALYSIS

The public policy of the APRA 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. INDOT does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy INDOT’s public records during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

As an initial matter, I note that some of the allegations in your complaint are untimely. Formal complaints alleging violations of the APRA must be filed within 30 days of the denial. I.C. § 5-14-5-7. You cite to requests made to INDOT in 2008 and 2009. Those portions of your complaint are untimely and will not be addressed in this opinion.

However, your complaint is timely with respect to your conversation on July 15th, which was in reference to your request on April 14th of this year. As of August 9, 2010, the date of your complaint, you had not received any records in response to that request. There are no prescribed timeframes when the records must be produced by a public agency. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as 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 is necessary to determine whether the agency has produced records within a reasonable timeframe. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. § 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. I.C. § 5-14-3-7(c).

Here, you submitted your request on April 14th. Ms. Miller believes that her response to you was reasonable because your request required INDOT to “compile information from several different sources in various parts of the state, a process which can be time consuming.” While I am sympathetic to the workload that Ms. Miller carries in responding to numerous public access requests, I cannot find that this response bears the agency’s burden of proof to show that it responded within a reasonable amount of time. See I.C. § 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-45* (ultimate burden lies with the public agency to show the time period for producing documents is reasonable). That said, it is my understanding that INDOT has now provided you with many of the records responsive to your request.

When requesters seek access to voluminous records or records that must be obtained from various locations within an agency, I advise agencies to, whenever possible, respond to public records requests with a target date for production of the documents. This sets expectations for the requester at the outset and allows for the requester to notify the agency if the anticipated production date is unsatisfactory for some reason. Moreover, my predecessors and I usually advise agencies to release portions of public records requests to the requester whenever possible to demonstrate a good faith effort on the part of the agency. Finally, if the agency requires a significant amount of time to produce responsive records and a requester files a formal complaint in response, the agency bears the burden of proof to explain why it required the time it did to produce the records. I hope that these suggestions can help avoid similar issues in the future.

Ms. Miller also notes that INDOT denied you access to portions of the records you requested on the basis of the deliberative materials exception to the APRA. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

(6) Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Thus, the deliberative materials exception requires that the redacted or withheld material be expressions of opinion or speculative in nature *and* communicated for the purpose of decision making. I do not have the authority to conduct an *in camera* review of the material that INDOT has withheld on this basis. *See* I.C. § 5-14-4-10. To the extent the withheld material fits both criteria as INDOT maintains, it is deliberative material under the APRA, which means that pursuant to I.C. § 5-14-3-4(b)(6) INDOT acted within its discretion by refusing to release it to you.

CONCLUSION

For the foregoing reasons, it is my opinion that INDOT has not met its burden of proof to show that the time it took to produce your records was reasonable. INDOT has not otherwise violated the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Amy Miller