



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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July 23, 2013

Mr. William A. Boyd
8301 Forward Pass Road
Indianapolis, Indiana 46217

Re: Formal Complaint 13-FC-191; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Boyd:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Transportation (“Department”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Lynn M. Butcher, Attorney, responded on behalf of the Department. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that you submitted a written request for records to the Department in February 2013 for all communications, in any form, relating to the publication of Professional Services Bulletin-2003-No.03 (“Bulletin”). On April 4, 2013, the Department informed you in writing that it had investigated your request and all records responsive to the request were destroyed pursuant to the applicable retention schedule. As a result, the Department no longer maintained any records responsive to your request. It is your belief that certain documents relate directly to an active contract.

In response to your formal complaint, Ms. Butcher advised that the Department received your request for records, via email, on February 23, 2013. On February 25, 2013, the Department acknowledged the receipt of your request in writing. On April 4, 2013, the Department informed you that all records responsive to your request were destroyed pursuant to the applicable retention schedule; thus the agency no longer maintained any records responsive to your request. A copy of the applicable retention schedule is enclosed for your review.

You specifically requested the following:

“Copy of any and all communications, in all forms relating to publication of Professional Services Bulletin – 2003 – No. 3 (“PSB – 2003 – No.3”) that INDOT posted January 24, 2013. The response should include:

1. Copies of responses received to PSB – 2003 – No. 3
2. Copies of all evaluations of responses received
3. Any communications between INDOT, and other Agency(s) and any respondent.”

Ms. Butcher advised that the Bulletin was issued on January 24, 2003; to which a copy is available for review on the Department’s website. Generally, the Bulletin was the official notice of professional services being requested by the Department. Interested entities could submit statements of interest in response. Often those responses would explain the entity’s claimed qualifications to perform the requested services. Subsequently, the Department would evaluate/determine the scope of work required and contracts would be negotiated with various contractors/vendors/consultants.

As applicable here, statements of interest were due to the Department no later than February 24, 2003. The Department’s retention policy during that time period called for the total retention of the file (which included the proposals submitted by the successful and unsuccessful consultants) for three (3) years after the selection of the consultant. The Department has attached an Affidavit of Jeff Clanton, a Department employee since 1983, who stated records responsive to your request were destroyed pursuant to the applicable retention schedule. Thus, the Department no longer maintains any records responsive to your request. Ms. Butcher noted that while various contracts may have eventually been formed after an evaluation of the responses to the Bulletin, you did not request copies of any contracts. Regardless, copies of contracts entered into by the Department are available on its website.

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.” *See* I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the



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public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy..."). However, the APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. See I.C. § 5-14-3-4(h). A public agency shall protect public records from loss, alteration, mutilation, or destruction. See I.C. § 5-14-3-7(a).

Here the records responsive to your request were required to be kept by the Department pursuant to Records Schedule Series 84-1011. The schedule requires a total retention of three years after selection of the respective consultant. The Bulletin was issued in 2003 and all responses were due no later than February 24, 2003. The Department has advised that all records responsive to your request have been destroyed pursuant to the respective schedule, as more than three years have passed since the consultant was selected. Accordingly, it is my opinion that the Department did not violate the APRA in response to your request. As noted in its response, copies of all Department contracts are available on the agency's website, should you desire to review any such records.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Department did not violate the APRA in response to your request.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Lynn M. Butcher