



STATE OF INDIANA

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March 12, 2013

Mr. Marion Vian
217 W. 10th Street
Suite 120
Indianapolis, Indiana 46202

Re: Formal Complaint 13-FC-78; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation

Dear Mr. Vian:

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.* Our office forwarded a copy of your formal complaint to the Department on March 6, 2013. The Department's response was due no later than March 11, 2013. As of today's date, we have yet to receive a response from the Department. I have granted your formal complaint priority status pursuant to 62 IAC 1-1-3(3).

BACKGROUND

On December 14, 2012, you submitted a written request for records to the Department for all records relating in any way to a Department memorandum issued on July 9, 2012 regarding Rails to Trails. On December 14, 2012, the Department acknowledged in writing the receipt of your request. Thereafter you have been in periodic contact via email with Ms. Amy Miller regarding the status of your request. As of March 6, 2013, the date you filed your formal complaint with the Public Access Counselor's Office, the Department has failed to produce any records in response to your request.

Although the Department failed to file a response to your formal complaint, Ms. Miller in previous communications has advised that the Department was still trying to access the former employees' email in order to determine if there were any records that would be responsive to your request. Ms. Miller further noted that the request was difficult to manage as it sought records of a former employee and due to recent turnover in staff.

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 24 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 (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here the Department acknowledged the receipt of your written request in writing on the date of its receipt. As such, it is my opinion that the Department complied with section 9(b) of the APRA in response to your request.

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). 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. *See* 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. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency’s failure to provide “instant access” to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

Without the benefit of a response by the Department to your formal complaint, it is difficult for me to determine why it has failed to provide any records in almost three months since the original request was submitted. As provided *supra*, the ultimate burden

lies with the Department to demonstrate that the period for the production of records in response to a request was reasonable. Although I can foresee the difficulties of handling a request for records that were managed by a former employee and acknowledge the effect that a high turnover rate in key Department personnel would have on the agency's ability to efficiently respond to a request, over three months have passed since the original request was submitted. In that time period, no records have been disclosed nor has a denial been issued pursuant to section 9(b) of the APRA. As a result, it is my opinion that the Department has violated the requirements of section 3(b) of the APRA in not providing all records responsive to your request in a reasonable period of time.

CONCLUSION

For the foregoing reasons, it is my opinion that that the Department complied with the requirements of section 9(b) of the APRA by acknowledging in writing the receipt of your request within seven (7) days of its receipt. Further, it is my opinion that the Department violated the requirements of section 3(b) of the APRA in not providing all records responsive to your request in a reasonable period of time.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Amy Miller