



# STATE OF INDIANA

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February 19, 2015

Ms. Anne. K. Ricchiuto  
C/o Faegre Baker Daniels LLP on behalf of Spirited Sales, LLC  
300 N. Meridian St.  
Indianapolis, IN 46204

*Re: Formal Complaint 14-FC-327; Alleged Violation of the Access to Public Records Act ("APRA") by the Indiana Alcohol and Tobacco Commission*

Dear Ms. Ricchiuto,

This advisory opinion is in response to your formal complaint alleging the Indiana Alcohol and Tobacco Commission ("ATC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* Mr. David Rothenberg, Executive Secretary/Hearing Judge has responded on behalf of the ATC. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on December 30, 2014.

## BACKGROUND

Your complaint dated December 30, 2014 alleges the Indiana Alcohol and Tobacco Commission violated the Access to Public Records Act by not providing records responsive to your request in a timely manner in violation of Ind. Code § 5-14-3-3(b).

On or about April 3, 2014, you made a number of public records requests to the ATC seeking documentation related to your client's application for a liquor wholesaler's permit. At issue in the present case are the emails requested pursuant to the April 3, 2014 request. There does not seem to be a dispute the number of emails generated from the inquiry could be a substantial sum. There appears to be as many as 19 different senders and recipients named.

On August 1, 2014, you proposed to the ATC that an outside document management vendor could be contracted to assist in expediting the retrieval of documents. This is due in part to State of Indiana's in-house Office of Technology's difficulty in efficiently producing the documentation. Apparently, the State of Indiana, Office of the Attorney General uses similar technology as the vendor to aid in their retrieval of emails.

As of August 1, 2014, ATC had not yet utilized this option and in their response to your formal complaint they allege they have considered using the same technology as the Office of the Attorney General. The claim, however, the search yielded some 30,000 records, which also need to be reviewed and potentially redacted if an APRA exception to disclosure were to apply to some of the communication. They reiterate your request has not been denied, but delayed due to the voluminous nature of the request. They are still treating the request as pending and will produce the documents as they become available.

On September 26, 2014, ATC responded to Spirited Sales's complaint. ATC represented that ATC was investigating the use of software. On October 15, 2014, PAC encouraged ATC's investigation and encouraged expediency. Spirited Sales inquired with ATC on October 23, 2014 about the status of the investigation. ATC responded that same day, claiming to be working with the Attorney General's office on the matter.

On November 20, 2014, ATC communicated to Spirited Sales it was revisiting the possibility of using a third party. Spirited Sales was not informed of the results of the October 23, 2014 investigation.

On December 1, 2014, ATC reported to Spirited Sales it was willing to use third party software. Spirited Sales authorized the expenditure that same day. Spirited Sales also inquired about PAC's October 15, 2014 order encouraging the release of email. ATC responded on December 3, 2014 it had "not discovered any information to be produced." On December 30, 2014, Spirited Sales was informed by a phone call between the Executive Secretary and Spirited Sales's counsel, which the Executive Secretary expected to begin review that day.

Spirited Sales presents two complaints: 1) It was not until nearly eight months after the APRA request was served, and six months after a request by Spirited Sales, the ATC contacted a third party to seek assistance with the document request. 2) Despite being pending for nearly nine months and despite PAC's October 15, 2014 opinion, the Commission has not produced any records responsive to the request. Spirited contends this represents unreasonable delay under APRA and the delay was arbitrary and prejudicial to Spirited Sales's application.

Spirited Sales also notes despite a refusal to delay the July 15, 2014 hearing, a recommendation on Spirited Sales's application was not issued until December 16, 2014. Spirited contends the harm caused by holding the July hearing without the documents could have been mitigated by production of the documents during the time following. Additionally, Spirited Sales notes Chairman Huskey, who had refused the previous request to use a vendor, had recused himself from consideration of Spirited Sales's application.

## 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 Ind. Code § 5-14-3-1. The Indiana Alcohol and Tobacco Commission is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the ATC’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

I hereby incorporate by reference the Opinion issued in *14-FC-205*. As you know, in that Opinion, I stated the ATC had acted contrary to the Access to Public Records Act by waiting a considerable amount of time to commence an email search. I have personally spoken to both parties and have been assured by Mr. Rothenberg he is doing all he can within the power of his office to produce the records in an expeditious manner. My assessment remains this matter could have been resolved earlier, however, it serves no purpose to ‘pile on’ the ATC by reprimanding them again. You requested I reiterate my instructions to the Commission and I do so herein. It is my expectation the emails should be released as they become available.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long horizontal flourish extending to the left.

Luke H. Britt  
Public Access Counselor

Cc: Mr. David Rothenberg, Esq.