

September 16, 2002

Mr. Staffan D. Peterson
813 N. Maple Street
Bloomington, IN 47404

Re: Advisory Opinion 02-FC-44; Alleged Denial of Access to Public Records by the Indiana Department of Transportation.

Dear Mr. Peterson:

This is in response to your formal complaint, which was received on September 10, 2002. You have alleged that the Indiana Department of Transportation ("Department") has violated the Indiana Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, you allege that the Department denied you access to copies of electronic files depicting the various route alternatives for the I-69 extension from Indianapolis to Evansville. Ms. Vaneeta Kumar, Deputy Commissioner for the Department responded in writing to your complaint. A copy of her response is enclosed for your reference. For the reasons set forth below, it is my opinion that the Department did not provide you with a substantive response to your August 27th request within twenty-four (24) hours as required under Indiana Code section 5-14-3-9(a) and that this constituted a denial under the APRA.

BACKGROUND

According to your complaint, on August 27, 2002, you made a public records request via e-mail to Mr. Lyle Sadler of the Department for copies of electronic files depicting the various route alternatives for the I-69 extension between Indianapolis and Evansville. As of the date of your complaint, September 9th, you had not received copies of these files nor had Mr. Sadler responded as was required under Indiana Code section 5-14-3-9 to your request. In fact, in response to your August 27th request, Mr. Sadler responded to your e-mail message by acknowledging receipt of your message and that the request had been "forwarded to the appropriate individuals." For these reasons, you filed your formal complaint with this Office.

In her response, Ms. Kumar stated that it is the position of the Department that Mr. Sadler, as project manager for the I-69 project, had adequately acknowledged receipt of your public records request on August 27th. After receiving your request, Mr. Sadler forwarded it to the Department's legal office as well as to Ms. Kumar. In addition, Ms. Kumar and Mr. Sadler set up a meeting with me to discuss your request and the Department's response. During that meeting, which took place on September 5th, Ms. Kumar, Mr. Sadler and I discussed your request, including providing a response within the time frame provided under Indiana Code section 5-14-3-9(a) and that the Department does not maintain the information you requested. Mr. Sadler indicated at that time that he had in fact already provided to you copies, in every form that the Department currently maintains, of all of the information concerning this

project.

Ms. Kumar responded in writing to your request in a letter dated September 9, 2002. She explained in her letter that Mr. Sadler had provided you with copies of all of the information currently held by the Department on this project. Ms. Kumar further stated that if the information you requested becomes a public record in the future, the Department will evaluate your public records request and provide you with any additional information that is disclosable.

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." Ind. Code § 5-14-3-1. The Department is clearly a public agency for the purpose of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

It is the responsibility of the public agency to respond to requests for access to public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. While the APRA does not specifically address requests made by e-mail, it appears that Indiana Code section 5-14-3-9(a) would apply for providing a response to such requests. Therefore, under the APRA a denial of a request delivered via e-mail is deemed to have occurred if

1. the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or
2. twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made; whichever occurs first.

Indiana Code §5-14-3-9(a). If twenty-four (24) hours elapse and a requestor does not receive any response, a denial is deemed to have occurred. Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court in the county in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code § 5-14-3-9(d).

It is the responsibility of the public agency to respond to requests for public records within a specified time period. The APRA, however, does not set any time periods for producing public records, merely for responding to the request. While this response has not been defined under the APRA, what is contemplated is a communication to the requestor. For example, a public agency may respond that the request has been received, whether there are any records responsive to the request, that the records requested are confidential or otherwise nondisclosable, or that the public agency needs more time to

compile the records requested. A response may also provide the records requested, or notify the requestor that the public records requested are available for his or her inspection.

According to your complaint and the Department's response, you did in fact receive a return message in response to your August 27th request. Mr. Sadler's response, however, merely communicated that he would forward your request to the appropriate individuals for consideration. You then did not receive a substantive response until Ms. Kumar's letter of September 9th. The fact that the Department did not have the records you requested should have been communicated to you. As to the time frame, the Department stated that Mr. Sadler did pass on your request to the legal office and Ms. Kumar for consideration. More than twenty-four (24) hours elapsed after this took place, in fact it took several days for the Department to provide you with a substantive response to your request. For this reason, it is my opinion that the Department did violate the APRA by failing to provide a substantive response within the twenty-four (24) hours anticipated under Indiana Code section 5-14-3-9(a).

It is important to note, however, that the Department was clearly making efforts to respond to your request, beginning with Mr. Sadler's communications both internally and with this Office. It may have been appropriate for the Department to communicate these efforts to you rather than to allow several days to pass before responding substantively to your request for access to public records.

Ultimately, however, the Department did respond to your request by notifying you that the records requested are not even maintained by the Department. While the contractor working on the project may have the information you requested, unless the Department maintains the information, it does not fall within the definition of "public record" as defined at Indiana Code section 5-14-3-2. While the general rule of the APRA is that public agencies must disclose public records upon request under Indiana Code section 5-14-3-3, these agencies are generally not required to produce or acquire records in order to respond to a public records request. It is clear from Ms. Kumar's response to you dated September 9th, however that the Department is committed to considering your request again in the event that the information you requested is filed with or received by the Department in the future.

CONCLUSION

It is my opinion that the Indiana Department of Transportation did not provide a response to your August 27, 2002 request for access to public records in the time frame required under Indiana Code section 5-14-3-9(a) and that this failure constituted a denial under the APRA.

Sincerely,

Anne Mullin O'Connor

Enclosure cc: Ms. Vaneeta Kumar, INDOT, w/o enclosure