

November 26, 2002

Mr. Thomas S. Frailey  
III Foundation for Fair Contracting  
2658 S. State Road 2  
Valparaiso, IN 46385

Re: *Advisory Opinion 02-FC-54*; Alleged Violation of the Access to Public Records Act by the Indiana Department of Transportation.

Dear Mr. Frailey:

This is in response to your formal complaint, which was received on October 31, 2002. You have alleged that the Indiana Department of Transportation ("Department") violated the Indiana Access to Public Records Act ("APRA") Indiana Code chapter 5-14-3. Specifically, you claim that the Department denied you access to information from certified payrolls and failed to respond to your public records request and produce the public records within a reasonable period of time. Ms. Kelly Whiteman, Chief Legal Counsel for the Department, responded in writing to your complaint. A copy of her response is enclosed.

For the reasons set forth fully below, it is my opinion that the Department violated the APRA by failing to provide a written denial and by failing to provide the statutory basis for the denial of public records related to Contract #R-26174 on October 21, 2002.

It is also my opinion that the certified payrolls in question are not personnel files and that Indiana Code section 5-14-3-4(b)(8) does not provide the Department with authority to remove the address and social security information from the copies you requested. As to Contract #R-24433B, the Department did not respond in a timely manner under the APRA. It is my opinion that, since the Department advised you that the copies you requested were ready in early October, but sent them out three (3) weeks later, this was not reasonable under the APRA.

## BACKGROUND

According to your complaint, you made a request to the Department for copies of certified payroll records on Contract #R-26174. Initially, you were advised that you would be provided access to these public records. On October 21, 2002, Ms. Denise Scott, St. Joseph County Engineer, told you that she could not provide the certified payroll records to you. Ms. Scott stated that this was a determination by Mr. Verge Gilliam of the Department's EEOC LaPorte District. You then contacted officials at the LaPorte District Office and did not receive any return calls. On another contract, #R-24433B, you asked

the Department for copies of the certified payrolls and you received a call on October 3, 2002 from Mr. Bill Huff, an attorney for the Department, stating that he would send the records to you the following week. When you did not receive the records by October 21st, you again contacted Mr. Huff and learned that the certified payroll records had not been sent to you. As of the time you filed your formal complaint, you had not yet received the certified payroll records but knew that the address and social security number information would be redacted. You complain that the Department redacted the address and social security number information in violation of the APRA in response to your request for copies of certified payroll records under Contract #R-24433B. You also were denied access to the certified payroll records for Contract #R-26174. In addition, you believe that the Department has violated the APRA with respect to its failure to respond and failure to produce the certified payroll records to you.

In her response to your formal complaint, Ms. Whiteman stated that certified payroll records are public records of the Department and should be released to the public upon request. It is the Department's position, however that the social security number and address information should not be disclosed. The reason cited for the redaction is based in part on Indiana Code section 5-14-3-4(b)(8), the exception for personnel files of a public agency. Ms. Whiteman likens the information the Department has redacted to the same type of information that is not disclosable from a public employee's personnel file. Further, she defends the nondisclosure on the basis that since the Indiana Department of Revenue and the Internal Revenue Service do not disclose this information the Department should not either. Ms. Whiteman states that it is the position of the Department that they must redact this information in order to protect the privacy of the persons involved and protect them from potential harm, such as identity theft.

## 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 purposes of the APRA. Ind. Code §5-14-3-2.

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). A public record is defined as follows:

*any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.*

Indiana Code § 5-14-3-2. [Emphasis added.] The general rule, therefore, is that a public agency is

required to permit inspection and copying of public records under the APRA unless there is a valid statutory exception to disclosure.

Removing or redacting information from a public record is permissible under certain circumstances. "If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request . . . separate the material that may be disclosed and make it available for inspection and copying." Ind. Code 5-14-3-6(a). A public agency may deny access to a public record by refusing to allow inspection or copying of all or a part of the document. Ind. Code 5-14-3-9(a). Once this denial has occurred, the person denied access may file suit in the circuit or superior court in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code §5-14-3-9(b).

In the case of the certified payroll records submitted to the Department, it is clear that these documents are public records under the APRA. Under the general rule stated at Indiana Code section 5-14-3-3, the Department is required to make these records available for inspection and copying unless there is a valid statutory exception to disclosure under Indiana Code section 5-14-3-4. In the following paragraphs, I have addressed the legal issues raised by your formal complaint.

#### *Denial of Access to Certified Payroll Records*

According to your complaint, the Department denied you access to the certified payroll records related to Contract #R-26174, after your organization was advised that the records would be made available. You were then advised verbally that you would not be granted access to these certified payroll records, but you were apparently not provided any statutory basis for this denial.

Under the APRA, the burden is on the Department to show that a public record is not disclosable. Your request for access to these public records was in writing and under Indiana Code section 5-14-3-9 (c), the Department was required to deny such a request in writing and did not do so. It is my opinion that the Department violated the APRA by failing to provide a written denial and by failing to provide the statutory basis for the denial on October 21, 2002.

#### *Redaction of Information from Certified Payroll Records*

Ms. Whiteman argues that Indiana Code section 5-14-3-4(b)(8) governs the address and social security number information contained in these records and that it requires the Department to redact this information. My interpretation of that section, however, is that the General Assembly has provided the Department with discretion over the disclosure of information from the personnel files of Department employees. Certified payrolls submitted to the Department, however, are not personnel files of the Department. It is my opinion that the certified payrolls in question are not personnel files and that Indiana Code section 5-14-3-4(b)(8) does not provide the Department with authority to remove the address and social security information from the copies you requested.

Ms. Whiteman also referenced the fact that social security number and address information is never disclosed by other public agencies, namely the Indiana Department of Revenue and the Internal Revenue Service. These two public agencies, however, have explicit statutory authority making this type of

information confidential in their hands. The Department does not have similar statutory authority.

Ms. Whiteman also raised the sensitivity of providing address and social security number information as a basis for the Department's nondisclosure. While I am familiar with and understand many of these public policy concerns, without some statutory basis for denial, the Department is not permitted to redact this information. I cannot locate any statutory bases for denying access to the address or social security information from these certified payroll records. It is my opinion, therefore, that the Department was not authorized to redact this information from the weekly payroll records.

### *Timeliness of Response and Production*

It is the responsibility of a 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. Ind. Code §5-14-3-9. Often, this Office is asked to make a determination as to the reasonableness of the time for production by a public agency. What is a "reasonable" time period under one circumstance may not be reasonable under other conditions. The determination of what is a reasonable time for production therefore, depends upon the public records requested.

According to your complaint, the response received in response to the request for copies of records related to Contract #R-26174 appears to have been timely as a response to a request was dated July 10, 2002. This would account for time for mailing, etc. At first you were advised that you would be provided with the certified payroll records, but as noted above the Department then changed course and ultimately denied you access to these records.

As to Contract #R-24433B, the Department did not respond to your initial request, which was dated August 27, 2002, until October 3, 2002. This was not a timely response under the APRA. As for production of these records, the Department did not produce them to you until some time after October 25, 2002, and you believe that this was an excessive period of time. You stated in your complaint that you were advised by Mr. Huff from the Department on October 3rd that the certified payrolls would be sent to you the following day. You did not receive the documents and after calling again on October 21st, you learned that the copies had not been sent to you. These copies were ready for you on or about October 4th, but the Department did not send them out until three (3) weeks later and only after your follow up telephone call. While the APRA does not directly address the production of public records, there appears to be no reason for the additional three (3) weeks before production. Further, if you had not contacted Mr. Huff, the time for production may have been even longer. As noted above, the APRA does not set a time for production of public records but there does not appear to have been a valid basis for failing to produce the records you requested in early October. It is my opinion that, since the Department advised you that the copies you requested were ready in early October, but sent them out three (3) weeks later, this was not reasonable under the APRA. The Department has since produced these records to you.

## CONCLUSION

It is my opinion that the Indiana Department of Transportation violated the APRA by failing to provide a written denial and by failing to provide the statutory basis for the denial of public records related to Contract #R-26174. It is also my opinion that the certified payrolls in question are not personnel files and that Indiana Code section 5-14-3-4(b)(8) does not provide the Department with authority to remove the address and social security information from the copies you requested. As to Contract #R-24433B, the Department did not respond in a timely manner under the APRA. It is also my opinion that, since the Department advised you that the copies you requested were ready in early October, but sent them out three (3) weeks later, this was not reasonable under the APRA.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Ms. Kelly Whiteman, INDOT