



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

December 1, 2008

Frank Martelli
4830 West Kennedy Blvd; Suite 550
Tampa, Florida 33609-2589

Re: Formal Complaint 08-FC-230; Alleged Violation of the Access to Public Records Act by the Indiana Bureau of Motor Vehicles

Dear Mr. Martelli:

This advisory opinion is in response to your formal complaint alleging the Indiana Bureau of Motor Vehicles ("BMV") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records and by taking an excessive amount of time to comply with your request. I have enclosed a copy of the BMV's response to your complaint for your reference. It is my opinion the BMV's response to your request may have been untimely under the APRA, but the BMV has not otherwise violated the Access to Public Records Act.

BACKGROUND

In your complaint you allege that you requested records from the BMV beginning on February 16, 2007. You allege that since your initial request you have received two letters from the BMV. One was dated February 27, 2007, and the other was dated March 29, 2007. You allege the February 27 letter provided a response to your request, indicating your request was being reviewed. The March 29 letter, in response to your March 6 request, advised you your request had been sent to the Finance/Procurement Department for processing. The letter further provided an indication the records you requested were maintained by Access Indiana, but you allege the letter did not provide further information regarding Access Indiana. Finally, you indicate you sent a letter to Access Indiana dated September 15, 2008 by which you requested the records. You indicate you have received no response.

The BMV responded to the complaint by letter dated October 29, 2008 from BMV General Counsel Scott DeVries. The BMV contends the information you seek - names, addresses and other information related to BMV contractors - is available online through the state government website. The BMV indicates it contracts for the bulk transmission of data. The bulk data storage system is maintained by Access Indiana, which is administered by the Indiana Office of Technology ("IOT"). The BMV contends

you should direct your request to IOT. Further, the BMV contends that all BMV contracts are available via the Indiana Department of Administration website.

Finally, the BMV contends you are not entitled to the list you request, based on I.C. § 5-14-3-3(f). The BMV contends that because you have not cited statutory authority requiring the BMV to publish and disseminate a list of its contractual partners, you are not entitled to such a list.

ANALYSIS

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

The General Assembly has provided agencies with the option of providing enhanced access to public records. See I.C. § 5-14-3-3.5. This section further provides that the contract between a state agency and the third party (which provides the enhanced access) may provide for the payment of a reasonable fee to the state agency by either the third party or the person. Here, Access Indiana is the entity which has been contracted by the state to provide enhanced access to public records.

Indiana law provides the following regarding copies of public records:

If:

(1) a person is entitled to a copy of a public record under this chapter;

and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record;

the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record *or if the person cannot reproduce the record by use of enhanced access under section 3.5 [IC 5-14-3-3.5]* of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance.

I.C. § 5-14-3-8(e), emphasis added.

Through the highlighted provision, the General Assembly has indicated that providing enhanced access to records satisfies the APRA requirement to provide copies of records upon request. The BMV has complied with the disclosure requirements of the APRA for any records made available for inspection and copying via the state's web

portal. The BMV has indicated the information you request is available via the web portal. As such, it is my opinion the BMV has not violated the APRA by directing you to the website to obtain the information.

The BMV may have violated the APRA if it did not respond to your requests within the time prescribed by law. A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). 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. I.C. § 5-14-3-9(b). Here, you allege you submitted the initial request on February 16, 2007 and the response from the BMV was dated February 27, 2007. I do not have information regarding the date the BMV received the request. If the BMV did not respond to the February 16 request or the March 6 request within seven days of receipt, the BMV's response was untimely under the statute.

Further, it is my opinion this conflict has arisen primarily from lack of communication. You indicate the BMV directed you to "Access Indiana" but did not provide you any further information. My suggestion to agencies utilizing the state's web portal is to provide requesters with information like the web address where the records or data can be found. A simple paragraph regarding Access Indiana like the one included in the BMV's response to the complaint may have been helpful in directing you to the correct location to find the records. In addition, it is my opinion the BMV should not have directed you to IOT, as IOT is not the keeper of the BMV's records. While Access Indiana provides enhanced access to records through its contract with the agencies, neither Access Indiana nor IOT is responsible for *maintaining* the BMV's records or responding to APRA requests for the BMV's records.

Finally, the BMV contends the information you seek is a list to which you are not entitled. I would clarify that the APRA does not require you to provide the BMV with the statutory authority requiring the BMV to publish and disseminate a list. Instead, the APRA places the burden of proof to sustain the denial on the agency. *See* I.C. § 5-14-3-1. Here, the BMV can bear that burden by showing that no statute requires the agency to publish and disseminate the list you request. I find no statute requiring the BMV to do so. As such, I.C. § 5-14-3-3(f) is applicable.

Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses) it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law.
I.C. § 5-14-3-3(f).

The BMV is correct in asserting that it is not required to create a list to respond to your request. If a list has been created, the BMV must permit you to inspect and make

memoranda abstracts from the list. It is my understanding the BMV asserts it has not created such a list but instead has made information available via the web portal. In my opinion the BMV has not violated the APRA in refusing to create the list you have requested.

CONCLUSION

For the foregoing reasons, it is my opinion the BMV's response to your request may have been untimely under the APRA, but the BMV has not otherwise violated the Access to Public Records Act.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Scott DeVries, Indiana Bureau of Motor Vehicles