



# STATE OF INDIANA

**MITCHELL E. DANIELS, JR., Governor**

**PUBLIC ACCESS COUNSELOR  
HEATHER NEAL**

Indiana Government Department 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](http://www.IN.gov/pac)

March 25, 2009

Scott Ainsworth  
147 South Second Street  
Decatur, Indiana 46733

*Re: Formal Complaint 09-FC-67; Alleged Violation of the Access to Public Records Act by the Indiana Department of Revenue*

Dear Mr. Ainsworth:

This advisory opinion is in response to your formal complaints alleging the Indiana Department of Revenue ("Department") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Department's response to the complaint for your reference. In my opinion the Department can likely bear the burden of proof to sustain the denial of access on the grounds the requested records are confidential.

## BACKGROUND

You allege that on December 17, 2008 you submitted to the Department a request for copies of certain oversize/overweight vehicle permits. The Department responded to the request by letter dated December 30 and in the letter denied you access to the records, claiming the records are confidential. You submitted a new request on February 11, 2009, asking the Department to reconsider its decision. You allege that as of the date of the complaint, February 27, you had received no response. You contend the Department has established a policy to deny any request regardless of whether the records are confidential, and you contend that the requested records are not confidential.

The Department responded to the complaint by memorandum dated March 6. The Department indicates it does not have a record of the date the December request was received, but the Department did respond by letter dated December 30. Regarding the February 11 request, the Department contends the request was postmarked on February 12 and received by the Department on February 18. The Department mailed its response to you on February 25. The Department contends its response was timely.

Regarding the substance of the records at issue, the Department contends the records may not be disclosed, pursuant to I.C. § 5-14-3-4(a)(1). The Department cites I.C. § 6-8.1-7-1, which applies to the disclosure of certain records it maintains. The

Department explains that pursuant to state statute and an agreement with the Indiana Department of Transportation, it operates the oversize/overweight permit program and collects the oversize/overweight vehicle permit fee. The Department interprets the oversize/overweight vehicle permit fees to be a "listed tax" pursuant to I.C. § 6-8.1-1-1 and therefore contends it is precluded by statute from disclosing the information except pursuant to a judicial order. The Department further argues that it cannot redact some information from the records and disclose the remaining information because the Department's confidentiality statute applies to all "other information disclosed" by the permit requestor. Finally, the Department asserts that Indiana law sets out severe consequences for disclosure of confidential information.

## 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 Department is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m)(1). 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 the APRA. I.C. § 5-14-3-3(a).

The APRA provides that an agency may not disclose any record declared confidential by state statute unless disclosure is required by statute or an order of court. I.C. § 5-14-3-4(a)(1). The Department contends I.C. § 6-8.1-7-1 is a state statute which requires the requested records be kept confidential. I.C. § 6-8.1-7-1 provides the following:

(a) This subsection does not apply to the disclosure of information concerning a conviction on a tax evasion charge. Unless in accordance with a judicial order or as otherwise provided in this chapter, the department, its employees, former employees, counsel, agents, or any other person may not divulge the amount of tax paid by any taxpayer, terms of a settlement agreement executed between a taxpayer and the department, investigation records, investigation reports, or any other information disclosed by the reports filed under the provisions of the law relating to any of the listed taxes, including required information derived from a federal return, except to:

(1) members and employees of the department;

(2) the governor;

(3) the attorney general or any other legal representative of the state in any action in respect to the amount of tax due under the provisions of the law relating to any of the listed taxes; or

(4) any authorized officers of the United States;  
when it is agreed that the information is to be confidential and to be used  
solely for official purposes.  
I.C. § 6-8.1-7-1(a).

The Department relies upon the language “any other information disclosed by the reports filed under the provisions of the law relating to any of the listed taxes” in denying access to the permits. The Department explains that it operates the oversize/overweight permit program pursuant to I.C. §§ 9-20-3-6 and 9-20-4-4 and an agreement with the Indiana Department of Transportation. I.C. §§ 9-20-3-6 and 9-20-4-4, which address the oversize/overweight permits, consist of the same language: “The department of state revenue shall administer this chapter.” For the purposes of I.C. § 6-8.1-7-1(a), a “listed taxes” is defined in I.C. § 6-8.1-1-1. The oversize/overweight vehicle permit fee is not specifically identified in I.C. § 6-8.1-1-1, but the last line in the definition of “listed taxes” is “any other tax or fee that the department is required to collect or administer.”

I.C. §§ 9-20-3-6 and 9-20-4-4 require the Department to administer the oversize/overweight vehicle permit. As such, it is my opinion the fee is a “listed tax” as contemplated by I.C. § 6-8.1-7-1(a) because the permit fee is certainly a “fee that the department is required to collect or administer.” Because the permit fee is a listed tax, the Department is required to keep confidential “the amount of tax paid by any taxpayer, terms of a settlement agreement executed between a taxpayer and the department, investigation records, investigation reports, or any other information disclosed by the reports.” *Id.*

You argue that pursuant to I.C. § 5-14-3-6 the Department should separate the disclosable from nondisclosable information and provide you the disclosable information. You suggest the Department should redact the fee information and disclose the remaining permit information. It is my opinion the Department may not do this. I.C. § 6-8.1-7-1(a) requires the Department to keep confidential not just the tax or fee information but also “any other information disclosed by the reports.” It is my opinion the information you request is “any other information disclosed by the reports.” As such, the Department may not disclose the permit information.

The APRA places on the public agency who would deny access the burden of proof to sustain the denial. I.C. § 5-14-3-1. For the foregoing reasons, it is my opinion the Department can bear that burden in this instance.

Regarding the procedural matter, you complain that the Department did not respond to your request in the time required by the APRA. Your complaint is untimely relative to the December request, as I.C. § 5-14-5-7(a)(1) requires a complainant to file the complaint not later than thirty days after the denial. Your February 27 complaint was filed 59 days after the December 30 denial. Your February 11 request was postmarked on February 12 and received by the Department on February 18. The APRA provides that a request is deemed denied if an agency receives it by mail and does not respond

within seven days of receipt of the request. *See* I.C. § 5-14-3-9(b). The Department's response was sent on February 25, which is seven days from the date of receipt of the request. As such, it is my opinion the Department's response to the February request was timely.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Department can likely bear the burden of proof to sustain the denial of access on the grounds the requested records are confidential.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Collin Davis, Indiana Department of Revenue