

Request for an Advisory Opinion

Background.

The Indiana Department of Environmental Management's Office of Enforcement (OE) issues dozens of Notices of Violation (NOV) and Agreed Orders (AOs) each month. Each of these is a public document.

In my experience, useful access to these documents has always been problematic. Originally, the only access was to request a document from the IDEM public file room by the name and address of the violator.

This improved about a half-dozen years ago when, after much urging from the public, the OE installed an online Enforcement Database, permitting searches for NOV's and AOs by name, by county, and by media of interest (i.e. air, water, hazardous waste, or solid waste/UST). See: http://www.in.gov/serv/idem_oe_order.

Although seriously limited in capability, this was a step in the right direction. However, in the past few years, the database has not been a priority of the Department and has been infrequently updated.

Late last fall, when the Enforcement Database had not been updated since April of 2006. I filed a request with the OE for digital copies of all the outstanding NOV's and AOs. (Note: When finalized, a digital copy of every NOV and AO is filed with the OE administrative assistant in charge of keeping the Enforcement Database updated. These documents are in MS Word format.)

I was told filling my request was not possible, that these documents might contain "deliberate, privileged and confidential material" and also might contain metadata. I was offered the opportunity to obtain paper copies of the approximately 800 multipage documents.

After I informally contacted the Office of the Public Access Counselor, IDEM appointed one of their attorneys to oversee the matter, and it was agreed that these digital documents likely were covered by IC 5-14-3-3(d).

In addition, I explained to the OE attorney that metadata should not be an issue, that the precautionary practice in local law firms was to "sweep" every MS Word document with a software tool provided by Microsoft especially for that purpose prior to distribution, and that IDEM should follow suite, rather than using this as a means to deny public access.

I provided IDEM with a link to the tool plus, when asked, technical advice on how to use the tool to sweep a "batch" of documents at one time.

After months of back and forth, and much foot dragging, I was finally allowed to purchase CDs with the MS Word NOV's and AOs through December 2006, but was required to pay for the time it took an IDEM employee to "sweep" the files of any potential metadata.

During the course of my communications with IDEM's legal representative on this matter, I suggested that thought should be given to improving public access to the enforcement documents. At IDEM's request, I made a number of suggestions and offered my future assistance. Here were my recommendations:

Re your request for input, improving the OEA webpage would be a simple process. There is nothing wrong with what is there now, if it were up to date. In addition, however:

1. It should clearly state on the main page: "This database includes documents current through [put in the most recent month it has been updated through]. Currently it shows a computer-generated today's date, which is very misleading.
2. The monthly reports should be available for timely downloading. These reports listing all orders, novs, etc, for the past month, are extremely useful; I am on OEA's mailing list, but most people don't know about them. Put a link to them on the DB page.
3. The documents (AOs, NOVs, etc) for each month should be available for batch downloading as soon as each month is over. This would be very simple to do, and would avoid requests such as mine in the future. The entire folder of documents can be compressed and made downloadable as one ZIP file: your DP person will know how to do this. Put a link to them on the DB page.

As you are aware, all IDEM permits are readily available online for easy downloading and have been for several years. I am pleased that OEA now plans to make its records easily available in a timely manner. Please let me know if I may provide further assistance.

The Denial of Access.

During the course of my 2006 negotiations, I made it clear a number of times that I wished to obtain the digital records on a continuing basis in the future, at the end of each month, at least until such time as IDEM had had an opportunity to put in place online improvements along the lines I had discussed with IDEM's attorney..

However, when I requested the January 2007 digital documents earlier this year, I was again put off and when, last week, I requested what were now both the January and February documents, I was notified:

The January 2007 enforcement records are available on the IDEM webpage at http://www.in.gov/serv/idem_oe_order. Hard copies of those records are also available in the IDEM Central File Room on the 12th floor of the Indiana Government Center North, 100 N. Senate Ave, Indianapolis, IN.

I believe this is a denial to the public right of access under IC 5-14-3-3(d), which provides that "a public agency shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, etc... if the medium requested is compatible with the agency's data storage system."

Why is this Matter Important?

This matter is important for reasons beyond my individual request:

1. Providing these OE records in digital format is the most efficacious method for both the agency and the user – no extra steps are required of authorized IDEM OE staff other than attaching the files via an email or loading on a CD. No staff time needs to be devoted to searching out the documents in filing cabinets, loading them into the copying machine, etc. Restricting public access to paper copies is wasteful of human and environmental resources, and

the result is a copying fee for hundreds of pages to be paid by the user, in itself a limitation on access.

2. There are a number of significant number of questions that can only be answered by access to the digital versions of the IDEM OE's NOV's and AO These include: What kind of violations is IDEM devoting its resources to pursuing? Has this emphasis changed over time? What is IDEM's track record with respect to, for instance, manure spills? What is the average penalty amount for such a violation? Do penalties for the same offense vary significantly among violators? How many agreed orders has IDEM issued over the past two years concerning a violation of – here insert a specific provision of the IAC. None of these questions can be answered via the narrow window to specific information afforded by IDEM's Enforcement Database. One needs to review the documents in bulk, and this is only practical in today's world via the computer.

Thus, this question of ready access to digital documents has ramifications far beyond that of IDEM's documents. Most state government documents are now digitally created.

My FOIA Request.

As for my specific request for the OE digital NOV and AO documents from Jan. 1, 2007 forward:

1. IDEM's March 7th response that the "January 2007 enforcement records are available on the IDEM webpage" is inadequate. Accessing these records would require that the user first conduct a search for, and then manually download, each document individually. Furthermore, IDEM's online resource is always behind, sometimes by many months. Even when it is "up-to-date" it is many weeks behind the most recently issued documents. Thus this is not "timely access."
2. IDEM 's response that " Hard copies of those records are also available in the IDEM Central File Room" is also inadequate, for the reasons given previously regarding waste of resources.

In sum, refusal by IDEM's Office of Enforcement to provide the documents in the requested digital format, in a timely manner, and without imposing additional charges for "sweeping" the documents (which should have been done by the agency as a matter of course), is a violation of the Indiana Access to Public Records Law, the policy of which is stated in IC 5-14-3-1:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.