

April 7, 2006

Kristene Davis  
1327 E. Illinois St.  
Evansville, IN 47711

*Re: Formal Complaint 06-FC-50; Alleged Violation of the Access to Public Records Act by the City of Evansville*

Dear Ms. Davis:

This is in response to your formal complaint alleging that the City of Evansville (“City”) violated the Access to Public Records Act when it failed to produce the records. I find that the City violated the Access to Public Records Act by not disclosing the records within a reasonable period of time.

#### BACKGROUND

On January 30, 2006, you sent a written request for records to the City Controller’s Office. You do not specify in your complaint whether your request was mailed or hand-delivered. You requested, in relevant part, the cell phone records for a stated cellular telephone number for the period March 1, 2005 through January 31, 2006. The cellular telephone was assigned to Gail Riecken, Executive Director of the City Parks and Recreation Department.

The City issued a letter on February 3, 2006, stating that it was in the process of compiling the information and expected the information to be ready within a few weeks. You allege that you called the City on March 2 to inquire about the status of the request, but were unsuccessful in reaching the City Controller Lisa Acobert. When you had not received a return call by March 7, you visited the Controller’s office. You were unable to ascertain any information about your request from the City during your visit, but upon your return home, you received a call from the Controller’s office, assuring you that the City was still compiling the information but could not estimate when the information would be ready to produce to you. You filed this complaint on March 8.

I sent a copy of your complaint to the City. The City responded via letter from Mr. Joseph Harrison, City Attorney. Mr. Harrison informed me that the City's initial response was the letter dated February 3, 2006. He indicated that it took the City a considerable amount of time and effort to compile the cell phone records for the specified telephone, because the City did not receive a specific detailed monthly invoice from its wireless provider by user telephone number. Rather, the City received only the total amount due, and a computer disc detailing all monthly charges to all City-issued telephones. Hence, the Controller was required to cull through six discs to find and list each and every cell phone call charged to Ms. Riecken's cell phone during the time in question. In essence, the City had to create the records that you requested. On March 17, the City completed the task and mailed the cell phone records to you.

## ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). A public agency is required to disclose any non-exempt records or materials that are "created, received, retained, maintained, or filed by or with a public agency." See IC 5-14-3-2(m). Hence, a public agency is not required to create a record or compile information at a person's request, only provide any then-existing records. A request for a record must identify the record with reasonable particularity. IC 5-14-3-3(a)(1).

If a public agency receives an in person request for a record, the agency must issue a response within 24 hours of receipt, or the request is deemed denied. IC 5-14-3-9(a). If the public agency receives a request via U.S. Mail or facsimile, the public agency must issue a response within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b). A public agency is required to issue a responsive letter acknowledging receipt of a request for records within these timeframes, not necessarily provide the records concurrent with the response. Compiling various records may take extra time, and thus, a public agency must produce records only within a time that is reasonable under the circumstances.

Your complaint is centered on the time it took for the City to produce the records, which the City had produced on March 17, about ten days after you filed your complaint. If the City received your request by hand-delivery, as it appears may have occurred, its February 3 response was tardy because it was not sent within 24 hours of receipt on January 30. If the request was sent by mail or facsimile, the February 3 response was timely. I make no firm finding with respect to timeliness of the response because the facts are unclear. In any event, your complaint takes issue only with the time for producing the records.

As stated earlier in this opinion, the City was not obliged to create a record containing all the information about only one cellular user's charges. Because the City did not receive a cellular bill that detailed the charges aggregated by user, the City could have informed you that no record existed containing only one user's charges. Had the City informed you that it did not maintain a record that showed only one user's charges, but maintained a record detailing all users' charges, the City could have afforded you several options. You could have declined any record, or requested that the City disclose all detailed charges for your inspection or copying. The entire cellular telephone bill was responsive to your request, although it was broader than the

information you requested. The City never told you the reason it was taking six weeks to “compile the information,” only that the information was being compiled. You could reasonably have inferred that the City was collecting numerous records and compiling them.

In my opinion, because the City could have made the entire cellular telephone bill available to you (or stated that it was exempt) much sooner than six weeks after your request, the time in which the City produced the records was unreasonable under the APRA. The City may well believe that because it did not have to compile the list of only one user’s charges, it could take six weeks or even longer. I do not disagree with this assertion. However, the City did not make clear to you that it had a responsive record that it could have produced much sooner than six weeks (saving the City much unnecessary labor in the bargain). In other words, the City created the delay that it seeks to excuse.

The City may also believe that you framed your request for records in a way that demanded that the City either compile the record or inform you that the record, as you stated it, did not exist. However, this puts an inordinate burden on a requester to specify precisely what record the requester wants. This burden is not appropriate where the requester is unaware of what records a public agency maintains, and must, of necessity, attempt to describe the record. Although the APRA requires that a request identify the record with reasonable particularity, it does not require a person to specify the precise record that is responsive to the request for information.

To clarify my opinion, the public agency is normally not out of compliance with the APRA where the agency takes a long time to create a record where no record or records exist that contain the information requested. In that event, the alternative left to the requester is to not receive any record at all, as the public agency is not obliged to compile or create a record. Even then, I advise the public agency to clearly communicate with the requester that no record currently exists, but the agency is willing to compile the record.

In contrast are the facts in this complaint. Under these circumstances, the City could have offered you the option of 1) foregoing the more inclusive record and waiting for a compilation, the latter completely at the discretion of the agency and in due time, *or* 2) of receiving the over-inclusive record containing all the information (and more) that was responsive to your request. In addition, the City is not excused from producing the record in a timely fashion merely because it declined to withhold the record under a discretionary exemption that it believes it could have asserted. Just as records should be produced in a timely manner, any exemption that the public agency intends to assert should be asserted in a timely manner.

## CONCLUSION

For the foregoing reasons, it is my opinion that the City should have informed you that it could produce the entire cellular telephone bill, and in failing to inform you that it was preparing an abstract of the record and why, it did not produce the records in a reasonable time.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Joseph Harrison