



# STATE OF INDIANA

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November 6, 2009

Mr. Gary VanHook  
P.O. Box 155  
Atlanta, IN 46031

*Re: Formal Complaint 09-FC-230; Alleged Violation of the Access to  
Public Records Act by the Town of Atlanta*

Dear Mr. VanHook:

This advisory opinion is in response to your formal complaint alleging that the Town of Atlanta (the "Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records.

## BACKGROUND

In your complaint, you allege that on September 10, 2009, you requested documents from the Town, including (1) the "minutes or memorandum that shows the proposal for selling the Atlanta Fire Truck;" (2) the "minutes or memorandum that shows the proposed offer made to you for the Atlanta Fire Truck;" (3) the "minutes or memorandum that shows the proposed offer, that was accepted, by the Atlanta Town Council for the sale of the Atlanta Fire Truck;" and (4) a "copy of the appropriation or the part of the budget where the check for the sale of the Atlanta Fire Truck was deposited." You acknowledge that the Town has produced some records in response to your request, including several pages printed from Ebay's internet website. In the Town's response to your request, Town Clerk-Treasurer Robyn Emmert noted, "Regarding number one (1): this was discussed in several meetings and agreed upon by the Town Council and is on audio tape."

The narrative in your complaint also appears to allege that the Town violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.*, when it held a "special meeting" that was not open to the public on August 5, 2009.

My office forwarded a copy of your complain to the Town. Clerk-Treasurer Robyn Emmert's response on behalf of the Town is enclosed for your review. In it, Ms. Emmert references the Town's response and my advisory opinion in Formal Complaint 09-FC-215. Ms. Emmert reiterates that in the beginning of 2007, the former town council of the Town had several discussions with the Atlanta Volunteer Fire Department regarding the purchase of a new fire truck and the sale of the old truck. Ultimately, the council, in a public meeting, approved the purchase and agreed that the old truck would

be sold. The minutes from that meeting do not reflect the decision to sell the truck, but the discussions that took place are on audio tape in the clerk's office. Regarding the accepted bid for the fire truck, Ms. Emmert states that Ebay meets state requirements for auctioning off excess equipment for municipalities. Ms. Emmert further notes that the meeting on August 5, 2009, was, in fact, an open meeting that was properly noticed and advertised. As far as your request for a "copy of the appropriation or the part of the budget where the check for the sale of the Atlanta Fire Truck was deposited," Ms. Emmert asserts that the Town is unclear what you are asking for but that the Town has already produced "a printout of revenue history showing the payment for the truck being recei[ved] into the Fire Truck Fund on August 21, 2009, receipt number 6721."

## 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." I.C. § 5-14-3-1. The Town does not contest that it is 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 Town during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The burden of proof for nondisclosure of a public record is on the public agency that would deny access to the record. I.C. § 5-14-3-1.

As far as your allegation that the Town violated APRA by failing to provide you with minutes from its public meetings, it is my understanding that the Town has provided you with the minutes that it possesses. The Town also informed you that it maintains audio recordings of the meetings. Presumably, such recordings are available for you to inspect and copy if you make a valid request for access to those records. It is unclear why you have apparently not yet done so. Town is not obligated to create paper copies of those audio records in response to your request. The APRA entitles you to inspect and copy existing records of the Town (unless a valid exception to the APRA applies), but the Town need not *create* any new records for you. As Counselor O'Connor opined in 2001, "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*. Thus, it is my opinion that the Town has not violated the APRA with respect to your request for access to its minutes.

I am also not persuaded that the Town violated the APRA by failing to produce a "copy of the appropriation or the part of the budget where the check for the sale of the Atlanta Fire Truck was deposited" in response to your request. According to Ms. Emmert, the Town has already produced the record it maintains regarding that subject: "a printout of revenue history showing the payment for the truck being recei[ved] into the Fire Truck Fund on August 21, 2009, receipt number 6721." Again, the Town is not obligated to create new records for you. If the only document responsive to your request is the revenue history, the Town satisfied its obligations under APRA by making that available to you.

With regard to the August 5, 2009, council meeting, minutes from that meeting and Ms. Emmert's statement indicate to me that the meeting was, in fact, open to the public. Consequently, it is my opinion that the Town did not violate the ODL as to that meeting.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Town did not violate either the APRA or the ODL.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack  
Public Access Counselor

Cc: Robyn Emmert, Clerk-Treasurer, Town of Atlanta