



STATE OF INDIANA

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October 14, 2010

Mr. Marcus D. Harden
0187 Lincoln Quad
Terre Haute, IN 47809

Re: Formal Complaint 10-FC-210; Alleged Violation of the Access to Public Records Act by the Gary Public Transportation Corporation

Dear Mr. Harden:

This advisory opinion is in response to your formal complaint alleging the Gary Public Transportation Corporation ("Corporation") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Corporation's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on September 2, 2010, you hand-delivered a written request for records to the Corporation's office. As of September 13th, you had not received a written response. However, you note that through telephone and email communications, the Corporation informed you that its bank statements are confidential. The Corporation did, however, agree to release its budget documents to you. You requested that the Corporation provide you with a statutory basis for withholding the bank statements, but as of September 13th the Corporation had not yet done so. Finally, you allege that the Corporation is required by state law to "complete yearly and retain a copy of Form 100R for public inspection." When you requested that form from the Corporation, the Corporation provided you with a "generic listing not on the prescribed form." You believe that notwithstanding the fact that the Corporation does not have a copy of the form, the Corporation is obligated to produce it upon request.

In response to your complaint, Corporation General Manager Daryl E. Lampkins denies that the Corporation violated the APRA. He acknowledges that the Corporation did not initially respond to your request in writing, but that was due to the fact that the Corporation "has been in constant contact with [Mr. Lampkins'] assistant regarding the status of your request from day one." As a result, the Corporation did not believe that a written response was necessary. He states that all documents responsive to your request

are now available for you to pick up at the Corporation's office. The Corporation did not immediately agree to produce its bank statements to you because it wanted to analyze whether or not those records were confidential or disclosable under the APRA. Further, the Corporation's understanding is that "Form 100R is optional and not required by state law," but Mr. Lampkin notes that the Corporation is audited by an outside agency annually. With regard to the timeframe for producing the records to you, Mr. Lampkins cites to the fact that the Corporation had "many major obligations and issues pending," including "budget preparation, [a] bond issu[ance], union negotiations, negotiations with RDA for long term funding, etc." He notes that the Corporation will respond to your records requests, but will "not stop everything it is doing [to] respond to [your] repeated request."¹

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 Corporation 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 Corporations' public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

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 in person and the agency does not respond within twenty-four (24) hours, the request is deemed denied. I.C. § 5-14-3-9(a). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. It is unclear when the Corporation actually responded to your request. The Corporation claims that it has been in "constant" contact with you since you made your request. If the Corporation responded to your request within 24 hours, it did not violate the APRA.

You argue that the Corporation violated the APRA by failing to respond in writing to your request. However, the APRA does not require that public agencies respond in writing to *all* requests. Rather, it provides that when a request is made in writing and the agency *denies* the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person

¹ I note that Mr. Lampkins alleges that you were disrespectful to his assistant and "very aggressive" when discussing this issue with her. He also claims that you left "threatening" messages on the assistant's voicemail. While such allegations are disturbing, I have no way to verify their veracity and express no opinion as to whether such things actually occurred or, if they did, their legal significance or lack thereof. Such issues lie outside of my authority to opine on the public access laws. See I.C. § 5-14-4-4(10). However, if Mr. Lampkins believes that the alleged threats rose to the level of criminal intimidation or some other illegal act, I would encourage him to contact his local law enforcement agency or prosecutor and refer the matter for further investigation.

responsible for the denial. I.C. § 5-14-3-9(c). Here, the Corporation informed you that it would not release bank statements to you until it determined whether or not those records were confidential or disclosable. In my opinion, it was reasonable for the Corporation to delay producing those records until it made that determination. The APRA provides criminal penalties for public employees and officials who knowingly or intentionally disclose confidential information. I.C. § 5-14-3-10(a). In other words, I do not view such delay as a “denial” under the APRA that required a written response to you. Moreover, the Corporation has now made those records available for you. I trust this satisfies that aspect of your complaint.

With regard to your allegations regarding General Form 100-R, it is unclear whether state law requires the Corporation to maintain a copy. I.C. § 5-11-13-1 is the statute that pertains to the form at issue. Granted, I.C. § 5-11-13-1 requires most public agencies in Indiana to prepare the form and file it with the state examiner for the State Board of Accounts. Moreover, I.C. § 5-11-13-2 provides that the “*state examiner shall accept all such reports for filing and keep the same as public records which shall be open to public inspection and examination at reasonable times.*” Nothing requires the submitting agency to do so as well. Finally, the statute notes that “no more than one (1) report covering the same officers, employees, and agents need be made from the state or any county, city, town, township, or school unit in any one year.” In other words, if the City of Gary already submitted the form on behalf of the Corporation, the City satisfied the Corporation’s obligations under statute. It is unclear to me whether or not the City has done so or whether the State Board of Accounts currently maintains Form 100-R information regarding the Corporation. In any event, it does not appear that state law requires the Corporation to maintain the record.² If the Corporation does not maintain the record, it is not required to produce it.

Finally, you allege that the Corporation violated the APRA by failing to produce the records within a reasonable amount of time. Although agencies must *respond* to requests in accordance with section 9 of the APRA, there are no prescribed timeframes when the records must be actually *produced* by a public agency. This is due to the fact that requests for voluminous amounts of documents can consume significant amounts of staff time locating and preparing the documents for disclosure. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. Here, the Corporation explains its delay by citing to several pressing issues that the Corporation was managing contemporaneously with your request. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-

² Whether or not the Corporation violated I.C. § 5-11-13-1 by failing to complete a Form 100-R is outside of the scope of this opinion. Because those forms are submitted annually to the State Board of Accounts, that agency is the appropriate entity to determine whether or not the Corporation is required to submit its own copy of the form and, if so, whether it violated I.C. § 5-11-13-1 by failing to do so.

3-7(a). You submitted your request on September 1st, and the Corporation released all relevant records to you on October 14th. Under such circumstances, it is my opinion that the Corporation produced the records within a reasonable amount of time. I note, however, that my opinion might be different if the Corporation had received your request under more typical circumstances.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Corporation responded to your request within 24 hours, the Corporation did not violate the APRA because the APRA does not require all responses to be in writing. The Corporation did not otherwise violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: Daryl E. Lampkins