



# STATE OF INDIANA

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

**PUBLIC ACCESS COUNSELOR  
ANDREW J. KOSSACK**

Indiana Government Center South  
402 West Washington Street, Room W470  
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)

October 25, 2010

Ms. Kristen S. Brown  
918 Shorewood Ct.  
Columbus, IN 47201

*Re: Formal Complaint 10-FC-219; Alleged Violation of the Access to  
Public Records Act by the Columbus Redevelopment Commission*

Dear Ms. Brown:

This advisory opinion is in response to your formal complaint alleging the Columbus Redevelopment Commission ("CRC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

## BACKGROUND

In your complaint, you allege on September 7, 2010, you requested copies of subleases of property owned by the City of Columbus ("City") and its CRC. The CRC holds a master lease for the property with an entity called Columbus Downtown, Inc. ("CDI"), which has itself entered into subleases with other entities. The master lease requires CRC's approval of any of CDI's subleases. Specifically, the master lease provides,

Tenant [CDI] shall not be entitled to assign this Lease in whole or in part, or sublet all or any part of the Premises, or grant a license or concession in connection therewith without the prior written consent of the Landlord. Tenant shall present to the Landlord any proposed sublease of any portion of the Premises, and Landlord shall within sixty (60) days notify the Tenant of the Landlord's approval or disapproval of such sublease.

You argue that because the master lease requires CRC's approval of the subleases, the CRC cannot now deny you access to the subleases based on the fact that CRC does not physically maintain them. You also note that you spoke with CRC's attorney, who informed you that CRC somehow approved the subleases but nevertheless did not maintain copies of them.

In response to your complaint, CRC Executive Director C. Edward Curtin explains that the delay in responding to your request was due to his dealing with family medical issues during the week following his receipt of your request. With regard to the substance of your request, Mr. Curtin states that CRC “did not have and never had the documents” that you requested.

## 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. CRC does not contest that it is a public agency subject to the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy CRC’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2. Generally, the APRA does not require public agencies to produce records that the agency does not physically maintain. “[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*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”).

However, in 2005 the Court of Appeals in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) (“*Knightstown*”), held that because a private entity created a settlement agreement *for* a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Id.* at 1134. The Court did not find that the language “created, received, retained, maintained or filed by or with a public agency” in I.C. §5-14-3-2 excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room in order to deny the public access. *Id.* at 1133. In other words, where records are created or maintained for a public agency but kept in the possession of an outside entity, the Court of Appeals ruled that the agency is obligated to retrieve the records and make them available for inspection and copying upon request.

Here, it is unclear why CRC does not have copies of the subleases maintained by CDI. The master lease requires CRC to approve all subleases. Under the master lease, if a sublease has not been approved, it is not valid because CDI “shall not be entitled to assign this Lease in whole or in part . . . without the prior written consent of the [CRC].” CDI is required to “present to the [CRC] any proposed sublease” for CRC to approve. If such subleases have been executed, CRC should have received a copy of them and

maintained them in accordance with the county's retention schedule. In the *Knightstown* case, the Court of Appeals noted that "[t]he fact that Knightstown never signed or received a copy of the settlement agreement is immaterial; delegating the responsibilities of creating, receiving, and retaining the settlement agreement to outside counsel does not thereby remove the document from the statute's definition of public document." *Id.* at 1134. Similarly here, CRC cannot now claim to have approved the subleases without ever having received a copy of the sublease where the master lease explicitly requires CDI to submit a copy of the sublease to CRC for CRC's approval. In my opinion, the subleases are public records that should be available for inspection and copying upon request.

### CONCLUSION

For the foregoing reasons, it is my opinion that the subleases are public records that should be available for inspection and copying upon request, unless an exception to disclosure in section 4 of the APRA applies.

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: C. Edward Curtin