



STATE OF INDIANA

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November 8, 2010

Ms. Jamie L. Wagner
474 Southpoint Cir.
Brownsburg, IN 46112

Re: Formal Complaint 10-FC-243; Alleged Violation of the Access to Public Records Act by the City of Indianapolis Department of Parks and Recreation

Dear Ms. Wagner:

This advisory opinion is in response to your formal complaint alleging the City of Indianapolis Department of Parks and Recreation ("DPR") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The DPR's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on September 21, 2010, you sent to the DPR via certified mail a request for records pertaining to the Bethel Park Pool Project (the "Project"). As of October 4th, the DPR had not yet responded to your request, so you contacted the DPR via telephone to inquire about the status of your request. You spoke with Don Colvin, who informed you that the DPR did not have any records responsive to your request because the Indy Parks Foundation took the lead on the Project. You believe that the DPR would have received design and budget information for the Project, along with project schedules and operating cost projections. Moreover, you argue that the DPR should have ultimately approved the Project and received information about the Project during the approval process.

In response to your complaint, the DPR maintains its position that it has not records responsive to your request, and reiterates that the Project was constructed under the direction of the Indianapolis Parks Foundation and funded through a grant by the Lilly Endowment, Inc.

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 DPR 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 DPR’s 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 by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). 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. Here, if the DPR failed to respond to your written request within the required seven (7) days without a basis for denying the records, the DPR failed to comply with section 9 of the APRA.

However, if the DPR maintains no records responsive to your request, the DPR did not violate the APRA by denying the request. “[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*). Moreover, the DPR was not required to create records to satisfy the request. *Opinion of the Public Access Counselor 10-FC-56* (“Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”). Therefore, it is my opinion that the City has not violated the APRA with respect to denying your request for records that the City does not have.

You seem to allege that the DPR has failed to maintain certain records regarding the Project. The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). If the DPR received any records regarding the Project, it should have retained them in accordance with the applicable retention schedule. However, because nothing before me indicates that the DPR ever received a record pertaining to the Project, it is my opinion that the DPR did not violate the APRA by denying your request.

I note that the public access counselor is not a finder of fact. Advisory opinions are issued on the basis of the information presented by the parties. To the extent a public agency persists in its denial of access following the issuance of an advisory opinion from this office and you believe it to be in violation of the APRA, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that the DPR failed to comply with section of the APRA if it did not respond to your request within seven days of receiving it, but the DPR 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 style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Andrea L. Brandes