



STATE OF INDIANA

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May 25, 2011

Mr. Murray Miller
23698 Western Avenue
South Bend, IN 46619

Re: Formal Complaint 11-FC-107; Alleged Violation of the Access to Public Records Act by the City of South Bend Street Department

Dear Mr. Miller:

This advisory opinion is in response to your formal complaint¹ alleging the City of South Bend Street Department (“Department”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* The Department’s response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that you “went to a meeting with at [sic] Mr. Hensley [of the Department] at his office and talked about inspecting records. Mr. Hensley said he was going on record that he was not going to allow us to inspect any records.”

In response to your complaint, Assistant City Attorney Thomas L. Bodnar denies that Mr. Hensley refused to permit an inspection of the Department’s records. Rather, Mr. Bodnar states that he gave you permission to inspect the records subject to your request, but when you ultimately met with Mr. Hensley you did not request to see those records. He acknowledges that Mr. Hensley denied your request for access to a record showing how many hours each Department employee put in on particular jobs because such a record does not exist. Mr. Hensley declined to create such a record because doing so would be extremely time consuming.²

¹ The Department questions whether this complaint was filed within the required 30-day timeframe due to the fact that our date stamp is April 25, 2011, and the date of denial listed on the complaint form is March 23, 2011. However, Ind. Code § 5-14-5-7(b) provides that “[a] complaint is considered filed on the date it is: (1) received by the counselor; or (2) postmarked, if received more than thirty (30) days after the date of the denial that is the subject of the complaint. Because the complaint was postmarked on April 18, 2011, it was timely.

² The Department’s response also includes background information and defenses to allegations that were not included in the complaint. As a result, I decline to opine specifically on these matters at this time.

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 Department 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 Department’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).

Here, it appears that Mr. Bodnar granted your request to inspect the records subject to your request. You claim that Mr. Hensley later denied you access to the records, but the Department counters that it merely denied you access to a record that does not yet exist and that you never requested to see existing records during your meeting with Mr. Hensley. The public access counselor is not a finder of fact, so I express no opinion as to whether or not a denial occurred here as a matter of fact. I note, however, that the Department is correct that it need not create new records to satisfy a records request. *See Opinion of the Public Access Counselor 10-FC-56*. That said, if the Department maintains records that contain the information you seek and the Department cannot justify withholding those under section 4 of the APRA, the Department should permit you to inspect them upon request.

CONCLUSION

For the foregoing reasons, it is unclear whether a violation occurred in this instance because the facts are in dispute. However, if the Department merely denied your request for access to a record that does not exist, the Department did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Thomas L. Bodnar