



# STATE OF INDIANA

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June 30, 2011

Ms. Christine A. Kraly  
*The Times*  
601 45th Avenue  
Munster, IN 46321

*Re: Formal Complaint 11-FC-132; Alleged Violation of the Access to Public Records Act by the City of Gary Legal Department*

Dear Mr. Kraly:

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

## BACKGROUND

In response to my issuing *Op. of the Public Access Counselor 11-FC-12*, in which I recommended that you submit a more particularized request for records maintained by the City, you submitted another request to the City on February 9, 2011. In that request, you asked for communication between 13 listed individuals and Mayor Rudy Clay's appointment calendar (with the understanding that the City would redact personal information from the calendar). On February 23rd, you left a voicemail with Ms. Severtson seeking an update on your request. The two of you exchanged emails and spoke on March 8th, at which time Ms. Severtson informed you that she would be in touch within the next couple of weeks regarding the request. On March 22nd, you emailed Ms. Severtson again and left a voicemail seeking an update. On March 28th, she informed you that the City would provide an initial response to your request on or before April 1st. You claim, however, that the initial response consisted only of the mayor's calendar, which was not made available until April 12th. You received no documents responsive to your request for emails, which was the bulk of the request.

On May 10th, you emailed Ms. Severtson again asking for an update. You also left her a voicemail on May 12th. She responded on May 12th via email in which she stated, "It's been crazy," and expressed her hope that the documents could be available

by the following week. As of May 19th, you had not received any of the correspondence requested.

Ms. Severtson responded to your complaint on June 24th. She states that the City's response was "delayed in part by the magnitude of [your] request and the necessity for attorney review of the documents provided. The City . . . has only two full time attorneys and our ability to review such a large number of documents was delayed by a number of pressing litigation matters demanding our time." Ms. Severtson added that the City had advised you that 616 pages of records were ready for you to pick up. Based on that production, the City had asked you to withdraw your complaint.

When I contacted you today to inquire about whether you wished to withdraw or maintain your complaint, you informed me that you consider the City's response as "far from adequate or fulfilled." For example, the City only provided emails, but you requested letters sent via facsimile or regular mail; several of the 616 pages of emails appear to be copies of the same email; there appear to be several months of emails missing from the materials provided. You add that you "find it difficult to believe 13 email accounts generated fewer than 600 emails over the course of nearly two years."

#### 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 City is a "public agency" under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School's public records during regular business hours unless the public records are exempt from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The first question is whether the City has produced all records responsive to your request. Ms. Severtson's response stated that the City viewed the 616-page production as the City's "compliance" with your request, but you claim that it is deficient in size and scope. I have no direct knowledge of what records the City does or does not maintain, so it is admittedly difficult for me to determine whether or not the City has fulfilled your request. That said, it appears that the City neither denied your request for letters sent via facsimile or regular mail nor produced any responsive records. As you argue, it is difficult to believe that 13 employees would produce no such records over a two-year span. To the extent that the City has neither produced such records nor denied access to them by citing to a provision in section 4 of the APRA that permits such denial, the City is in violation of the APRA. In that case, I encourage the City to release any responsive records as soon as practicable. To the extent that an agency fails to grant access to public records following the issuance of an advisory opinion from this office, a complainant's remedies lie with a court pursuant to Ind. Code § 5-14-3-9(e). If, on the other hand, the City does not maintain any responsive records, the City should affirmatively state as much in order to complete its response to your February 4th request.

Notwithstanding the question of the completeness of the City's 616-page production, the question remains whether the City made those 616 pages available to you within a reasonable period of time. As I stated in *Op. of the Public Access Counselor 11-FC-12*, the APRA does not prescribe timeframes for the actual production of records. 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. 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. §5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*.

Here, Ms. Severtson acknowledges that the City's response was "delayed," and cites to the breadth of your request, the need to review the emails for confidential information, and the City attorneys' heavy workloads due to pending litigation matters in explaining why the City took from February 4th to (on or about) June 24th to make the 616 pages available. I agree that your request was broad, and I do not doubt that the workload of the City Legal Department is substantial. However, it remains unclear why the City required from February 4th until June 24th to produce the 616 records, particularly if the response remains incomplete. The City did release disclosable portions of the mayor's calendar on April 12th, but even that took nearly two months to release, and the release occurred after Ms. Severtson estimated on March 28th that the City would provide you that portion of the response by April 1st. In my opinion, the City has not met its burden to show that it acted within a reasonable period of time.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the City should either affirmatively state that it maintains no other records responsive to your request or produce all responsive and non-confidential records. Further, the City has not shown that it produced responsive records within a reasonable period of time.

Best regards,



Andrew J. Kossack  
Public Access Counselor

Cc: Susan Severtson