



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR

JOSEPH B. HOAGE

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

August 8, 2011

Mr. David L. Ditman
401 N. Randolph Street
Indianapolis, Indiana 46201

Re: Formal Complaint 11-FC-176; Alleged Violation of the Access to Public Records Act by the Greenwood Mayor's Office

Dear Mr. Ditman:

This advisory opinion is in response to your formal complaint alleging the Greenwood Mayor's Office ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Assistant City Attorney, Jay D. Isenberg ("Isenberg"), responded on behalf of the City. His response is enclosed for your reference.

BACKGROUND

In your complaint you allege that you submitted a written request to the City for a "Listing by first and last name of all city employees and their salary/hourly pay, whichever is applicable." In response to your request, Isenberg provided a copy of the City's most recent salary ordinance, which listed all of the City's current positions and their corresponding salaries. In an effort to respect the privacy of the City's employees, the employees' names were not provided.

In response to your formal complaint, Isenberg admitted that he mistakenly stated in his response that the City could withhold the employees' names in order to protect their privacy. After inquiring with the City's Human Resources Department and the Clerk-Treasurer's Office, Isenberg provided that the City has never created, received, retained, maintained, or had on file a document that lists by first and last name all city employees and their salary/hourly pay. As such, the City has no document responsive to your request.

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 City 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 City’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. Under the APRA, 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 responsible for the denial. I.C. § 5-14-3-9(c).

The City has not violated the APRA by failing to provide you a list of its employees and their salary/hourly pay if the City has no such record. As the public access counselor has repeatedly stated, if a public agency has no records responsive to a public records request, an agency does 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.” *Op. of the Public Access Counselor 01-FC-61*; *see also Op. 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....”).

While the City is not required to create a new record in response to a request, it should release public records in its possession if you request those records with reasonable particularity. *See Op. of the Public Access Counselor 10-FC-161*. The APRA provides that personnel files of public employees may be excepted from the APRA’s disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

IC 5-14-3-4(b)(8). The information you have requested referred to in (A) above should be released to you if you make a particularized request for the information located within the City’s personnel files. I also note that the APRA permits a public agency to charge a fee for copies of public records and a public agency may require a requester to pay any applicable copying fees in advance. I.C. § 5-14-3-8(e). Nothing in the APRA requires

that a public agency waive a copying fee. *See Op. of the Public Access Counselor 07-FC-124.*

CONCLUSION

For the foregoing reasons, it is my opinion that the City did not violate the APRA by failing to create a new record in response to your request. If you make a particularized request for the information located in the City's personnel files, the City should release the information required to be disclosed under subsection 4(b)(8)(A).

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive, somewhat stylized font.

Joseph B. Hoage
Public Access Counselor

cc: Jay D. Isenberg