



STATE OF INDIANA

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August 29, 2011

First Partners, LP
130 N. Main Street
Crown Point, Indiana 46307

Re: Formal Complaint 11-FC-205; Alleged Violation of the Access to Public Records Act by the City of Valparaiso

Dear Mr. Svetanoff:

This advisory opinion is in response to your formal complaint alleging the City of Valparaiso ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Patrick Lyp responded on behalf of the City. His response is enclosed for your review.

BACKGROUND

In your complaint, you provide that you submitted a written request to the City on July 26, 2011 for an appraisal and other information related to property located at 2610 Roosevelt Road ("Property"). You specifically requested the following:

1. A copy of any and all real estate appraisals for the Property.
2. A copy of any and all City administrative notices, actions, and reports from 2000 to present for the Property.
3. A copy of any and all City staff reports from 2000 to the present for the Property.
4. A copy of any and all communications of the City, including memorandums, staff documents, and correspondences from 2000 to the present for the Property.
5. A copy of all City public hearing information from 2000 to present concerning the Property.
6. A copy of all City Ordinances from 2000 to present concerning the Property.
7. A copy of all City Resolutions from 2000 to present concerning the Property.
8. A copy of all agreements between the City and First Partners, LP from 2000 to present concerning the Property.
9. A copy of any and all drawing, renderings, sketches, or architectural plans from 2000 to the present concerning the Property.

On August 5, 2011, the City responded to your request and provided in part, records responsive to your request. In regards to the appraisal, the City denied your request due to “no offer [being] authorized concerning [the property].” On August 15, 2011, the City advised you that it had exercised its discretion in not releasing the appraisal and that no final plan was in place in regards to the Property. You allege that the City did not comply with the APRA in response to your request, in that it did not cite an applicable section of the Indiana Code as the basis for denial.

In response to your formal complaint, the City admitted that a specific section of the Indiana Code was not provided in the denial of your records request for the appraisal. The City has maintained that it denied your request for the appraisal pursuant to the deliberative materials exception provided under I.C. § 5-14-3-4(b)(6). The City has a general policy that it does not provide appraisals until such time a decision is made to enter negotiations with a property owner. The City further provided there were no records responsive to certain items in your request, particularly items (2), (4), (6), (7), and (8). As to items (3), (5), and (9), documents responsive to your request were provided. As to items (6) and (7), the City maintained that the request was overly broad and it further did not have records 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.” *See* I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. *See* 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. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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. *See* I.C. § 5-14-3-9(b). 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 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. *See* I.C. § 5-14-3-9(c). 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, the City responded to your request within the seven-day time period required by the APRA but failed to provide the specific exemption for which it denied your request for the appraisal. As such, it is my opinion the City acted contrary to section 9 of the APRA when it denied your request.

As to the substance of the denial, the APRA excepts from disclosure, among others, the following:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.
I.C. § 5-14-3-4(b)(6).

The deliberative materials exception requires that the records be expressions of opinion or are speculative in nature and communicated for the purpose of decision making. The City maintains that the appraisal was prepared for the Property at its request in order to provide an opinion as to the Five-Points-Round-About project. The City has stated that a decision regarding the Property and the project has not yet been made.¹ Accordingly, it is my opinion that the record qualifies as intra-agency deliberative material under I.C. § 5-14-3-4(b)(6) and the City did not violate the APRA by withholding it. *See also Opinion of the Public Access Counselor 07-FC-129.*

I would note that the APRA requires public agencies to separate and/or redact the nondisclosable information in public records in order to make the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). In *Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003), the Indiana Court of Appeals held that Ind. Code § 5-14-3-6(a) requires an agency to separate disclosable information from the nondisclosable information where the two types of information are not “inextricably linked.” *Id.* at 914. Thus, if any of the records at issue here contain factual information along with the deliberative material, the APRA permits the City to withhold the factual material only if it is inextricably linked with the deliberative material. Otherwise, the City should redact the deliberative material and produce the remainder of the record. *See Op. on the Public Access Counselor 11-FC-83.*

If a public agency has no records responsive to a public records request, the 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.” *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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56.* Thus, the City did not violate the

¹ I would note that I agree with Counselor Davis who opined that the exception survives even after the decision is made, although public agencies often, in their discretion, later decide to release deliberative records. However, the APRA does not require that an agency exercise its discretion in this manner. *See Informal Inquiry, Indiana Stadium and Convention Building Authority, January 5, 2006, available at http://www.in.gov/pac/informal/files/Lough_inquiry_Stadium_appraisals.pdf*

APRA by failing to produce a record in response to your request when no such record existed.

The APRA requires that a records request “identify with reasonable particularity the record being requested.” *See* I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *See Opinions of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-13*.

Here, the City provided in response to items (6) and (7) that it did not have an ordinance or resolution concerning the property dating back to 2000. The City further provided you with an avenue to search for any respective documents concerning the property via www.valpo.us. As such, in light of the City’s response and the additional resource provided that allowed you to check the City’s records for any respective record, it is my opinion that the City did not violate the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the City acted contrary to section 9 of the APRA when it failed to provide a specific exemption in denying your request for a copy of the appraisal. In all others aspects, it is my opinion that the City did not violate the APRA.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Patrick Lyp