



STATE OF INDIANA

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October 12, 2011

Mr. Kevin D. Roessler
350 North 14th Avenue
Beech Grove, Indiana 46107

Re: Formal Complaint 11-FC-240; Alleged Violation of the Access to Public Records Act by the City of Beech Grove

Dear Mr. Roessler:

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

BACKGROUND

In your complaint, you allege that you submitted an e-mail request to the City on August 25, 2011 requesting "the total amount of any and all legal fees paid by any Department of the City or RDC concerning the Indianapolis Wastewater negotiation from its inception." You also requested what legal firms were participants in the negotiations. You further allege that on September 2, 2011 the City responded to your request in writing and provided that records responsive to your request would be available for pick up by Wednesday, November 9, 2011 in the office of the Clerk-Treasurer. The City indicated that the delay in production of the records could be attributed to increased demands placed on the City by the budget, new health insurance, and the negotiation of property insurance contracts.

In response to your formal complaint, Mr. Bosma provided that the City, in addition to its September 2, 2011 response, responded to your request via e-mail on August 29, 2011. The City's August 29, 2011 response advised that there were no non-confidential records that exist which were responsive to your request. Mr. Bosma stated that you specifically requested "the total amount of legal fees paid" and that the City did not possess and would not be required to create any document that provided the requested information pursuant to the APRA. As to your request for all legal firms that participated in the negotiations, you again were seeking information rather than a public record, but to

the extent you requested a document maintained by the City, the City did not have any records that were responsive to that portion of your request.

In regards to the City's September 2, 2011 response to you, Mr. Bosma provided that it was forwarded to you without prior consultation or knowledge of his August 29, 2011 response. Regardless, the City fails to have any records that are 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 timelines prescribed by the APRA.

Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor. *See Opinions of the Public Access Counselor 99-FC-21, 00-FC-15, 10-FC-120.* Counselor Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-38*:

A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a

public agency is under no obligation to create a record that complies with the requesting party's request.

After reviewing your request, it is my opinion that it seeks general information rather than records. The City is not obligated to create records in response to a request, and it is also not obligated to answer generalized inquiries. *See Opinion of the Public Access Counselor 11-FC-07.* If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. *See Opinion of the Public Access Counselor 10-FC-56.* The 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. *See Opinions of the Public Access Counselor 09-FC-35 and 09-FC-210.* As such, it is my opinion that the City did not violate the APRA in response to your request.¹

As to the City's somewhat conflicting initial responses that it provided, I would encourage the City in the future to refrain from making multiple initial responses to avoid any possible confusion. However, as the City responded to your request pursuant to the timelines provided by section 9 of the APRA and has demonstrated that it maintained a continuous dialogue with you via e-mail concerning your request; it is my opinion that it has not violated the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the City did not violate the APRA.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Brian Bosma

¹ I would note that in the City's response to your formal complaint, Mr. Bosma provided guidance on remedying the deficiencies in your current public records request, which you would be allowed to resubmit the request to the City in the future.