



# STATE OF INDIANA

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October 17, 2011

Ms. Jody Owens  
1322 S. Morgantown Road  
Morgantown, Indiana 46160

*Re: Formal Complaint 11-FC-255; Alleged Violation of the Access to Public Records Act by the Jackson Township Trustee*

Dear Ms. Owens:

This advisory opinion is in response to your formal complaint alleging the Jackson Township Trustee ("Trustee") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Dan Broyer, Jackson Township Trustee, responded to your complaint. His response is enclosed for your reference.

## BACKGROUND

In your amended formal complaint, you allege that on September 13, 2011, you submitted an oral request to the Trustee for a copy of the 2012 proposed budget. You provide that you were allowed to inspect the proposed budget, but the Trustee denied your request for a copy. You further allege that the Trustee stated that the budget was not for the public to view other than what was published in the newspaper. On September 26, 2011, you submitted a written request to the Trustee for the 2012 budget, a list of persons who received W-2's or 1099's from the Trustee for 2007-2010, and an itemization of a payment made to Morgan County Insurance in 2010. On September 28, 2011, you called the Trustee to inquire about your request. The Trustee provided that the W-2 and 1099 information would not be disclosed because of the personal information provided in the records. You indicated to the Trustee that you wanted only a list of those who received the tax forms and the amount each person received, not a copy of each individual form. The Trustee continued to deny your request and provided that the Morgan County Insurance information would be available that day. On September 30, 2011, Mr. Broyer responded to your request in writing and advised that the budget had not been set by the County Council or the Department of Local Government Finance, and thus was not currently available.

In response to your formal complaint, Mr. Broyer provided that you were given two (2) hours to review the proposed 2012 budget at the September 13, 2011 budget

meeting. It was explained to you that the budget was only a proposal at that point and had not been formally adopted by the Jackson Township Board. In regards to the request for W-2 and 2099 information, the Trustee's attorney and Public Access Counselor has provided that these items are confidential. Lastly, insurance audits are not performed on a yearly basis. The information sought was on file at the Auditor's office, to which you may submit a request to it to inspect the records that were sought.

## 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 Trustee 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 Trustee'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, you made an oral request of the Trustee of September 13, 2011 for a copy of the 2012 budget, to which the Trustee responded to you on the same day. On September 26, 2011, you made a written request of the Trustee for the 2012 budget, along with certain payroll and insurance information. The Trustee responded orally and in writing to this request on September 28, 2011. Thus, it is my opinion that the Trustee did not act contrary to the timelines provided by section 9 of the APRA.

In regards to the proposed budget, you have provided that you were allowed to inspect a copy of it on September 26, 2011, but the Trustee denied your request for a physical copy of the proposed budget as it had not been formally adopted by the Jackson Township Board. Previous opinions from this office have viewed draft or incomplete records as disclosable public records under the APRA. *See Opinions of the Public Access Counselor 98-FC-4; 05-FC-142; 06-FC-124; 08-FC54; and 10-FC-297.* In one such case, Counselor Neal reasoned:

Here the Auditor may sustain the denial by providing the statutory authority exempting the record from disclosure.

The record is not exempted from disclosure merely by the fact that it is a draft or incomplete record. The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request. *Opinion of the Public Access Counselor 08-FC-54.*

As such, to the extent the Trustee denied your request for a copy of the proposed budget due to it had not been approved by the Jackson Township Board, it violated the APRA. I would note that to the extent that you requested a copy of the actual budget, as opposed to a *proposed budget*, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. (emphasis added). “[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....”). As such, the Trustee did not violate the APRA in response to your request for a copy of the actual budget if it did not have any records responsive to the request at the time of the request.

In regards to the Trustee allowing you to inspect a copy of the proposed budget, but denying your request for a physical copy, the APRA provides that any person may inspect and copy the public records of any public agency, except as provided in the exceptions listed in section 4 of the APRA. I.C. § 5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). IC 5-14-3-3(b). The public agency shall either:

- (1) provide the requested copies to the person making the request; or
  - (2) allow the person to make copies:
    - (A) on the agency’s equipment, or
    - (B) on his own equipment.
- IC 5-14-3-3(b).

Indiana law provides the following regarding copies of public records:

If:

(1) a person is entitled to a copy of a public record under this chapter;

and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. A public

agency may require that the payment for copying costs be made in advance.  
I.C. § 5-14-3-8(e).

While Section 3(b) of the APRA indicates an agency shall either provide copies or allow access to records, Section 8(e) makes it clear an agency is to provide copies when it has reasonable access to a machine capable of reproducing the record. *See* I.C. §5-14-3-8(e) and I.C. §5-14-3-3(b). Counselor Neal addressed this exact issue and provided:

“The Auditor here asserts the word “provide” in Section 8(e) does not mean the agency must make the copies. “When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. App. 1991). “Provide” means to “supply or furnish,” to “afford or yield,” or “to prepare, make ready, or procure beforehand.” *New Illustrated Webster’s Dictionary of the English Language* 780 (1992). Further, “provide” as used in Section 3(b)(1) clearly means the public agency is to make a copy, as it is followed by “or” and then Section 3(b)(2), which allows the requester to make a copy. We must assume provide was used by the legislature to convey the same meaning in the two different sections. As such, I agree with previous public access counselors that Sections 3(b)(1) and 8(e) together to require a public agency to make copies of records upon request when the agency has reasonable access to a copy machine.” *Opinion of the Public Access Counselor 07-FC-223*.

Thus, if the Trustee had reasonable access to a machine capable of reproducing the records, it must provide at least one (1) copy of the public record to you.

In regards to your written request for a list of person who received W-2’s and 1099’s from the Trustee from 2007-2010, the Trustee responded in writing that the information contained privacy information and cannot be released. 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). Here, the Trustee failed to provide a specific exemption authorizing withholding the record, as such it is my opinion that it acted contrary to the APRA. I would note that pursuant to I.C. § 5-14-3-4(a)(3) and 26 U.S.C. 6103(a), an individual’s W-2 Tax form or 1099 Tax Form would be considered confidential. Further, if the Trustee did not have a record that listed all individuals who received a W-2 or 1099 from 2007-2010, then it was not required to

create a new record in order to satisfy your public records request. *See Opinion of the Public Access Counselor 10-FC-56.*

As to your request for insurance information, the Trustee provided that all information is on file at the County Auditor's Office. As the Trustee did not have any records responsive to your request, it is my opinion that it did not violate the APRA in response to your request for records regarding the Morgan County Insurance Company.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Trustee violated the APRA by failing to provide you with a copy of the 2012 proposed budget and by failing to cite the specific exception to deny your request for W-2 and 1099 tax information. As to all other issues presented, it is my opinion that the Trustee did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Dan Broyer