



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

January 23, 2012

David R. Snyder
236 E Pendle St
South Bend, Indiana 46637

Re: Formal Complaint 12-FC-14; Alleged Violation of the Access to Public Records Act by the Town of Roseland

Dear Mr. Snyder:

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

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Town on January 5, 2012 for the following records:

- (1) Copies of issues "Code and Ordinance Violation Notice, Roseland Police Department" for 2010-2012;
- (2) Copies of police report and any other documents or correspondence by any police personnel, town employees, town clerk-treasurer, or council members/President regarding Code and Ordinance Violation No. 00011, issued January 4, 2012; and
- (3) A copy of the Town's form to request an appeal of a Code and Ordinance Violation.

On January 10, 2012, Peter J. Agostino responded on behalf of the Town. He advised that as to (1), the Town will make available all records after they have been retrieved and reviewed. As to (2), the request is overly broad and therefore denied. Mr. Agostino provided the Town has no records responsive to (3).

In response to your formal complaint, Mr. Agostino provided that the Town responded in a timely manner to your request and pursuant to the APRA. In addition,

Mr. Agostino advised that the Town will not be pursuing the ordinance violation for which you were cited.

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 Town 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 Town’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 twenty-four 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 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 Town responded to your request within the timeframes proscribed by section 9 of the APRA.

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 of the request. 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. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). 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. *See* 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. *See* 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. *See Opinion of the Public Access Counselor 02-FC-45.*

As to part (1) of your request, the Town advised that it would provide all records that were responsive to your request after they have been retrieved and reviewed. You submitted your request to the Town on January 5, 2012; the Town responded to your request on January 10, 2012; you filed your formal complaint with the Public Access



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Counselor's Office on January 13, 2012. The Town is required to separate and/or redact confidential information in public records prior to their disclosure. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.* Your request sought copies of all violation notices issued by the Town's Police Department from 2010-2012. It is my opinion that the Town did not violate the APRA in failing to produce all records from a three-year time period that were responsive to your request within eight days of your initial submission.

The APRA requires that a records request "identify with reasonable particularity the record being requested." 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." *Ops. 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 Town denied part (2) of your request due to it being overly broad. As opposed to denying your request, the proper response by the Town would have been to request that you clarify your request so that it may provide all records responsive to it. As such, the Town acted contrary to the APRA in denying your request. However, outside of your request for copies of any police report related to the citation you received, it is my opinion that part (2) of your request was not reasonably particular. You should clarify your request, including providing the names of the "police personnel" or "town employees" to whom you seek correspondence from, and resubmit the request to the Town.

Generally, 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.* The Town provided that it did not have any records responsive to part (3) of your request. Accordingly, it did not violate the APRA in failing to provide records that it did not maintain.

CONCLUSION

For the foregoing reasons, it is my opinion that the Town acted contrary to the APRA by denying part (2) of your request for being overly broad. As to all other matters, it is my opinion that the Town 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: Peter Agostino