



STATE OF INDIANA
MITCHELL E. DANIELS, JR., Governor

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July 17, 2012

Mr. Mark O. McDaniel
2745 Jordan Rd.
Martinsville, Indiana 46151

Re: Formal Complaint 12-FC-162; Alleged Violation of the Access to Public Records Act by the City of Martinsville

Dear Mr. McDaniel:

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

BACKGROUND

In your formal complaint, you allege that on June 7, 2012, you hand-delivered a written request to the Mayor's secretary that sought a record of all those property owners where were to be effected by the proposed annexation. You specifically sought "parcel number, name, and valuations of all effected parcels in adopted Resolution No. 2012-283. Preferably in an Excel Format." You allege that the City has already compiled this information in light of the coming annexation and has provided a certified mailing to all affected property owners in March of this year. You requested the information from the City Clerk, and were told that the records were still the property of the City Engineer, as the entity had yet to be paid for its services.

In response to your formal complaint, Mr. Ochs advised that the City began the process of annexing territory in accordance with I.C. 36-4-3-1 *et seq.* ("Annexation Statute) in March 2012. Pursuant to I.C. § 36-4-3-2.2, a notice of hearing on the proposed annexation was sent by certified mail to "each owner of real property, as shown on the county auditor's current tax list, whose real property is located within the territory proposed to be annexed."

The City assembled a list, based upon the auditor's current tax list, for purposes of preparing the mailing of the notices. The list that was compiled does not contain all of the information that you have specifically sought. You have been notified that pursuant to I.C. § 5-14-3-3(f), you may contact the Mayor's offices and arrange to personally

inspect the City's mailing list and make memoranda abstracts of the list. The Annexation Statute does not require the City to create, provide copies of, publish, or disseminate to the public a list containing "parcel number, name, and valuations of all effected parcels. . .", but instructs that it is the county auditor's list upon which the City must rely, for the purposes of providing notice to owners of real property in the proposed annexation area.

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 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, you hand-delivered a written request for records to the City on June 7, 2012. The City was required to respond, in writing, within twenty-four hours of receipt of your hand-delivered written request and acted contrary to section 9 of the APRA when it failed to do so. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63.*

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.* As applicable here, the City has provided that it does not maintain a list containing all the information that is responsive to your request. As such, it is my opinion that the City did not violate the APRA by failing to create a record in response to a request.

The City did acknowledge however that a list was assembled, pursuant to the Annexation Statute, that provides a list of the name and address of all persons that were required to be provided notice pursuant to I.C. § 36-4-3-2.2. I.C. § 5-14-3-3(f) provides:

“Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute.” However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses) it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law. *See* I.C. § 5-14-3-3(f).

As it has not been alleged that the information that you requested is considered confidential, pursuant to I.C. § 5-14-3-3(f), the City would be required to allow you to inspect and make memoranda the list of names and addresses of all those who were provided notice pursuant to I.C. § 36-4-3-2.2. Section 3(f) would not require that the City provide you with a copy of the list. After inspecting the list produced by the City, to the extent you seek further records not maintained in a list format as contemplated under I.C. § 5-14-3-3(f), the City would be required to either provide the requested records or cite to the specific statutory exemptions that authorizes their withholding. *See* I.C. § 5-14-3-9.

CONCLUSION

For the foregoing reasons, it is my opinion the City violated section 9 of the APRA by failing to respond in writing to your hand-delivered written request within twenty-four hours. As to all other issues, it is my opinion that the City has complied with the requirements of the APRA.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Timothy E. Ochs