



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
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August 6, 2012

Greg W. Bader
1174 Hinson Road
Martinsville, Indiana 46151

Re: Formal Complaint 12-FC-186; Alleged Violation of the Access to Public Records Act by the City of Martinsville

Dear Mr. Bader:

This advisory opinion is in response to your formal complaint alleging 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 you submitted the following written requests to the City on July 3, 2012:

- Copies of the two un-redacted appraisals that the City sought in order to value the property located at 130 S. Ohio Street, written proof of the realtors involved in the transaction, and proof of the title company that was utilized.
- Records indicating the compensation paid to Ralph Holloway as an employee, consultant, and subcontractor with Holloway Engineering and Survey.
- Pursuant to Resolution No. 2012-283, copies of the estimated revenues from taxation on annexed properties by year for the period of planning, estimated sewer fees on planned annexed properties by year for the period of planning, and estimated water revenues from annexed properties by year for the period of planning.
- Un-redacted copies of all appraisals used to value property located at 15 Industrial Drive, as well as written proof establishing the realtors and title company that were utilized.
- All email, either sent or received by Ralph Holloway, using his government e-mail account for the 2012 calendar year.

On July 3, 2012, Mayor Phil R. Deckard responded in writing to your requests. Mayor Deckard advised that many of the records that were sought were maintained by the City's

Clerk-Treasurer and provided you with the Clerk-Treasurer's contact information. Mayor Deckard advised that the remainder of your request was being forwarded to the City's attorney so that it could be properly addressed. You allege that the information that the Mayor has said is maintained in the Clerk-Treasurer's office is not available.

In response to your formal complaint, Mr. Ochs advised that in regards to your request for records regarding property located at 130 S. Ohio St and 15 Industrial Drive, you were informed by Mayor Deckard via written correspondence on July 3, 2012, that said records were available via the City's Clerk-Treasurer's Office. As to your request for email correspondence from Ralph Holloway, Mr. Ochs provided that the person you are requesting e-mail correspondence for is "Ross Holloway", not Ralph Holloway. The City is currently in the process of reviewing all records that are responsive to your request and will notify you when the records are available. As to information regarding Mr. Holloway's compensation, you have now been directed in writing to contact the City's Clerk Treasurer. Lastly, as to your request for estimated revenues and fees, the City has informed you previously that it had not undertaken the process of making these calculations, other than what has been provided in the fiscal plan, a copy of which has been sent to all property owners within the proposed annexation territory. Thus, there are currently no records at this time 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). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, the City responded in writing to your written requests on the day of its receipt. As such, it is my opinion that the District complied with the requirements of section 9(b) of the APRA in responding to your request.

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*



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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.*

Here, you submitted your request for records to the Mayor’s Office. The Mayor advised you in writing in responding to your original request that many of the records that you had sought were maintained by the City’s Clerk-Treasurer and provided you with the contact information for the agency. You have provided that the information is not available where the Mayor has indicated. As to the City, specifically, the Mayor’s Office, it is my opinion that it would not have violated the APRA by failing to produce records that it did not maintain. I would encourage you to inquire with the City’s Clerk-Treasurer regarding said records. Mr. Ochs in response to your formal complaint has again advised that many of the records sought are maintained by the Clerk-Treasurer. To the extent that the Clerk-Treasurer provides that it does not maintain the records that the Mayor had indicated it would, I would inform the Mayor as such and inquire with him who the appropriate agency would be to submit your request. As to your request for fee and revenue calculations, the City has advised that there are currently no records responsive to your request other than the fiscal plan, which has been provided. As such, it is my opinion that the City did not violate the APRA by failing to produce a record that does not exist.

As to your request for email correspondence for Mr. Holloway, effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, 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.* This office has often suggested a public agency make portions of a

response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172.* 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.*

You submitted your original records request to the City for Mr. Holloway's email correspondence on July 3, 2012. You then filed your formal complaint alleging the City failed to timely produce Mr. Holloway's email on July 9, 2012. The City has provided that it is in the process of collecting and reviewing all records that are responsive to your request and will notify you when the records are available. Due to the expansive nature of your request, the fact that only six days elapsed between the date of your original request and the date of filing your formal complaint, and the City's prompt response in writing to your written request, it is my opinion that the City has currently complied with the requirement that all records be provided within a reasonable period of time as required by I.C. § 5-14-3-3(b).

CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" at the end.

Joseph B. Hoage
Public Access Counselor

cc: Timothy E. Ochs