



STATE OF INDIANA
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October 15, 2012

Anthony and Betty Pesavento
2601 W 107th St., Unit A
Chicago, Illinois 60655

Re: Formal Complaint 12-FC-284; Alleged Violation of the Access to Public Records Act by the LaPorte County Plan Commission and Board of Zoning Appeals

Dear Mr. and Mrs. Pesavento:

This advisory opinion is in response to your formal complaint alleging the LaPorte County Plan Commission ("Commission") and the Board of Zonings Appeals ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Douglas Biege, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on June 19, 2012, you attended a meeting of the Board in LaPorte County. You were told to return on August 21, 2012. On August 9, 2012, you submitted a written request for records to the Commission. On August 13, 2012, you received a copy of your request and certain records that were responsive. On August 21, 2012, you appeared before the Board, at which time you allege that a member of the Board and Mr. Biege made false statements.

On August 22, 2012, you went to the Commission with Sara Zervos, and made an additional request for records, including electronic records of the meeting. You were informed that you were not allowed access to the audio tapes and your request would not be accepted. On August 23, 2012, you submitted another request via certified mail, to which you allege the Board has failed to respond in any fashion.

In response to your formal complaint, Mr. Biege advised that the Commission is under the impression that it fully answered your August 9, 2012 request and provided all records that were responsive. As to the August 22, 2012 request, the County does not maintain an electronic record of these meetings, as they can be found at allcommunity.org. Mr. Biege informed you of this at the time of your request. Mr. Biege does not believe that the APRA would require the agency to produce the record in a

specific format. As to the August 23, 2012 request, the Commission does concede that it did not respond to your request pursuant to the requirements of section 9 of the APRA; however at this time, all records that are responsive to the request have been provided.

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 Board and Commission are public agencies for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy either agency’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.

As to your August 9, 2012 request, the Commission and Board have provided all records that were responsive to your request. As such, it is my opinion that both agencies complied with the APRA in response to your August 9, 2012 request. As to your August 23, 2012 request, the Commission admitted that it failed to respond to your request within the time requirements of section 9 of the APRA. As such, it is my opinion that the Commission acted contrary to the APRA in that regard. As the Commission has now provided all records that are responsive to your request, I trust that this is in satisfaction of your formal complaint.

The APRA requires a public agency to provide one copy of a disclosable public record but does not require an agency to provide additional copies or to repeatedly provide copies of a particular record. *See* I.C. § 5-14-3-8(e). However, if a public agency has no records responsive to a public records request, the agency generally 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....”). As to your August 22, 2012 request, you sought

audio/video records of the Board. The Board in response provided that all electronic records can be found at allcommunity.org. If the Board does not maintain a copy of the audio/video records that were sought, it would not violate the APRA by failing to produce a record that it does not maintain. If the Board does maintain a copy of the records, but does not have the capability to make a copy of the recordings, you would only be entitled to inspect and manually transcribe the record. *See* I.C. § 5-14-3-8(e); *see also Opinions of the Public Access Counselor 10-FC-101; 10-FC-102; and 11-FC-281.* However, if the Board does retain the audio/video recordings and is able to make a reproduction, despite the fact that the records may be found online, the Board would be required to provide one copy of the record. It should be noted that while access to the audio/video record at allcommunity.org is free of charge, the Board would be able to charge a fee pursuant to section 8 of the APRA if you still seek to be provided a copy of the recordings by the Board.

CONCLUSION

For the foregoing reasons, it is my opinion that the Commission acted contrary to the requirements of section 9 of the APRA in responding to your August 23, 2012 request. As to your August 22, 2012 request, if the Board maintains a copy of the audio/video recordings and has a machine capable of reproducing the record, the Board would be required under the APRA to provide one (1) copy of the record, to which it may charge an applicable fee pursuant to section 8 of the APRA. As to all other issues, it is my opinion that the Commission and Board did not violate 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: Douglas L. Biege