



STATE OF INDIANA

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June 26, 2013

Ms. Jerri A. Hays
670 S CR 900 E
Coatesville, Indiana 46121

Re: Formal Complaint 13-FC-161; Alleged Violation of the Access to Public Records Act by the Putnam County Commissioners

Dear Ms. Hays

This advisory opinion is in response to your formal complaint alleging the Putnam County Commissioners ("Commissioners") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* James W. Ensley, Attorney, responded on behalf of the Commissioners. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that you submitted a written request for records on May 24, 2013 for records related to two road projects in Putnam County and certain personnel records. You believe that the Commissioners have failed to provide all records responsive to your request in a reasonable period of time.

In response to your formal complaint, Mr. Ensley advised that you personally submitted a written request for records to the Putnam County Auditor ("Auditor") on Friday, May 24, 2013 at 2:45 p.m. Upon receiving your request, the Auditor began the process of collecting and reviewing all records responsive to your request. On Wednesday, May 29, 2013, after the Memorial Day weekend, you again presented yourself at the Auditor's office and sought copies of the records previously requested. At that time, the Auditor had not completed the process of collecting and reviewing all records responsive to your request. You thereafter filed a formal complaint with the Public Access Counselor's Office on May 31, 2013. On behalf of the Commissioners and Auditor, Mr. Ensley is submitting correspondence to you this week outlining the agencies response to your formal complaint. Many of the records that you have sought do not exist in the form of a document or meeting record. All records that are maintained by the Commissioners and/or Auditor responsive to your request will be provided shortly.

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 Commissioners and Auditor are considered to be a 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 the Commissioners and Auditor’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, you submitted a written request for records to the Auditor and/or the Commissioners on May 24, 2013. The Commissioners provided you with a written record of receipt on the date your request was submitted. As such, it is my opinion that the Commissioners complied with section 9 of the APRA in response to your request.

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 among the factors to be considered in determining if the requirements of section 3(b) 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 redacted prior to disclosure. 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*.

As applicable here, your original request was submitted in writing on Friday, May 24, 2013 in the afternoon. You received a written receipt that the Commissioners and/or Auditor received your request on the day it was submitted. You filed your formal

complaint with the Public Access Counselor Office on May 31, 2013; approximately four business days after originally filing your request with the Auditor, as county offices were closed on Memorial Day. The request that was submitted sought multiple records and/or information that were alleged to be maintained by the county. Mr. Ensley has advised that correspondence will be submitted to you the week of June 24, 2013 regarding the Auditor and Commissioners response to your request. In light of all of these factors, it is my opinion that the Auditor and Commissioners are currently in compliance with the requirements of section 3(b) of the APRA in providing all records responsive to your request in a reasonable period of time.

I further would note that, “[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. The Commissioners and Auditor would not violate the APRA by not creating a record in order to satisfy your request or by failing to maintain a record that it was not otherwise be legally obligated to possess.

As to your request for personnel records, the APRA provides that that certain personnel records may be withheld from disclosure:

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion.

CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners and Auditor complied with the requirements of the APRA in response to your request.

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: James W. Ensley