



STATE OF INDIANA
MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

July 18, 2013

Mr. Jim Brugh
1315 East Market Street
Logansport, Indiana 46947

Re: Formal Complaint 13-FC-177; Alleged Violation of the Access to Public Records Act by the Logansport Municipal Utilities

Dear Mr. Brugh:

This advisory opinion is in response to your formal complaint alleging that the Logansport Municipal Utilities ("LMU") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John R. Molitor, Attorney, responded on behalf of the LMU. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on June 5, 2013, you hand-delivered a written public records request to LMU, via Paul Hartman, Superintendent, for a copy of any contract entered into between LMU and William-Lynn-James, Inc. or between LMU and Gary Petersen, which were executed after January 1, 2012 to the present. On June 6, 2013, Superintendent Hartman advised in writing that the records will be prepared and delivered by June 14, 2013. On June 14, 2013, Superintendent Hartman informed you in writing that LMU was not going to be able to meet its self-imposed deadline and now anticipated that all records would be provided sometime after July 1, 2013. Superintendent Hartman provided that the reason for the delay was attributed to LMU reviewing and determining whether certain portions of the records were required to be redacted pursuant to the APRA. You provide that you made a simple records request that was due within twenty-four hours pursuant to I.C. § 5-14-3-9 and that LMU violated the APRA in its response to your request.

In response to your formal complaint, Mr. Molitor noted that the City of Logansport ("City") is currently engaged in an effort to identify who might be able to make the best offer to the community for the construction of a new power plant. In this effort, Mayor Ted Franklin, Mr. Hartman, and members of the City Council have been holding discussions with various private vendors pursuant to the provisions of the Public-Private Agreement Law (e.g. I.C. 5-23) in the hope that the parties may eventually be able to negotiate an agreement with one or more vendors to build and operate a new plant

to serve the City's power customers. In anticipation of this process, the City and its Utilities Board entered into lengthy contracts with a private consulting firm ("Firm") to assist City officials in their efforts.

LMU received your request for records on June 5, 2013. LMU responded to the request, in writing, on June 6, 2013 and again on June 14, 2013. On June 18, 2013, you filed your complaint with the Public Access Counselor in the belief that LMU had acted contrary to the APRA in its response. LMU has been in the process of reviewing all records in response to your request. The Firm who entered into the various agreements with the City has objected to their release, primarily on the grounds that the records contained "trade secrets" as defined in I.C. § 24-2-3-2. The City and the LMU are inclined to accept the firm's assertions, but seeks guidance from the Public Access Counselor regarding the issue. Further, LMU is of the belief that there may be other provisions that would prevent it, or allow it discretion, to disclose the records, including I.C. § 5-14-3-4(b)(5)(A); I.C. 5-14-3-4(b)(6); I.C. § 5-14-3-4(b)(7); and I.C. § 5-14-3-4(b)(19). In previous opinions, Counselor Neal appeared to agree that the legislature had recognized the need for a governing body to maintain as private the content and context of negotiations conducted in its efforts to carry out economic development functions." *See Opinion of the Public Access Counselor 09-FC-102*. Specifically:

"The IEDC has been granted by the Indiana General Assembly broad discretion to withhold from disclosure records relating to negotiations so long as those records were created while negotiations were in progress."
Id.

The City believes that this rationale should apply as well to all local governments, including the City and the LMU.

Specifically to your formal complaint, LMU denies that the timeframe in providing records responsive to your request has been unreasonable in light of the length of the records responsive to your request and the requirements that LMU review the record to prevent the disclosure of confidential information. LMU has complied with section 9 of the APRA in acknowledging your request and all records will be provided upon the completion of the City and LMU's review of the records and receipt of the respective advisory opinion.

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. LMU 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 LMU'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). 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 LMU on June 5, 2013. Thus, LMU was required to respond, in writing, within twenty-four hours of receipt of your hand-delivered written request, and at a minimum acknowledge the receipt of your request. LMU responded in writing to your request on June 6, 2013, acknowledging its receipt. As such, it is my opinion that LMU complied with the requirements of section 9 of the APRA in acknowledging the receipt of your hand-delivered, written request. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63; 12-FC-316; 13-FC-10.*

Beyond the timeframes in which an agency must acknowledge a request for records under section 9, section 3(b) of the APRA requires that 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 to your formal complaint, LMU received your written request for records on June 5, 2013. LMU complied with the requirements of section 9 of the APRA in responding to your request, in writing, within twenty-four hours of receipt. LMU thereafter advised you in writing that it was unable to meet its initial self-imposed deadline and provided further information regarding the disclosure of records responsive to your request. You filed your formal complaint with the Public Access Counselor on June 18, 2013. In light of the requirement that all records be reviewed prior to disclosure, LMU's compliance with section 9 of the APRA, its efforts to keep you updated regarding the status of your request, and the length of the records that had been requested,

it is my opinion that LMU did not violate section 3(b) of the APRA in not providing all records responsive to your request within thirteen (13) days of the receipt of your original request.¹

CONCLUSION

For the foregoing reasons, it is my opinion that LMU complied with the requirements of section 9 of the APRA by acknowledging the receipt of your hand-delivered, written request within twenty-four (24) hours of its receipt. Further, it is my opinion that LMU did not violate section 3(b) of the APRA in failing to provide all records responsive to your request within thirteen (13) days of the receipt of your original request.

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 long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: John R. Molitor

¹ Issues related to the authority of the City and LMU to deny or provide a redacted copy of records responsive to your request will be addressed in a separate, informal opinion after all parties have had an opportunity to submit a written response. At this time, if there remains any portion of the records responsive to your request that LMU believes it does not maintain the authority to redact, LMU should promptly provide a redacted copy of the records pursuant to section 6 of the APRA at this time, prior to the issuance of the separate, informal advisory opinion.