



# STATE OF INDIANA

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February 12, 2014

Ms. Karla Bowsher  
610 S. Adams St.  
Marion, IN 46953

*Re: Formal Complaint 14-FC-05; Alleged Violation of the Access to Public Records Act by the City of Marion*

Dear Ms. Bowsher,

This advisory opinion is in response to your formal complaint alleging the City of Marion ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The City has responded via Counsel Don Gallaway, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on January 10, 2014.<sup>1</sup>

## BACKGROUND

Your complaint dated January 9, 2014, alleges City of Marion violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b) in a timely manner.

On December 5, 2013 you requested financial records relating to the City's economic development revenue bonds via email. You also requested 2013 fund reports for several months of that year. You served these requests on the City Controller. You followed up with the City on December 19, 2013, as you had not received any acknowledgement or information responsive to your request. On December 9, 2013, you hand-delivered a third request for bond anticipation notes to the Office of the Corporate Counsel. You allege you did not receive acknowledgement within 24 hours.

The City responded stating they are committed to transparency and public access and they have a procedure set forth for public records requests and how to address them

<sup>1</sup> Please note all of your complaints have been consolidated for the purposes of this Opinion and each complaint will be referenced herein.

appropriately. I have reviewed this policy and if it is indeed memorialized as employee standard operating procedure, it is sound. However, from the information provided it appears the City Controller did not follow the procedure in this situation. The City has stated it has been cooperative with you in the past by providing documents, however, it concedes this was an instance of procedure (and the public access law) not being followed.

The City states all of the information has been provided to you. They have sent all of the records to this Office and I have not been able to verify as of the date of this writing whether you are in receipt of them as well. I trust this response is satisfactory and fulfills your request even though the City's acknowledgment of your requests was untimely.

### **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 Ind. Code § 5-14-3-1. The City of Marion is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

It does appear the City failed to acknowledge your requests in a timely manner by not responding within seven days of the December 5, 2013 request and in 24 hours of the December 9, 2013 request. In this way they have indeed violated the APRA. And while this practice is certainly frowned upon, they have apparently remedied the situation by providing records responsive to your request. The City has indicated they have recommitted to the established procedure reflecting the APRA deadlines and I encourage them to continue to implement that policy.

You also suggest the City has not made good faith efforts to comply with the law or your request by not producing the records in an acceptable time. Ind. Code § 5-14-3-3(b) states a public agency must allow the inspection or copying of a record disclosable to the public in a reasonable amount of time. The APRA does not define what is considered a reasonable amount of time and there is no bright line test to determine how long is too long. The determination is made on a case-by-case basis and often depends on the size of the request, the size of the agency, the storage medium of the records, among other

factors. I do not have any information on how the fund reports or the banking activity records are housed, therefore I cannot make an evidentiary conclusion on how long the City can reasonably take to produce them before it would be a violation.

The City has stated the bond anticipation notes are in the custody of a trustee who maintains those records. As I have stated before (and is referenced in the article attached to your complaint submission), if an agency chooses to house records in the custody of a third party, the agency is still responsible for those records and is obligated to produce them upon request. Third party records custodians are common throughout the state, but it cannot become a shield to prevent disclosure. It does not seem that this is the case with the City of Marion and the City has contacted the trustee to retrieve and produce them to you. Records like these may indeed take more time to compile and produce. This method of housing records, especially sensitive financial documents, is appropriate and consistent with public access laws. The responsibility remains with the City to ensure accessibility and accuracy of the records; however, I recognize it may take a bit longer to produce records stored in this manner. If the records the City sent me are the ones they sent you – and if they are responsive to your request – I do not find the City has failed in producing them in a reasonable amount of time.

### CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the City of Marion violated the Access to Public Records Act by not acknowledging receipt of your request within the statutory timeframes, however, they did not violate the APRA in regard to producing the records in a reasonable time.

Regards,

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

Luke H. Britt  
Public Access Counselor

Cc: Mr. Don Gallaway, Esq.