



# STATE OF INDIANA

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June 23, 2014

Ms. Yael Bortnick  
Americans United for Separation of Church and State  
1301 K Street NW, Ste. 850, East Tower  
Washington, DC 20005

*Re: Formal Complaint 14-FC-108 & 121 (consolidated); Alleged Violation of the Access to Public Records Act by the City of Westfield*

Dear Ms. Bortnick,

This advisory opinion is in response to your formal complaint alleging the City of Westfield ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The City has provided a response to your complaint via Mr. Brian Zaiger, Esq. His response is attached 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 May 27, 2014.

## BACKGROUND

Your complaint dated May 20, 2014, alleges the City of Westfield, Indiana, 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).

On April 9, 2014, you made a request to the City of Westfield and the City of Westfield Police Department for records relating to the Westfield Police Department's shoulder patch design. You requested that "[if] any documents are available in electronic format, please provide copies in that format to [your email address] or burned to disc; otherwise, please send hard copies."

On April 14, 2014, the City of Westfield via Westfield City Attorney, Brian Zaiger, Esq., responded that "[a]ll public documents are available for review, inspection and copying during normal business hours." Essentially, the disagreement between you and Mr. Zaiger hinges on whether the Access to Public Records Act (APRA) requires an agency to provide and deliver requested documents or simply to allow the requester to search for and inspect documents.

You support your position, that an agency must, if requested to, provide and deliver the documents, by citing to Ind. Code § 5-14-3-8(e)(2) (if “the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person”), and by referring to the “Sample Records Request Letter” included in the *Public Access Counselor’s Handbook on Indiana’s Public Access Laws*, which allows one to request to either “inspect or obtain a copy of” a public record.

Mr. Zaiger argued in his discussion with you “the City is under no obligation to gather, copy and send them to you if indeed any exist.” In his response to your formal complaint, Mr. Zaiger disputed your interpretation of Ind. Code § 5-14-3-8(e), suggesting “[t]his simply means that if the agency has reasonable access to a copy machine, and then they must make the person a copy.” Mr. Zaiger also argues “the statute does not require any public agency ... to research, gather, copy, and then send documents to any person requesting such. The tasks potentially placed on a public agency by such an interpretation of Indiana law is not only burdensome, but places an undue hardship on many if not most public agencies in the State of Indiana.” Finally, Mr. Zaiger states “[i]t also must be noted requests such as Mr. Bortnick’s require the City to evaluate, interpret, gather and then provide documents which later may be deemed unacceptable, incomplete or nonresponsive. Indiana law provides him access, not a research assistant.”

## **DISCUSSION**

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 Westfield 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).

The crux of the current issue is whether a public agency has an affirmative duty to mail public records upon request to an individual seeking records. The ‘to mail or not to mail’ question has been resolved in part by former Public Access Counselor, Andrew Kossack in 10-FC-111 (a public agency is under no obligation to mail copies to a requestor at the agency’s expense). The City has relied on this Opinion to only allow in-person inspection and copying pursuant to Ind. Code § 5-14-3-3(b).

I spoke with Mr. Zaiger before I became familiar with the current situation and advised him in an email as follows:

If they are already in electronic form, the agency must make a reasonable effort to provide the records to the requestor (email, pdf, etc. See IC 5-14-3-3(d)), but not to mail paper copies. The only obligation is to have them available for inspection and copy at the agency’s place of business.

I went on to suggest that despite the APRA's silence on mailing, best practice would entail advising the requestor of the cost of postage and mailing documentation anyway. I still believe this to be the case. The spirit of the APRA is to allow access to everyone no matter where or how they are situated. Public agencies routinely receive out-of-state records requests and mail them out of courtesy, recouping their cost by charging the actual cost of postage. In some cases, "provide" may mean merely making available. However, some individuals who lack the ability to collect records at an agency's place of business (inmates, shut-ins, out-of-state requestors) may require a heightened level of service. I encourage agencies to use sound judgment and mail records whenever possible. That being said, the Americans United for Separation of Church and State could very well send a courier to the City to collect the documents and forward them back to Washington.

I disagree in part with the City's blanket assertion that mailing is burdensome and creates an undue hardship. This very well may be the case in certain situations; however, it is the fundamental duty of public agencies to provide information upon request. It may not be the City's duty to be a research assistant, but it is the City's obligation to provide as much access as possible. Mailing is a reasonable method of providing information even if it is not specifically mandated by the APRA. Again, I implore agencies to evaluate the circumstances on a case-by-case basis in a light most favorable to transparency.

### **CONCLUSION**

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the City of Westfield has not violated the Access to Public Records Act. In the spirit of transparency and access, however, I encourage the City to mail the responsive records to you within a reasonable time.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long horizontal flourish extending to the left.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Brian Zaiger, Esq.