



STATE OF INDIANA

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July 11, 2016

Mr. Duane J. Hartly
Post Office Box 3823
Muncie, Indiana 47307

Re: Formal Complaint 16-FC-126; Alleged Violation of the Access to Public Records Act by the Indiana Housing and Community Development Authority

Dear Mr. Hartly:

This advisory opinion is in response to your formal complaint alleging the Indiana Housing and Community Development Authority ("Authority") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. The Authority has responded via Mr. David Stewart, General Counsel. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on June 3, 2016.

BACKGROUND

Your complaint dated June 3, 2016 alleges the Authority violated the Access to Public Records Act by taking an unreasonable amount of time to fulfill your request.

On September 21, 2015 you emailed a request to the Authority seeking payroll records for the employees of a subcontractor. You also requested records related to wage determination. Your request was acknowledged on September 28, 2015.

On September 30, the Authority informed you payroll records did not exist, because the project had not yet begun. The Authority stated it was working with the subcontractor to provide other records. You remained in contact with the Authority for several months. Several of your emails were not responded to during the timeframe.

On March 23, 2016 you sent an email to the Authority inquiring as to the status of your request. On March 29, 2016 the Authority informed you it was still waiting for the records from the subcontractor. You received substantially the same message on April 13 and 26 and on May 10, 2016. Based on the timeline provided by the Authority, it does not appear the subcontractor provided any records until June 2, 2016.

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

The APRA does not require a public agency to provide records it does not possess. The request was for payroll records for the employees of a subcontractor. You also requested records related to wage determination. These are not records maintained by the Authority. You were informed of this fact on September 30, 2015. Because these records were not directly related to the project or any other of the Authority executive functions, the Authority was not obligated to maintain these records on-site. Therefore, the Authority met its burden under the APRA.

The Authority took the additional step of working with the subcontractor to obtain the records requested. Based on the emails and the timeline provided, it seems the Authority acted properly and any delays in records production rested with the subcontractor.

The Authority received the wage determination records on January 27, 2016. However, because the general counsel was out of the office, you did not receive return communication until February 29, 2016. Counsel provided you with the wage determinations on March 1, 2016. The Authority received payroll records on June 2, 2016; however, could not release them to you immediately because of areas of noncompliance. You filed your complaint prior to receiving the payroll records.

Under Indiana Code § 5-14-3-3(b), records must be provided within a reasonable amount of time. Reasonableness depends on the circumstances. The Authority informed you it did not possess the records and made several attempts to obtain the records. The only delay was during the month of February, when general counsel was out of office. If general counsel was not in the office and did not see the email, it is understandable you would not receive the records until counsel returned.

However, a public agency cannot use the fact legal counsel is unavailable as *carte blanche* to neglect its duties under the APRA. While there may be several reasons legal counsel is unavailable for a prolonged period of time, it is expected counsel’s absence will be remedied by other persons deputized to respond during counsel’s absence. Such delegation of duties prevents a record request from languishing in email while counsel is unavailable. Because the APRA requires a response within a reasonable amount of time, I expect public agencies to create multiple points of contact to ensure a records request is promptly fulfilled. This did not happen because of the Authority’s failure to delegate during counsel’s prolonged absence.

In any case, based on the information provided, it appears as if the Authority acted in good faith and was reasonably timely in its responses to you. It is my opinion payroll records of a government subcontractor are not necessarily public records unless received by the public agency in the course of business. They

are not germane to a project unless explicitly stated in a contract. The records of a subcontractor do not automatically become public records once the firm contracts with a public agency. Nonetheless, most of these records appear to have been provided to you. It is my sincere hope you have now received the information you have been seeking.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline that extends to the left.

Luke H. Britt
Public Access Counselor

Cc: Mr. David Stewart, Esq.