



# STATE OF INDIANA

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Karen Davis

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September 21, 2005

David M. Austgen  
130 North Main Street  
Crown Point, IN 46307

*Re: Formal Complaint 05-FC-176; Alleged Violation of the Access to Public Records Act by the City of East Chicago*

Dear Mr. Austgen:

This is in response to your formal complaint alleging that the City of East Chicago ("City") violated the Access to Public Records Act ("APRA") by failing to timely respond to your request for records.

### BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor on August 23, 2005. In addition to your complaint, you provided a supplement to your complaint and both you and the City have provided copies of additional correspondence between the parties to this office. My staff attorney and I have spoken with you and the City via telephone regarding this matter. The following information has been gleaned from the aforementioned communications. On August 17, 2005 you hand-delivered a letter requesting certain public records to the City. Your request was addressed to individuals in four different departments of the City. The request was addressed to Building Inspections and Permits Administrator Ernest Hagler, Health Department Administrator Dr. Paula Benchik, City Clerk Mary Morris Leonard and Corporation Counsel Nathaniel Ruff. On August 18 and August 19, 2005 you received two telephone calls from Mr. Ruff indicating that the records would be produced. However, you have received no written response. On August 22, 2005 Mr. Ruff told you that you should speak with Alexander Lopez, attorney for the Building Inspections Department. Mr. Lopez stated that the documents would be provided and that you would receive a written response. As of August 23, 2005, the date you filed your complaint, you had not received a written response or the requested records.

On August 24, 2005 you received a letter from Mr. Lopez via facsimile. In the letter Mr. Lopez wrote, "[t]his correspondence will confirm that the records requested from the East Chicago Building Department will be ready on August 24, 2005 after 1:00 pm. A fee for the records sought will be assessed. You will need to contact the Building Department for a bill." When your clerk arrived to pick up the documents at 1:45 p.m. on August 25, 2005 he spoke with Ms. Winna Guzman. Ms. Guzman informed your clerk that the records had not been copied, but that he could review them at the office at that time. Ms. Guzman indicated that she would not be able to copy the approximately 330 pages by the next day, a Friday, but that she

would have them ready for pick up on the following Monday. The documents had been copied by August 29, 2005 and were picked up by your firm on August 30, 2005. Your letter of September 14, 2005 to the City indicated that the production of records partially satisfied the request; however, you still had not received a written response or records regarding the remainder of your request from any other City department.

My staff attorney spoke with Mr. Ruff via telephone on September 20, 2005. Mr. Ruff asserted that the City provided you with a copy of the entire file for the property in question on August 30, 2005. He stated that all records regarding the property would be located in the Building Department's file and that the City does not have any other records that are responsive to your request. He felt that this had been communicated to you previously.

Mr. Ruff forwarded additional correspondence to this office via facsimile on September 20, 2005. Copies of the faxed documents are enclosed for your reference. Mr. Ruff included a September 19<sup>th</sup> letter addressed to him from Ernest Hagler of the Building Department, which included a brief summary of the correspondence regarding your request. Mr. Hagler explained that Mr. Lopez' August 24, 2005 correspondence to you was "regarding the approximate number of pages and related cost for the copying of the file in its entirety. He also stated that the Building Department was not aware that you would be sending someone to the office to pick up the documents on August 25, 2005.

## ANALYSIS

### *Timeliness of Response*

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). If a public agency receives a request for records via U.S. mail, facsimile, or e-mail, it has seven (7) days in which to respond. IC 5-14-3-9(b). For requests that are delivered in person, the agency must respond within twenty-four (24) hours. IC 5-14-3-9(a). A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in writing, the agency must respond to the request in writing. IC 5-14-3-9(c). A response may be an acknowledgment that the request for records was received, and a statement of how and when the public agency intends to comply. If the public agency fails to respond within the required timeframe, the request is deemed denied.

Your request was in writing and was hand-delivered to the City. Therefore, the City had a duty to respond, in writing, within twenty-four (24) hours of receipt of the request. The City responded by telephone on August 18<sup>th</sup> and 19<sup>th</sup>. However, as of the filing of your complaint on August 23, 2005 you had not received a written response to your request of August 17, 2005. The City's failure to provide a written response within 24 hours of receipt of your request is a violation of the APRA.

### *Reasonable Production Time*

The City was not required to provide you with the requested records within 24 hours. This office has frequently stated that a timely response to the request does not mean that the public agency must expressly decline to produce or produce the documents that are responsive to

the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. The response should include a timeframe for when the requestor could expect to receive the requested records or a denial from the agency.

The APRA does not specify a time for production or inspection of responsive records, but merely requires that records be produced within a reasonable time of the request. What constitutes a reasonable time will vary with the nature of the request and the office from which the records are requested. A public agency may regulate material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 5-14-3-7(a). The Building Inspections Department produced approximately 300 pages within one and one half weeks. The production time of one and one half weeks for such a large quantity of records would ordinarily be reasonable.

However, Mr. Lopez's letter seemed to state that the records would be copied on August 24, 2005. It appears that there was some miscommunication between the City and yourself regarding whether the records would be copied on August 25, 2005. Your request stated that you would like to copy or inspect the records. On August 24<sup>th</sup> at 10:00 a.m. Mr. Lopez informed you that the records would be *available* after 1:00 pm that day. He then indicated that a fee would be assessed and that you would need to contact the Building Department for a bill. As a fee may only be assessed for the actual cost of copying the records, it may be assumed that the copy fee is the fee to which Mr. Lopez referred. IC 5-14-3-8(d). The Building Department sent you a fax on that same day indicating that the cost for copying was \$0.10 per page and that there were approximately 330 pages, which would amount to a total cost of \$33.00.

When your clerk arrived on August 25<sup>th</sup> to pick up the copies Ms. Guzman informed him that she had not been told that you wanted the copies to be made and therefore had not yet made them. She promised to have them ready within two business days, which she did. Mr. Haglar explained in his September 19<sup>th</sup> letter that the copies were not ready on that date because the Building Department did not know that you intended to pick up the copies that day. Agencies often do not make copies until they receive confirmation that the requestor wants the copies at the established copy fee. The crux of the miscommunication appears to be Mr. Lopez's letter of the 24<sup>th</sup> that did not clearly communicate to you whether the records would be available for merely inspection or whether copies would be prepared.

While there was a miscommunication, it did not appear to be an intentional attempt to delay getting the records to you or to circumvent the requirements of the APRA. In fact, you received the records within two days of the date upon which they had been promised and within one and one half weeks of making your request.

#### *The Agency Should Inform the Requestor if it does not Maintain a Record*

As of September 14, 2005 you felt that your request remained unsatisfied as to records from the City Clerk and Health Department. I spoke with Mr. Ruff, corporation counsel for the City, on September 12, 2005. Mr. Ruff indicated that the requested records had been provided to you the previous week. On September 14<sup>th</sup> you inquired about the status of the remainder of

your request in a letter addressed to Mr. Ruff. My staff attorney spoke with Mr. Ruff on September 20, 2005. He stated that it had been communicated to you that the City did not maintain any records other than those received by you on August 30, 2005.

The City asserts that it has provided you with the complete file of all records that it maintains that are responsive to your request. If the City is not providing you with records that are named in your request because it does not maintain those records it should so state. It would be helpful to you and the City if the City had enclosed a cover letter, with the documents, stating that the City had reviewed your entire request, had located all responsive documents that it maintained from all departments, and no other records existed. In so stating, the requestor has a better understanding of how the agency had complied with the APRA.

#### CONCLUSION

For the foregoing reasons, I find that the City of East Chicago violated the Access to Public Records Act when it failed to respond in writing to your hand-delivered written request for records within 24 hours of receiving the request.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Nathaniel Ruff