



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

Karen Davis

PUBLIC ACCESS COUNSELOR

402 West Washington Street, Room W460
Indianapolis, IN 46204-2745
Telephone: (317) 233-9435
1-800-228-6013
FAX: (317) 233-3091
www.IN.gov/pac

September 30, 2005

Paulla Weinberg
WJOB Radio
6405 Olcott Avenue
Hammond, IN 46324

Re: Formal Complaint 05-FC-179; Alleged Violation of the Access to Public Records Act by the City of Hammond

Dear Ms. Weinberg:

This is in response to your formal complaint alleging that the City of Hammond ("City") violated the Access to Public Records Act ("APRA") by denying you access to public records.

BACKGROUND

On August 18, 2005 you requested a copy of a Uniform Property Acquisition offer to the Lake County Trust and Woodmar Country Club, dated October 19, 2005, from the City by completing the City's record request form. On August 19, 2005 Kristina Kantar, an attorney for the City, responded to your request. Ms. Kantar indicated that the record was not in the City of Hammond Law Department ("Law Department"). She stated that, since you indicated on the records request form that the department in which the record is located is "unknown," she would try to locate the document in other departments. She stated that if the record was located it would be produced. She estimated that she would have a response as to whether any other department maintained the record within seven (7) to ten (10) days. On August 29, 2005 you spoke with an unidentified employee who stated that the record "does not exist in City Hall." Ms. Kantar followed up on the matter with a letter to you on August 30, 2005. Ms. Kantar stated that the Law Department was not in possession of the requested record. She stated that she had attempted to obtain a copy from an outside attorney, but had not been successful in locating a copy. She also spoke to Corporation Counsel and he stated that he has never seen a copy of the letter. Ms. Kantar thanked you for your patience in this matter, but did not indicate whether she would make any further attempt to locate the record.

In your efforts to obtain the requested record, you provided the City with an e-mail between the Law Department and another person who had requested the same record in October 2004. The return e-mail from the Law Department on November 18, 2004 indicated that the requestor could pick up a copy of the Uniform Property Acquisition Offer for a charge of \$0.70, thereby indicating that the Law Department was in possession of the record you seek in November of 2004.

Equal Opportunity Employer

On September 7, 2005 Corporation Counsel William O'Connor responded to your formal complaint by letter. Mr. O'Connor indicated that upon performing an additional search of their records, it was discovered that the Law Department had forwarded a copy of the record by facsimile transmission on November 17, 2004. He stated that the initial failure to locate the document was an oversight because it was not prepared in that department. He stated that it was not located until the department conducted a comprehensive search of all public record requests for the past year. Mr. O'Connor indicated that he was prepared to forward a copy of that record to you at any time. Upon receiving a call from my staff attorney indicating that there was no need to wait for approval from this office to produce the record, the Law Department forwarded a copy of the November 17, 2004 fax to you. However, the second page of the facsimile copy that you received was partially obscured. As of September 19, 2005, when you spoke with my staff attorney, you had not been successful in your attempts to contact the City in order to obtain a complete copy of the record.

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." Ind. Code § 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." IC 5-14-3-1. The City is clearly a public agency for the purposes of the APRA. IC 5-14-3-2(1)(2). Accordingly, any person has the right to inspect and copy the public records of the City during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. IC 5-14-3-3(a). A public agency shall protect public records from loss, alteration, mutilation, or destruction, and regulate any 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 City was required to provide you with a copy of the requested record. It initially informed you that it did not maintain the record you seek. When you insisted that the agency must maintain the record and provided information showing that the agency did maintain the record in November 2004 the City was finally able to locate the requested record.

Generally, failure to produce a public record that does not exist and is not required to be maintained by an agency is not a denial under the Access to Public Records Act. *Opinion of the Public Access Counselor 01-FC-61*. However, if an agency is required to maintain a record, failure to provide a copy of it may be a violation of the Access to Public Records Act. IC 5-14-3-4(e)(1) states that public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention schedules under IC 5-15. If the record you seek is subject to a record retention schedule under IC 5-15, destroying the record except in accordance with a record retention schedule would be a violation IC 5-14-3-7(a).

IC 5-14-3-7(a) imposes a duty on public agencies to protect public records from loss, alteration, mutilation, or destruction. Hence, the City had a duty to conduct a diligent search for

the record, and to provide you a copy of it. Because the City did, in fact, have the record you requested, its denial of the record was a violation of the APRA.

Due to your persistence the City found the requested record. The City forwarded a copy of the record to you via facsimile. However, part of the second page of the record was obscured. You were unsuccessful in your attempts to contact the City to obtain the full second page. The City's failure to provide you with a complete copy of the requested record constitutes a denial of the request and is, therefore, a violation of the APRA.

Finally, I note that the City's public record request form requires the requestor to fill in a space indicating the "Department where record is located." You wrote "unknown, but signed by Attorney David Weigle." Ms. Kantar stated in her initial response to your request that the record was not available in the Law Department, but that she would attempt to locate the request in other City departments. On August 30th Ms. Kantar wrote that the Law Department was not in possession of the record, but did not indicate whether any other department in the City maintained the requested record. It is the City's responsibility to determine whether the City, as a whole, maintains the requested record. A public agency may not deny a request for a record simply because the department responsible for the request does not maintain the record. The City would be in a better position to know the location of its records than the requestor and may not place the burden on the requestor to inform it of the location of its records.

CONCLUSION

For the foregoing reasons, I find that the City of Hammond violated the Access to Public Records Act when it failed to produce a complete copy of a record that it maintained and is required to protect from loss.

Sincerely,

Karen Davis
Public Access Counselor

cc: William J. O'Connor