

September 23, 2005

Mr. Keith Karlson
748 Massachusetts Avenue
Indianapolis, IN 46204

Re: Formal Complaint 05-FC-186; Alleged Violation of the Access to Public Records Act by the City of New Albany

Dear Mr. Karlson:

This is in response to your formal complaint alleging that the City of New Albany (“City”) violated the Access to Public Records Act (“APRA”) by failing to respond to your request for records. I find that the City violated the Access to Public Records Act.

BACKGROUND

You filed your formal complaint with my office on September 16, 2005. You requested and met the criteria for priority status. Ind. Admin. Code tit. 62, r. 1-1-3. Hence, I am issuing this advisory opinion within 7 days of your complaint. You allege that the City failed to respond to your request for records on behalf of two firefighters whom you represent in proceedings before the City of New Albany. In a nutshell, you sought records pertaining to the disciplinary records and employment status of 76 named employees of the City of New Albany. You allege that you have not been given any response to the requests, which were sent to the City by mail and facsimile on August 12 and August 30.

I sent a copy of your complaint to the City. City Attorney Shane Gibson responded to the complaint. He enclosed a copy of a letter to you dated the same date as his complaint response, September 21. Mr. Gibson stated in his letter to you that certain records responsive to your APRA request were provided in the City’s response to your Request for Production of Documents, which was sent to you on September 20, 2005. The remainder of the documents will be available for inspection and copying at the City, at a mutually agreeable time, the letter states. In his letter to me, Mr. Gibson stated that the items requested that have not already been supplied will be available for your inspection, “subject to any HIPAA requirements...”

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). An agency that receives a request for records via U.S. Mail or via facsimile is required to respond within seven (7) days of receipt of the request. IC 5-14-3-9(b). A failure to respond within that timeframe is deemed a denial of access. If an agency denies a record that has been requested in writing, the agency is required to deny the request in writing, with citation to the exemption that applies to the record or records requested, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

From the City's response, it appears that the first response of the City to your request was the September 21 letter. This response was much later than seven days after it likely received your August 12 and August 30 requests, and hence was a denial of a record in violation of the APRA. Because you requested records that by the terms of your request are required to be disclosed pursuant to IC 5-14-3-4(b)(8), the City's belated response was more than just a failure to respond to an otherwise deniable request; the City could not have had a basis upon which to deny your request.

Although the City does not tender any excuse for failing to respond to your request, I note that any discovery obligations of the parties are independent of the City's obligation to respond to an APRA request. I also raise an issue that may arise as you inspect and seek copies of records of the City employees. The City has stated that its production of records may be impacted by HIPAA, and I cannot state outright that HIPAA or other federal law could never apply to these personnel-related records. Rather, I caution the City to ensure that if it denies medical information contained in these or other City records, it should be mindful that the federal Standards for Privacy of Individually Identifiable Health Information under the Health Insurance Portability and Accountability Act ("the Privacy Rule"), did not bestow confidentiality to all health information. *See* 45 CFR Parts 160 and 164. Rather, the Privacy Rule applies to only certain covered entities, as defined specifically in the Privacy Rule.

At the same time, the City should note that state law provides that medical records or charts created by a provider are confidential. IC 5-14-3-4(a)(9). Hence, under IC 5-14-3-9(c), the City must cite to the specific exemption that applies to any information that it seeks to deny to you.

CONCLUSION

For the foregoing reasons, I find that the City of New Albany violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Shane L. Gibson