

July 30, 2007

Michael Sylvester
625 Windrift Lane
Fort Wayne, Indiana 46845

Re: Formal Complaint 07-FC-187; Alleged Violation of the Access to Public Records Act by the City of Fort Wayne

Dear Mr. Sylvester:

This is in response to your formal complaint alleging the City of Fort Wayne (“City”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by failing to respond to your request for records. A copy of the City’s response to your complaint is enclosed for your reference. I find that while the City’s initial response to your requests was untimely, the City did not otherwise violate the APRA.

BACKGROUND

Your complaint alleges you filed five requests for access to public records on May 22, 2007. You did not include a copy of your requests, nor did you indicate how you made the requests (i.e. facsimile, mail, in person). You indicate you received an electronic mail message from Timothy Manges, City Attorney, on June 20 indicating you could have access to the records the following week. You filed your complaint on June 29, indicating you had not yet been granted access.

The City responded to your complaint on July 12, 2007. The City provided a copy of your five requests as well as a copy of the City’s letter to you dated July 3 and an email message exchange between you and Mr. Manges dated June 5. The City indicated it received one of your requests on May 22 and the other four requests on May 23. All were received by facsimile.

On June 5 you sent an email message to Mr. Manges inquiring on the status of your requests. Mr. Manges indicated he had now received the requests. The City sent an initial response to you on June 5, indicating it would respond to your request within a reasonable period of time and make all disclosable documents available to you. Also on June 5 you sent an email message to Mr. Manges indicating you would be out of the country until June 21. Because four

of your five requests were for inspection of records rather than copies of records, Mr. Manges sent you a message on June 20, knowing you would be returning soon. He indicated he would be out of the office that week but available for you to inspect any responsive records the middle of the following week (the week of June 25). There was no further communication between the two of you until June 29, when you sent the City a communication indicating your belief the City was engaged in a cover-up. You filed your complaint with this office the same day.

On June 29, Mr. Manges and you made an appointment to meet on July 5 so the City could provide a substantive response to your requests. Prior to that meeting date, though, the City responded in writing to your requests. The City's response to your requests was as follows:

1. Documents reflecting "The location and time of all board meetings of the Fort Wayne/Allen County Convention and Tourism Authority in 2007." The City indicated the Authority is not affiliated with the City, but Mr. Manges inquired with several sources seeking the information. He could not obtain a copy of the schedule, so the City had no responsive records. Mr. Manges provided you with the appropriate contact person to assist you in finding the information.
2. "All papers submitted to the State of Indiana to secure TIF and CRED funding for Harrison Square." No responsive documents have been created yet.
3. "All worksheets, notes, tabulations used to prepare documents submitted to Indiana to secure CRED or TIF funding for Harrison Square." No responsive documents have been created yet.
4. Documents reflecting "All Benchmarks set to measure the success of the Harrison Square Project." The City has no responsive documents but directed you to a document created by Crow Chizek dated March 21, 2007 posted on the City's website and previously furnished to you.
5. Documents reflecting "The projected hotel occupancy rate of the new downtown hotel over the life of the bonds." The City indicated the documents you request were provided by a private vendor and contain proprietary information, excepted from disclosure by Ind. Code 5-14-3-4(a)(4) and (5). The City did provide the specific information you requested in its response.

ANALYSIS

Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. IC 5-14-3-2.

The City is clearly a public agency for the purposes of the APRA. IC 5-14-3-2. 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 exempted from disclosure as confidential or otherwise nondisclosable under the APRA. IC 5-14-3-3(a).

The APRA contains a list of several public records that may not be disclosed by a public agency absent requirement by a state or federal statute or court order and a list of records that may be exempted from disclosure at the discretion of the public agency. IC 5-14-3-4. Records containing trade secrets fall into the first category, as do records containing confidential financial information obtained, upon request, from a person. IC 5-14-3-4(a)(4) and (5).

A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is delivered by mail or facsimile, the agency must respond to the request within seven days of receipt. IC 5-14-3-9(b).

A response can be an acknowledgement a request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to 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). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. IC 5-14-3-7(c). The public access counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material are necessary to determine whether the agency has produced records within a reasonable timeframe.

The City received one of your requests on May 22 and the other four on May 23. The first response from the City was dated June 5. While the content of the response was appropriate, the initial response was sent later than seven days after receipt of the requests and was therefore untimely under the APRA. The substantive response to your requests was ultimately made in a letter dated July 3.

When considering whether the production of records is within a reasonable period of time, the facts and circumstances must be considered. Here, the City had to research several of the items you requested. Further, while you requested access to inspect the records as listed on four of your requests, you were out of the country and unable to do so for half the month of June. Furthermore, Mr. Manges sent an email message to you on June 20 indicating the City would be able to grant you access the middle of the week of June 25. In his message, Mr. Manges did not indicate you should contact him for an appointment, nor did you follow up with him inquiring as to a specific time and date to view the records. This seems to me a miscommunication on both parts rather than a denial of access. Considering the foregoing facts and circumstances, I find the substantive response to your requests was within a reasonable period of time of your request.

You have not alleged any further violation of the APRA aside from a lack of response of the City.

CONCLUSION

For the foregoing reasons, I find that while the City's initial response to your requests was untimely, the City of Fort Wayne did not otherwise violate the Access to Public Records Act.

Best regards,

Heather Willis Neal
Public Access Counselor

cc: Timothy Manges, Fort Wayne City Attorney