

October 9, 2007

Gary Moody
778 Walnut Street #1
Franklin, Indiana 46131

Re: Formal Complaint 07-FC-267; Alleged Violation of the Access to Public Records Act by the Franklin Department of Planning and Economic Development

Dear Mr. Moody:

This is in response to your formal complaint alleging the City of Franklin Department of Planning and Economic Development (“Department”) violated the Access to Public Records Act (“APRA”) (Ind. Code §5-14-3) by denying you access to an audio recording of a public hearing. A copy of the Department’s response to your complaint is enclosed. I find the Department has not violated the APRA by failing to produce a record that does not exist.

BACKGROUND

In your complaint you allege that you requested from the Department on August 7, 2007 copies of several records including the audio recording and transcript of the Department’s July 9 public hearing. You further allege that you were told at some point after the request that the equipment malfunctioned the evening of the hearing so no recording was available. This was confirmed in writing via an electronic mail message dated September 6 from Joseph Csikos, Director of the Department. You indicate that contained in the records you received in response to your request was a transcript of the hearing and as such you conclude there must be a tape recording. You allege the Department is denying you access to the recording.

The Department responded to your complaint by letter from Mr. Csikos dated September 10. The Department contends the audio recording equipment being used to record the July 9 hearing malfunctioned, and so the hearing was not recorded. Upon discovery of this after the hearing, the Department telephoned representatives of the Indiana Office of Community and Rural Affairs (“IOCRA”) to inquire as to how to proceed since the grant application that was the subject of the hearing required a transcript of the hearing. The Department was told by the IOCRA the hearing should be documented to the best of the knowledge of Krista Linke, who was responsible for creating the minutes and who telephoned the IOCRA. Ms. Linke immediately

began to create minutes of the hearing. She then circulated the minutes to those in attendance to ensure accuracy.

You sent a letter to my office dated September 16 again alleging your belief that an audio recording exists, as you indicate you do not believe Ms. Linke could create such detailed minutes from memory.

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." I.C. §5-14-3-1. The Department is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

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. I.C. §5-14-3-2.

Here you requested a copy of the audio recording of the July 9 public hearing conducted by the Department. If an audio recording of the hearing existed, it would be subject to inspection and copying under the APRA so long as no exceptions to disclosure are present. I.C. §5-14-3-3 To the extent a recording does not exist even though you believe it does, the Department does not have an obligation to provide records that do not exist. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created.

Absent any evidence beyond your allegation that Ms. Linke could not provide such detailed minutes from memory, I find no reason to believe the Department does or ever did maintain an audio recording from the July 9 hearing.

CONCLUSION

For the foregoing reasons, I find that the Department has not violated the APRA by failing to produce a record that does not exist.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Joseph Csikos