



STATE OF INDIANA

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February 4, 2010

Ms. Susan H. Engelbrecht
1647 S. 200 W.
Greenfield, IN 46140

Re: Formal Complaint 10-FC-14; Alleged Violation of the Access to Public Records Act by the City of Greenfield

Dear Ms. Engelbrecht:

This advisory opinion is in response to your formal complaint alleging the City of Greenfield ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

According to your complaint, you have repeatedly sought documents from the City because you "cannot find them at the courthouse with the help of the people working in the Recorders [sic] Office." You seek "documents or laws that would give the City the right to occupy or use our land." The City has responded to you via letters, but those letters "give no explanation of the failure to pay for their use of our land." You also allege that a five dollar (\$5) per page fee that the City's attorney, Gregg Morelock, requested for copies is too high.

My office forwarded a copy of your complaint to the City. Mr. Morelock's response is enclosed for your reference. Mr. Morelock states that the City is not the custodian of records for Hancock County, the Hancock County Drainage Board, the Hancock County Surveyor's Office, or the Hancock County Commissioners. Mr. Morelock claims that most of the documents you have requested are maintained by these entities. As such, the City has referred you to them.

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. The City 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 City's public records 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).

Here, the City claims that the records you requested are maintained not by the City but by another public agency. If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy..."). Therefore, it is my opinion that the City has not violated the APRA with respect to denying your request for records that the City does not have.

I also note that the City is not obligated to create documents or to provide legal arguments in response to your questions. While the APRA obligates agencies to respond to requests for *records*, it does not obligate agencies to respond to general requests for *information*. See I.C. § 5-14-3-3(a)(1) (requiring that a request for inspection or copying must "identify with reasonable particularity the *record* being requested" (emphasis added)).

With regard to the responsive records that the City does maintain, you allege that the City has requested an excessive copy fee. The APRA permits a public agency to charge a fee for copying a record, but sets certain limits on the amount of the copying fee depending upon the type of public agency. See I.C. § 5-14-3-8. Normally, a charge of \$5 per page would be excessive for a public agency to charge an individual when the cost of copying cannot exceed the "actual cost of copying." *Id.* However, the APRA also provides that notwithstanding other provisions within section 8 of the APRA, a public agency shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court. I.C. § 5-14-3-8(f). Thus, where a specific statute other than the APRA provides a public agency with the authority to charge a fee that exceeds the "actual cost," the public agency may charge the statutory fee without violating the APRA. Here, I do not have sufficient information regarding the type of record subject to the fee or the statutory basis (if any) for the City's charging you that fee. If the City cannot cite to a statute that provides it with the authority for the \$5 fee, the City has charged you an excessive fee and, therefore, violated section 8 of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the City has not violated the APRA if it does not possess the records you seek. However, if the City cannot cite a

statute that provides it with the authority to charge you a \$5 per page copy fee, the City has violated section 8 of the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Gregg Morelock, Brand & Morelock