



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

January 12, 2011

Mr. Jim James
6105 Welsh Landing
Charlestown, IN 47111

Re: Formal Complaint 10-FC-315; Alleged Violation of the Access to Public Records Act by the City of Charlestown

Dear Mr. James:

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

BACKGROUND

According to your complaint, on October 21, 2010, you delivered a records request to the City seeking access to an interlocal agreement between the City and the Greater Clark County School Corporation. On October 25th, Clerk-Treasurer Nancy Rogers verbally denied your request because "the city attorney said 'it was still in the works' (or words to that effect)." On December 9th, you emailed a second request for the agreement, which was attached to the City's Resolution 2008-R-0. That resolution passed on September 8, 2008.

My office forwarded a copy of your complaints to the City. Mayor Bob Hall responded on behalf of the City. Mayor Hall states that the City sent you the agreement on January 5, 2011, following its January 3rd approval by the City. At the time of your original request, the document was not in its final form.

ANALYSIS

The public policy of the APRA states, "[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 City does not contest that it is a "public agency" under 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 nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Regarding the fact that the agreement was in draft form and unapproved, previous opinions from this office have viewed draft or incomplete records as disclosable public records under the APRA. See *Opinion of the Public Access Counselor 08-FC-54; 06-FC-124; 05-FC-142; 98-FC-4*. In one such case, Counselor Neal reasoned:

Here the Auditor may sustain the denial by providing the statutory authority exempting the record from disclosure. The record is not exempted from disclosure merely by the fact that it is a draft or incomplete record. The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request.

Opinion of the Public Access Counselor 08-FC-54. In her opinion, Counselor Neal concluded that an auditor could not deny access to a deed simply because the deed had not yet been recorded; the deed existed and was maintained by a public agency, so it should have been disclosed unless an exception to the APRA permitted or required the auditor to withhold it. *Id.* On the other hand, if an *initial* draft of a record is not yet complete (i.e., the draft is in the process of being created for the first time), an agency does not violate the APRA by withholding such a record. *Opinion of the Public Access Counselor 10-FC-56* (“Draft minutes that have not yet been approved are different than records that have not yet been created. Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”) Here, if the “draft” agreement was already created and in existence at the time you made your request, the City should have disclosed the record to you even if it was subject to revisions and had not yet been signed.

That said, it is my understanding that the City has now provided you with a copy of the agreement. I appreciate the City’s efforts to comply with the APRA and trust that this resolves your complaint.

CONCLUSION

For the foregoing reasons, it is my opinion that if the requested agreement existed at the time of your request, it should have been released to you even if it was in draft or unapproved form. The City has now disclosed the agreement and has otherwise complied with the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Hon. Bob Hall