



STATE OF INDIANA

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February 4, 2011

Ms. Christine Kraly
The Times

Via Electronic Mail: ckraly@nwitimes.com

*Re: Formal Complaint 11-FC-12; Alleged Violation of the Access to
Public Records Act by the City of Gary Law Department*

Dear Ms. Kraly:

This advisory opinion is in response to your formal complaint alleging the City of Gary Law Department ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-3 *et seq.*, by denying you access to public records. City Corporation Counsel Susan M. Severtson's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on September 29, 2010, *The Times* submitted a records request to Ms. Severtson via certified mail. The City received the request on October 4, 2010. After you received no response, you sent an email to Ms. Severtson inquiring about the status of your request. She responded by asking you to send the request again, which you did via email the same day. Two days later, Ms. Severtson responded to your email and informed you that she forwarded your request to the "appropriate parties."

After you did not receive records from the City, you sent Ms. Severtson emails on November 1st, November 9th, and November 16th. You also left voicemails for her on November 15th and November 16th. On November 16th, Ms. Severtson left you a voicemail message detailing some concerns that she had with your request. When you spoke with her on November 17th, Ms. Severtson informed you that the records you requested of the Law Department were privileged, and that "certain personnel were not available to fulfill the remainder of the large request." She asked you to limit the list of offices from which you sought records. You agreed to remove the Law Department and parks and recreation departments from your request, but maintained your request for access to the remaining departments. Ms. Severtson also informed you that City Mayor Rudy Clay does not conduct business via email, so you would not receive any records

from him. You stated that you still wanted records of Mayor Clay's office. You also asked Ms. Severtson to send you any additional responses or updates in writing.

On November 17th, you sent Ms. Severtson an amended request. You sent her emails regarding that request on December 1st, December 7th, December 21st, and December 27th, and left her a voicemail on December 20th and another message on December 22nd. As of January 3, 2011, you had not received any of the records you requested. Your November 17th request sought access to (1) the calendar and/or scheduled appointments for Mayor Rudy Clay, and (2) all correspondence (email messages and attachments as well as letters sent via facsimile or regular mail) sent to and from employees and administrators of the following departments: Mayor Clay's office, Genesis Center, Planning, Public Information, Common Council, and Community Development.

In response to your complaint, Ms. Severtson states that it is the City's position that "it is physically impossible and unduly burdensome, given the magnitude of Ms. Kraly's request, for reduced City staff to review and copy all such correspondence between the remaining departments of Planning, Public Information, and Community Development and the Mayor." She argues that eighteen months of email communication and written correspondence between five departments and several employees per department is "an unmanageable task," because each email would need to be reviewed in order to determine whether or not it contained privileged information. She states that she asked you to tailor your request to specific issues or recipients and/or senders so as to reduce the scope of the project, but you were unable to do so. Ms. Severtson also states that the City does not have access to the emails or correspondence of the Common Council, so you will need to direct a request to it rather than the City in order to inspect or copy its emails. Finally, Ms. Severtson argues that Mayor Clay's calendar is not subject to disclosure because "it may contain personal information about him and his family members, as well as their personal appointments, and his personal notes."

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 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).

A request for records may be oral or written. I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. § 5-14-3-9(a). A response from the public agency could be

an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Thus, if the City failed to respond to your mailed request within seven days of receiving it, the APRA deems your request denied. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). The City has not cited to any provision in the APRA or any other applicable law that permits the City to withhold the records you requested. Consequently, the City's failure to deny your request in accordance with subsection 9(c) violated the APRA.

With regard to the substance of your request, Ms. Severtson states that the City denied it because it would be "physically impossible unduly burdensome" to comply with it. While I sympathize with reduced budgets and increased workloads of various public agencies, the APRA does not permit an agency to deny a request merely because it would be "unduly burdensome" to comply with it. The APRA requires public agencies to release responsive records within a reasonable amount of time, considering all of the relevant facts and circumstances. Considering factors such as 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 is necessary to determine whether the agency has produced records within a reasonable timeframe. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. § 5-14-3-7(a). In other words, a public agency need not -- and must not -- cease or neglect its essential functions to comply with records requests. However, section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act, so a public agency cannot simply ignore requests because they seek access to voluminous documents. I.C. § 5-14-3-7(c).

That said, there is a question as to whether or not your request is reasonably particular under the APRA, which requires a request for inspection or copying to "(1) identify with reasonable particularity the record being requested...." I.C. § 5-14-3-3(a). Counselor Neal analyzed this issue under similar circumstances in a 2009 opinion:

With your request, you seek "all emails sent and received by you in the last 100 days." The County argues this request does not identify with reasonable particularity the record(s) being requested. The APRA requires that a request for access to records identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). "Reasonable particularity" is not defined in the APRA. "When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. Ct. App. 1991). "Particularity" as used in the APRA is defined as "the quality or

state of being particular as distinguished from universal.” *Merriam-Webster Online*, www.m-w.com, accessed July 18, 2007.

In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain form of communication. It is important to remember that electronic mail is a method of communication and not a type of record. Electronic mail is one way an agency might receive correspondence. As Mr. Murrell indicates, and as I often advise people, electronic mail messages are similar to snail mail or facsimile transmissions. And certainly few individuals would disagree that a request for any piece of mail sent or received by an agency or official within the last one hundred days would be considered an overly broad request which does not identify with reasonable particularity the record being requested. The same is true for electronic mail messages. That the correspondence is communicated using a different medium does not change the scenario; in my opinion a request which identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits.

I have previously issued an advisory opinion in a similar matter regarding a request for access to electronic mail messages. In *Informal Opinion 08-INF-23*, I wrote the following:

If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure. *Informal Opinion 08-INF-23*, available at www.in.gov/pac.

Similarly, it is my opinion here that your request is overly broad. If your request identified particular records in such a way that the agency could identify which records you seek, the agency could better address your request. For instance, you might narrow your request to messages between a county official and certain other individual(s) for certain dates. In some cases, an agency may also be able to sort messages on the basis of the subject of the email. But this type of search is only as good as the information which appears in the “Subject” line of each electronic mail and is only feasible where an agency has the technology to conduct a search other than a manual search.

Op. of the Public Access Counselor 09-FC-124. I agree with Counselor Neal’s reasoning. As such, it is my opinion that your request was not reasonably particular because it sought access to an entire classification of records from multiple City agencies. If, however, you could narrow your request by sending/receiving individual instead of sending/receiving agency, the City should comply with the request unless an exception to the APRA permits or requires withholding the responsive records.

As to your request for Mayor Clay’s calendar, I agree with Ms. Severtson that such a record is exempt from disclosure under the APRA’s exception for “personal notes” found at Ind. Code § 5-14-3-4(b)(7); *see also Op. of the Public Access Counselor 01-FC-42* (calendar of Indiana Department of Environmental Management employee was

exempt from disclosure under subsection 4(b)(7) as a personal note because it contained personal notes and was shared with only a select few individuals).

Finally, with regard to the records held by the Common Council, the City did not violate the APRA by denying your request for those records if the City does not maintain them. However, if the City received emails from the Common Council that the City maintains that are responsive to your request, the City should disclose those unless an exception to the APRA applies.

CONCLUSION

For the foregoing reasons, it is my opinion that the City violated the APRA by failing to respond to your request in accordance with section 9 of the APRA. However, the City has not otherwise violated the APRA because it is my opinion that the substance of your request was not reasonably particular. Upon receipt of a more reasonably particular request, the City should release all non-exempt, responsive records to you within a reasonable amount of time.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: Susan Severtson