



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR

JOSEPH B. HOAGE

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

August 16, 2011

Ms. Sue M. Gooding
11 Stone Camp Trail
Winona Lake, Indiana 46590

*Re: Formal Complaint 11-FC-177; Alleged Violation of the Open Door Law
by the Town of Winona Lake*

Dear Ms. Gooding:

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

BACKGROUND

In your complaint, you allege that as Town Council President you have repeatedly requested an accounting of the Town's donation fund, including a list of the individual donors. You further allege that in response to your request, the Town Clerk-Treasurer has stated that the information is not any of your business and that the Clerk is not aware who made the donations. You are of the belief that the Clerk-Treasurer does have knowledge of the identities of the donors and you would like that information for the past five years.

In response to your complaint, the Town has advised that a complete accounting of the Town's donation fund was provided to all members of the Town Council, including yourself, two weeks prior to the date you filed your complaint with the Office of the Public Access Counselor. The accounting contains names, dates, and dollar amounts for the time period that you had requested. In regards to the "Resident Donations" listed on the records, the Town had provided that they reference the marriage ceremonies performed by the Clerk. The Clerk has elected to donate the fees received for performing the ceremonies to the Town and no record was kept of the names of the individuals who were married. The Town argues that whether it should have recorded the names is not a question of public access, but one for the State Board of Accounts, who has provided that it had no concern regarding the Town's practices in this area.

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

A request for records may be oral or written. *See* 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. *See* I.C. § 5-14-3-9(b). 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 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. *See* I.C. § 5-14-3-9(c). 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. Here, there is a factual dispute as to whether the Town provided records in response to your request. In your complaint, you allege that the Town never provided any records responsive to your request, even after multiple requests. The Town has provided an accounting of the donation fund, including the names, dates, and dollar amounts for the past five (5) years, has been provided to you.

The public access counselor has repeatedly provided that it is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. If the Office failed to respond to your request for records, it acted contrary to section 9 of the APRA. On the other hand, if the Office provided records responsive to your request, then the Town has fulfilled its obligations under the APRA. I have enclosed a copy of the records that the Town has provided to this Office in response to your request. I trust that they are in satisfaction of your complaint.

I would note for all parties involved that the APRA permits public agencies to withhold the “identity of a donor of a gift made to a public agency if: (A) the donor requires nondisclosure of the donor’s identity as a condition of making the gift; or (B) after the gift is made, the donor or a member of the donor’s family requests nondisclosure.” *See* I.C. § 5-14-3-4(b)(15). Further, 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....”). The

APRA does not require a public agency to create a new record in order to satisfy a public records request. *Opinion of the Public Access Counselor 10-FC-56.*

CONCLUSION

For the foregoing reasons, it is my opinion that if the Town failed to respond to your request, it violated the APRA. If, however, the Town provided all records responsive to your request, the Town did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Sue A. Beesley