



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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September 1, 2011

Mr. Chris J. Breedlove
421 W. 8th Street
Jasper, Indiana 47546

Re: Formal Complaint 11-FC-221; Alleged Violation of the Access to Public Records Act by the Jasper Clerk-Treasurer

Dear Mr. Breedlove:

This advisory opinion is in response to your formal complaint alleging the Jasper Clerk-Treasurer ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Sandra Hemmerlein, City Attorney, responded on behalf of the Clerk. Her response is enclosed for your reference.

BACKGROUND

In your complaint you allege that on Friday, August 26, 2011 you personally presented to the Clerk a written request for a copy of an August 2011 public records request form that you had submitted to the Clerk. You further allege that the Clerk failed to provide you with any records responsive to your request or provide any explanation as to why the request was not fulfilled. You maintain that the record you had requested was physically in the possession of the receptionist and Juanita Boehm on August 26, 2011 and that neither party allowed a copy to be made with the Clerk's copy machine or your digital camera.

In response to your formal complaint, the Clerk confirmed that it received your written records request on Friday, August 26, 2011. The Clerk advised that upon receiving your request, Ms. Boehm orally acknowledged its receipt and provided that you would be contacted when the record was available. In light of the continued litigation between yourself and the City of Jasper, the City has instructed its employees that any public records requests related to litigation or made by those who are in litigation with the City, be reviewed by legal counsel before the record is provided. Ms. Hemmerlein has spoken with your attorney and all parties had agreed that any records requested should be made between the attorneys. The Clerk provided that on Monday, August 29, 2011, you were informed via e-mail and voicemail that copies of the requested records were available for pick up.

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 Clerk 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 Clerk’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 in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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, the parties differ as to how and whether the Clerk responded to your records request. You maintain that the Clerk failed to provide any explanation as to why the record was not provided on August 26, 2011. The Clerk provided that is verbally informed you on August 26, 2011 that it had received your request and you would be contacted when the record was available. On Monday, August 29, 2011, the Clerk advised that it informed you via e-mail and voicemail that the record was now available for pick up.

The public access counselor 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 Clerk failed to respond to your records request, then it acted contrary of the APRA. However, if the Clerk orally responded to your request the day it was received, and followed up with an e-mail and voicemail the following business day notifying you that the record was available, then the Clerk fulfilled its obligations under the APRA.

I would note for any future record requests that you make of the Clerk, that the APRA *requires* public agencies to review records that have been requested and thereafter separate and/or redact confidential information before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a) (emphasis added). Further, nothing in the APRA indicates that an agency’s failure to provide a requester with “instant access” equates to a denial of access or a violation under the law. *See Opinions of the Public Access Counselor 02-FC-09, 09-FC-192, and 10-FC-121*.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Clerk failed to respond to your request, then it acted contrary of the APRA. If, however, the Clerk responded to you on the day of the request and thereafter on the next business day, then it 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: Sandra Hemmerlein