



STATE OF INDIANA

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November 9, 2011

Daniel N. Fagen
2240 Hart Street
Dyer, Indiana 46311

Re: Formal Complaint 11-FC-281; Alleged Violation of the Access to Public Records Act by the Dyer Clerk-Treasurer's Office

Dear Mr. Fagen:

This advisory opinion is in response to your formal complaint alleging the Dyer Clerk-Treasurer's Office ("Clerk") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Patricia Hawrot, Clerk-Treasurer, responded to your formal complaint. Her response is enclosed for your reference. I have granted your request for priority status pursuant to 62 Indiana Administrative Code 1-1-3(3).

BACKGROUND

In your formal complaint, you allege that on October 24, 2011, you requested an audio copy of the October Dyer Town Council meeting from the Clerk. You provide that the Clerk's responded to your request and informed you that it would not be providing you with a copy of the tape. On October 28, 2011, you appeared in person at the Clerk's office and requested a copy of the tape and brought with you a blank audio cassette. The Clerk contacted you after receiving your second request and advised that it did not have the capability to reproduce the tape. Disagreement followed regarding whether the Clerk had the capability to reproduce the recording, at which time you allege the Clerk stated she did not have the time to make a copy. You then offered to instruct her on how to make a recording of the tape from the equipment the Clerk had on hand, to which you provide the Clerk agreed to have a copy of the tape to you on Monday, October 31, 2011.

On October 31, 2011, the Clerk provided that she was not going to provide you with a copy of the tape after receiving guidance from the Public Access Counselor's Office. You believe that the Clerk was not truthful with the information that it provided to the Public Access Counselor. The Clerk then offered you the opportunity to come in during the Clerk's business hours to listen to the record or wait until the Clerk finished the minutes. You found this to be unacceptable and believe that the Clerk has acted

unreasonably in the time to finish the minutes from the October Town Council meeting and in providing you a copy of the tape.

In response to your formal complaint, the Ms. Hawrot provided that you filed a public record request on October 24, 2011 for an “audio recording of October 2011 council meeting.” The Clerk responded to your request within 24 hours and provided that the Town did not have the ability to duplicate audio tapes, but that Mr. Fagan could bring in a tape and recording device to copy the tape. On October 28, 2011, the Clerk received your second request, to which it responded in writing within 24 hours. The Clerk again advised that it did not have the ability to copy the tape and that draft minutes and final approved meeting minutes would be provided to you upon completion. The Clerk contacted the Public Access Counselor’s Office on October 28, 2011, to which the Office responded in writing with guidance on October 28, 2011.

Neither the Clerk nor the Town has a machine capable of duplicating an audio cassette. The picture of the equipment that was submitted with your formal complaint was of a machine that records the public meetings. To the best of Ms. Hawrot’s knowledge, the machine is not capable of making copies, which she confirmed with the Town’s IT Director. The Clerk provided you an opportunity to inspect and manually transcribe the record or alternatively to copy the tape with your own recording equipment, to which you declined.

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). 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, the Clerk responded to your requests within the timelines provided by the APRA.

Indiana law provides the following regarding copies of public records:

(e) If:

(1) a person is entitled to a copy of a public record under this chapter;

and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 [IC 5-14-3-3.5] of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance. I.C. § 5-14-3-8(e); *See Opinions of the Public Access Counselor 10-FC-101 and 10-FC-102.*

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.* There is no dispute that the Clerk offered you the opportunity to inspect and manually transcribe the audio tape during the business hours of the office, to which you declined. Accordingly, if the Clerk had reasonable access to a machine capable of reproducing the record and failed to provide an audio copy, it acted contrary to the APRA. However, if the Clerk did not have reasonable access to such equipment, then it did not violate APRA, when it allowed you the opportunity to inspect and manually transcribe the tape during the normal business hours of the office.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. 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. The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45.*

The APRA *requires* public agencies to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). (emphasis added). A public agency shall “regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees.” *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public

Records Act. See I.C. § 5-14-3-7(c); See also *Opinion of the Public Access Counselor 09-FC-115* (two months was not an unreasonable production time where agency director and records request handler recently assumed the duties of another position and needed time to review and redact confidential information); see also *Opinion of the Public Access Counselor 11-FC-222* (thirteen days was not an unreasonable amount of time to respond to the request when the School maintained communication with the requestor and established that it took action on the request outside of the normal hours of operation.). Here, the Clerk offered you the opportunity to inspect and manually transcribe the audio tape within a week of receiving your request after advising that it did not have reasonable access to a machine capable of reproducing the tape. You were invited to come to the Clerk's office during normal business hours, to which you declined. Alternatively, you were given the opportunity to make a reproduction of the audio tape with your own equipment. As such, it is my opinion the Clerk responded to your request within a reasonable period of time by pursuant to the APRA.

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...”). Draft or incomplete records are considered to be disclosable public records under the APRA. See *Opinions of the Public Access Counselor 08-FC-54; 06-FC-124; 10-FC-315*. The Clerk has provided that it has yet to commence creating the minutes of the October Dyer Town Council meeting from the audio recordings. Upon completion of the minutes, the Clerk has advised that a copy of the draft minutes and final approved minutes will be provided to you.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Clerk had reasonable access to a machine capable of reproducing the audio recording of the meeting and failed to provide you with a copy, it acted contrary to the APRA. However, if the Clerk did not have reasonable access to such equipment, then it did not violate the APRA when it provided you the opportunity to inspect and manually transcribe the recording during the Clerk's normal business hours. As to all other issues, it is my opinion that the Clerk did not act contrary to 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 long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Pat Hawrot