



STATE OF INDIANA

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January 25, 2012

Aaron J. Smith
2625 Countryside Drive
Lebanon, Indiana 46052

Re: Formal Complaint 12-FC-19; Alleged Violation of the Access to Public Records Act by the Indiana State Fire Marshall/Indiana Department of Homeland Security Fire and Building Safety Division

Dear Mr. Smith:

This advisory opinion is in response to your formal complaint alleging the Indiana State Fire Marshall/Indiana Department of Homeland Security Fire and Building Safety Division ("Fire Marshall") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Mara Snyder, Director of Legal and Code Services, responded on behalf of the Fire Marshall. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on January 4, 2012 you hand-delivered a written request to the Fire Marshall to inspect the public records used to establish the new 3,000 person occupancy limit for the Indiana Statehouse ("Statehouse") and the most recent Life Safety Evaluation Report for the Statehouse. On January 4, 2012, Mara Snyder responded in writing to your request, acknowledged its receipt, and provided that the Fire Marshall would respond to your request as quickly as possible. You further allege the Fire Marshall violated the APRA by not providing in its initial response either an estimated date of production, advise that the request was denied, or indicate that there were no records responsive to your request.

In response to your formal complaint, Ms. Snyder advised that there are no documents that the Fire Marshall used to establish the 3,000 person occupancy limit for the Indiana Statehouse. In comments to the media and the public, the Fire Marshall has stated he utilized a concept of a complying exit from the 2008 Indiana Building Code, together with measurements of the spaces in question. The Fire Marshall intends to formulate in writing the method used to arrive at the occupancy load for you. He has been delayed in providing this information due to the myriad of deadlines associated with public safety issues related to the Super Bowl. As to your request for the Life Safety

Evaluation Report, under Indiana law a “life safety evaluation report” is not required to be created for the Statehouse. Thus, there are no records that are responsive to your request.

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 Fire Marshall 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 Fire Marshall 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 twenty-four 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 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. The APRA does not require that an agency provide in its initial response to a records request either an estimated date of production, advise the request is denied, or indicate that there are no records responsive to the request. Ms. Snyder, on behalf of the Fire Marshall, acknowledged receipt of your request within the timeframes proscribed by section 9 of the APRA and provided that the Fire Marshall would respond to your request as quickly as possible.

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 APRA requires an agency 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). 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. *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). The ultimate



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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.*

You submitted your request to inspect various records of the Fire Marshall on January 4, 2012. On the same date, Ms. Snyder responded to your request in writing, acknowledged its receipt, and advised that the Fire Marshall would respond as quickly as possible. You filed your formal complaint with the Public Access Counselor's Office on January 6, 2012. The APRA requires that the agency must respond to the request within the timelines provided by section 9 of the APRA and advise how and when the agency plans to respond. Here the Fire Marshall acknowledged receipt of your request and provided that it would respond to your request as quickly as possible. As you filed your formal complaint with the Public Access Counselor's Office two days after your initial request of the Fire Marshall, it is my opinion that the Fire Marshall did not violate the APRA by failing to provide all records for your inspection in a two-day time period. Nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

Generally, 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..."). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56.* Here, the Fire Marshall provided that there were no documents used to calculate the occupancy load for the Statehouse. However, the Fire Marshall would formulate in writing the method he used to arrive at the occupancy load for the building in response to your request. Further, the Fire Marshall advised that it did not have any records responsive to your request for the Life Safety Evaluation Report for the Statehouse. Accordingly, the Fire Marshall did not violate the APRA by failing to provide records that it does not maintain.

CONCLUSION

For the foregoing reasons, it is my opinion that the Fire Marshall 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: Mara Snyder