



STATE OF INDIANA

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April 2, 2013

Ms. Nancy Garbrecht
6170 Joilet Road Suite 200
Countryside, Illinois 60525

Re: Formal Complaint 13-FC-100; Alleged Violation of the Access to Public Records Act by the City of Michigan City

Dear Ms. Garbrecht:

This advisory opinion is in response to your formal complaint alleging the City of Michigan City ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Dr. Angela Jackson responded in writing on behalf of the City. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on February 15, 2013, you submitted a written request for records to the City. Dr. Angela Jackson, Executive Director, responded in writing to your request on the date of its receipt and requested a deadline of March 8, 2013 to further investigate the request with legal counsel. On March 5, 2013, you received an email from Ms. Amber L. Lapaich, City Attorney, who advised that she just returned from vacation and would be assisting Dr. Jackson in reviewing the requested records. Ms. Lapaich advised that the City would need an additional extension and that the information would be provided in a reasonable period of time. As of March 26, 2013, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive any records from the City.

In response to your formal complaint, Dr. Jackson advised that the City acknowledged in writing the receipt of your request on the day in which it was received. Dr. Jackson informed you at that time that she needed to consult with the City's attorney regarding the request and anticipated providing a response by March 8. If that deadline could not be met, Dr. Jackson provided that would be in contact. Ms. Lapaich was out of the office on vacation from February 18, 2013 through March 4, 2013. Upon returning from vacation, Dr. Jackson requested Ms. Lapaich's assistance with your request. On March 5, 2013, Ms. Lapaich informed you that due to her vacation, the City would not be able to comply with the deadline of March 8, 2013. On March 27, 2013, the City provided all records that were responsive to your request. In addition, Dr. Jackson noted

that her assistant director had recently resigned, which presented another obstacle in attempting to retrieve and review all records responsive to your request and maintaining the normal duties of her office.

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 City 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 City’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). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here you submitted your written request on February 15, 2013 to which the City responded in writing on the same date. Accordingly, it is my opinion that the City complied with the requirements of section 9(b) of the APRA by acknowledging your request in writing within seven (7) days of receipt.

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. 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 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*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further 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*.

Your original request was submitted on February 15, 2013, to which the City acknowledged the receipt of your request on the same date. Your request sought the following records concerning the Selge Construction Company and the US Highways 35/20 Water Main Extension Project:

1. A copy of the Michigan City Local Hiring Agreement;
2. A copy of the Affirmative Action and Equal Employment Opportunity Policy Statement;
3. A copy of the notice of Non-Discrimination in Employment Form;
4. A copy of any and all certified payrolls submitted by contractors and/or subcontractors performing work on the project. If certified payrolls have not been certified, please provide a statement to that effect in your response;
5. A copy of the MBE/WBE Michigan City requirement concerning the above mentioned project.
6. A copy of all documentation pertaining to Michigan City's Local Hiring ordinance contractor monitoring monthly summary reports concerning:
 - a. The total wages paid and total percentage to Michigan City residents;
 - b. The Total wages paid and total percentage of such wages comprised of MBE & WBE and the amount contributed toward the contractor's goal.

The City's initial response asked for a deadline of March 8, 2013 to further investigate your request and review with local counsel. The APRA does not provide that a public agency must first negotiate a deadline for production prior to the agency gathering and reviewing all records that would be responsive to the request. As provided *supra*, the APRA requires that all records be provided in a reasonable period of time. On February 22, 2013, Mr. Rick Whitlow, Assistant Director of the City's Human Rights Department, contacted you via email and advised that the City's Human Rights Department was in the process of working to provide you with the requested information. On March 5, 2013, Ms. Lapaich contacted you via email and advised that she recently returned from vacation and was assisting Dr. Jackson in reviewing the information that was requested. Ms. Lapaich advised that the original deadline of March 8, 2013 could not be met. Ultimately, all records responsive to your request were provided on March 27, 2013. In light of the fact that all records have now been provided in response to your request, the City's compliance with section 9(b) of the APRA, its efforts to maintain communication with you throughout the pendency of your request, and the effect that Ms. Lapaich's vacation and Mr. Whitlow's resignation had on the City's ability to retrieve and review all records that were responsive, it is my opinion that the City complied with section 3(b) of the APRA in providing all records responsive to your request in a reasonable period of time.

CONCLUSION

For the foregoing reasons, it is my opinion that the City complied with the requirements of section 9(b) of the APRA in responding to your request within seven (7) days of its receipt. It is my opinion that City complied with the requirements of section 3(b) of the APRA in providing all records responsive to your request in a reasonable period of time.

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: Dr. Angela Jackson