



STATE OF INDIANA

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May 31, 2013

Mr. Charles J. Davis, Sr.
DOC 930610
P.O. Box 1111
Carlisle, Indiana 47838

Re: Formal Complaint 13-FC-140; Alleged Violation of the Access to Public Records Act by Edinburgh Town Council

Dear Mr. Davis:

This advisory opinion is in response to your formal complaint alleging the Edinburgh Town Council ("Council") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Dustin D. Huddleston, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on April 22, 2013, you submitted two written requests for records to the Council. As of May 7, 2013, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive any response from the Council to your request.

In response to your formal complaint, Mr. Huddleston advised that the Council received your written requests sometime after April 22, 2013. One of the requests submitted was virtually identical to a request that you had previously submitted in February 2013, to which the Council had already responded in writing and informed you that it did not maintain any records responsive to the request. A clerical issue was made regarding the second request that was submitted in April. Immediately upon being made aware of the oversight, the Council commenced the process of gathering records responsive to the request. Mr. Huddleston provided that all records will be sent to you within the next seven (7) days.

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 Council 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 Council’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). 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 your written requests for records were received by the Council sometime after April 22, 2103. Due to a clerical error, the Council failed to acknowledge in writing the receipt of the requests within seven (7) days of receipt. Accordingly, it is my opinion that the Council acted contrary to the requirements of section 9(b) of the APRA by not acknowledging your requests in writing within seven (7) days of receipt. However, it is clear from the Council’s response that the failure to comply with section 9(b) was not intentional, as the Council is working diligently to provide all records responsive to your request. All of which I trust is in satisfaction of your formal complaint.

“[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. As to one of the requests that were submitted, the Council had previously denied a virtually identical request on the basis that the Council did not maintain records responsive to the request. It is my opinion that the Council would not violate the APRA by failing to produce records that do not exist.

CONCLUSION

For the foregoing reasons, it is my opinion that the Council acted contrary to the requirements of section 9(b) of the APRA by failing to acknowledge the receipt of your requests within seven (7) days of receipt. The Council has now rectified the clerical error and commenced the process of gathering and reviewing all records that would be responsive to your request, which I trust is in satisfaction of your formal complaint. Further, it is my opinion that the Council would not violate the APRA by failing to produce records that do not exist.

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: Dustin D. Huddleston