



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

February 28, 2013

Mr. Donald Ray
P.O. Box 2101
Bridgeview, Illinois 60455

Re: Formal Complaint 13-FC-55; Alleged Violation of the Access to Public Records Act by the Town of Schneider

Dear Mr. Ray:

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

BACKGROUND

In your formal complaint you provide that on October 3, 2012, you hand-delivered a notarized request for records to the Town. You believe that you made two trips to the Town Hall in order to successfully deliver the request as there initially was a note on the door stating that the staff was attending classes. You have never received a response from the Town to this request. Thereafter, on February 6, 2013 you resubmitted your request to the Town. As of February 15, 2013, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive any response from the Town. You further allege that you have previously submitted to the Town a written request for records in September 2011, which you allege was ignored.

In response to your formal complaint, Ms. Beier advised that the Town never received your notarized request for records on October 3, 2012. As to your February 6, 2013 request, Ms. Beier provided that you made a verbal request for insurance information. Ms. Beier orally denied your request unless the request was submitted to Mr. Psimos, the Town's attorney. You then allegedly informed Ms. Beier that Mr. Psimos was incompetent. Ms. Beier provided that Mr. Psimos had informed her that you had been instructed to submit all records requests directly to Mr. Psimos. Ms. Beier has been informed by the State Board of Account and the town's insurer that her actions were proper. As to your request that was allegedly submitted on October 3, 2012, there is a conflict as the request seeks information from the Town's liability carrier on September 6, 2012, but that case referenced is from a different year.

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 Town 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 Town’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).

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the counselor must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. Your initial request for records was submitted to the Town in September 2011; thereafter you submitted an additional request in October 2012. You provide that the Town responded to your September 2011 request in writing and advised the records requested would be provided by the Lake County Prosecutor. As to your October 2012 request, you provide that the Town never responded in any fashion. Your formal complaint was not filed with our office until February 15, 2013. Therefore, you would have standing to file a formal complaint only in regards to your February 6, 2013 request. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your formal complaint addressing your September 2011 and October 2012 requests will be addressed as an informal inquiry. *See* I.C. § 5-14-4-10(5).

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 orally, the request is deemed denied if the agency fails to respond within twenty-four hours of its receipt. *See* I.C. § 5-14-3-9(a)(2). 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 information regarding how or when the agency intends to comply.

As to your written request that was submitted in September of 2011, the Town’s attorney responded in writing to your request and advised that the records you sought would be provided by the Lake County Prosecutor. 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*. To the extent that you requested records that were not maintained by the

Town, the Town would not violate the APRA by failing to produce a record that it did not maintain.

As to your October 3, 2012 request, the Town advised that it has no record of receiving your request. As previous Public Access Counselor's have provided, the Public Access Counselor is not a finder of fact. *See Opinion of the Public Access Counselor 10-FC-15*. Consequently, I express no opinion as to whether or not the Town received your request. Under the APRA, if a 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)*. A public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (B) the name and the title or position of the person responsible for the denial. *See I.C. §5-14-3-9(c)*. If the Town received your request and did not respond to it within these timeframes, the Town acted contrary to the APRA. However, if the Town did not receive your request, it was not obligated to respond to it.

As noted *supra*, the Public Access Counselor is not a finder of fact. You allege that you submitted a hand-delivered written request to the Town on February 6, 2013. The Town advised that you appeared at Town Hall on February 6, 2013 and made an oral request. Thus, I will address both scenarios that have been presented. If you made an oral request of the Town on February 6, 2013, the Town would have complied with the requirements of section 9(c) of the APRA by denying your request orally on the date of its receipt. From the Town's version of the events, your oral request was orally denied by Ms. Beier on February 6, 2013. Under such facts, the Town would not have violated the APRA in response to your request.

Alternatively, if you hand-delivered a written request then Town would have been required to respond in writing within twenty-four hours and at a minimum, acknowledge the receipt of your request. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63; 13-FC-05*. Thereafter, if the Town was to deny your request, the APRA provides that 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)*. If the Town received your request in writing and it responded to the request by orally denying it, it is my opinion it violated section 9 of the APRA.

CONCLUSION

Based on the foregoing reasons, it is my opinion that if you made an oral request for records of the Town on February 6, 2013, the Town did not violate the APRA by issuing an oral denial on the date of receipt. Alternatively, if you hand-delivered a written request for records and the Town orally denied your request, it is my opinion that the Town violated section 9(c) of the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Jenny Beier