



STATE OF INDIANA

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April 1, 2011

Mr. John E. Phifer
305 S. John St., P.O. Box 43
Atlanta, IN 46031

Re: Formal Complaint 11-FC-63; Alleged Violations of the Access to Public Records Act by the Town of Atlanta Clerk-Treasurer

Dear Mr. Phifer:

This advisory opinion is in response to your formal complaint alleging the Town of Atlanta Clerk-Treasurer ("Clerk-Treasurer") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Clerk-Treasurer's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege¹ that you hand-delivered a request to the Clerk-Treasurer on January 25, 2011. Your request enumerated 10 types of records for which you sought access. In response, the Clerk-Treasurer sent you an email the next day stating that she accidentally shredded the request and wanted another copy. You submitted a second copy on January 26, 2011, also via hand-delivery. The Clerk-Treasurer responded to your request on February 1st. You submitted this complaint alleging that her response was not satisfactory and contrary to the APRA.

In response, the Clerk-Treasurer states that she initially responded to your complaint on January 26th via a letter separate from her January 26th email in which she asked for an additional copy of your January 25th request. In that letter, she acknowledged receipt of your request and informed you that the workload of the office was extremely heavy due to several annual reports coming due and the town council's express desire to limit a Clerk-Treasurer's staff member's hours. She also cited to computer issues related to a police department investigation that corrupted many of her electronic records and required the reinstallation of programs and recreation of records.

¹ Some of the allegations in your complaint concern events that occurred more than 30 days prior to February 25, 2011, which is the date you filed your formal complaint. Due to the time limits for filing a complaint with this office, this opinion will be limited to alleged denials of access that occurred within 30 days of that date. See I.C. § 5-14-5-7.

She stated that her office would “work diligently to accommodate your request” and that you were “more than welcome to peruse archived information yourself.”

With regard to your specific requests and the Clerk-Treasurer’s responses to each, I will address each in turn herein.

ANALYSIS

The public policy of the APRA states, “[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.” I.C. § 5-14-3-1. The Town is a public agency for the purposes of the APRA. 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. I.C. § 5-14-3-3(a).

You do not take issue with the Clerk-Treasurer’s responses to request #2, #5, or #8, either because the Clerk-Treasurer produced all of the records you requested or because you found her response to your request satisfactory. With regard to request #1, the Clerk-Treasurer states that she does not maintain this record; it is maintained by the police department. Your complaint cites the Clerk-Treasurer’s failure to produce it and the fact that you had to go to the police department yourself and retrieve it. However, if the Clerk-Treasurer did not maintain that record, she did not violate the APRA by failing to produce it and, instead, referring you to the police department. The Clerk-Treasurer states that she does not have access to the police department or its records. 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*. The Clerk-Treasurer also has no records responsive to requests #7, #9, or #10.

You argue that the Clerk-Treasurer should maintain records responsive to those requests, however. Request #7 seeks copies of records showing hours worked by the Clerk-Treasurer, but it is not clear that any statute or rule requires such records to be created or maintained by the Clerk-Treasurer. You acknowledge that you have posed that question to the State Board of Accounts (“SBOA”). As the entity that audits local units of government, I will defer to the SBOA’s determination regarding whether such records should be kept. The Clerk-Treasurer states that she has been audited by the SBOA for several years, but has never had to produce such records. Consequently, at this time it is my opinion that the Clerk-Treasurer did not violate the APRA by failing to produce records showing her work hours.

You also argue that the Clerk-Treasurer’s response to request #9 was incomplete because she produced copies of signed vouchers in response to your request for payroll

records. You assert, however, that she should have produced the actual checks used for employee remuneration. In response, the Clerk-Treasurer states that her office uses direct deposit, so no actual checks exist and the signed vouchers are all that is available. Again, if the Clerk-Treasurer produced all responsive records in her possession, it is my opinion that she did not violate the APRA. I see no requirement that the Clerk-Treasurer create and maintain paper checks for payroll purposes, so her release of the vouchers complied with the APRA.

As to request #10, your complaint notes that you feel the Clerk-Treasurer's response was incomplete because she failed to tell you "why she is billing [you] for an account [sic] that should not exist." While your concern is certainly legitimate, it appears that this request seeks *information* rather than *records*. Public agencies are not obligated to create records in response to a request or to answer generalized inquiries. *See Op. of the Public Access Counselor 10-FC-120*. Thus, to the extent you seek records containing responsive information, the Clerk-Treasurer should produce those, but the Clerk-Treasurer did not violate the APRA by failing to tell you why she is billing you for a certain account because she has not denied you access to records.

Thus, the only remaining requests at issue are #3, #4, and #6. Requests #3 and #4 are similar insofar as you sought access to a "tape cassette of the minutes" for two meetings: December 14, 2010, and December 31, 2010, respectively. The Clerk-Treasurer initially denied those requests on the basis that no cassettes exist because the town uses digital records. You state that you asked for cassettes "by mistake," and argue that the Clerk-Treasurer should have disclosed the digital recordings by emailing them to you as she has done in the past. You claim that she failed to do so "out of spite." The Clerk-Treasurer denies that allegation and states that she emailed the records to you contemporaneously with her response to this complaint on March 14th. She also argues that she read your request for cassettes literally and believed that you wanted her to create cassettes, which she cannot do with the technology she currently has. I note that her response to you informed you of the fact that she did not have any cassettes because the records were created digitally. As such, I do not interpret her response as an intent to deny you access, because I do not see where you submitted a supplemental response for the digital copies after the Clerk-Treasurer informed you that no cassettes were available. Consequently, I cannot find that the Clerk-Treasurer violated the APRA with respect to this request. If you had asked for digital copies initially and the Clerk-Treasurer denied you copies without a statutory basis, I would agree that her actions violated the APRA. However, the Clerk-Treasurer can only produce what was requested and the APRA requires that a "request for inspection or copying must: (1) identify with reasonable particularity the record being requested. . . ." I.C. § 5-14-3-3(a).

With respect to request #6, which sought payroll records for a Clerk-Treasurer employee, the Clerk-Treasurer states that those records were "archived records" that would take some time to compile. She also informed you that you were free to inspect the records yourself prior to her making copies for you. In her March 14th response to your complaint, the Clerk-Treasurer states that all records have been copied and provided to you. The APRA provides no firm deadlines for the production of public 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. 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. *Opinion of the Public Access Counselor 02-FC-45*. In her January 26th response to you, the Clerk-Treasurer cited to the numerous audit and reporting demands faced by her office, the computer-related problems regarding electronic records, and the limited availability of her employee. Due to the number and breadth of your requests and the Clerk-Treasurer's limited personnel resources, it is my opinion that the Clerk-Treasurer acted within a reasonable period of time by provided the records by March 15th in response to your January 25th request. Under the APRA, a public agency shall "regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees." I.C. § 5-14-3-7(a). *See also Op. 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); *Op. of the Public Access Counselor 04-FC-81* (not unreasonable for agency to take two months to produce personnel records and policies where other staffing changes occurred at the agency and responding employee was new to the position); *see also Op. of the Public Access Counselor 07-FC-327* (three months was not an unreasonable amount of time to respond to seven requests with approximately 1000 pages of responsive documents; 34 days was not unreasonable amount of time to produce three-page document considering number of other pending requests).

CONCLUSION

For the foregoing reasons, it is my opinion that the Clerk-Treasurer did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Robyn Emmert