



# STATE OF INDIANA

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November 7, 2012

Mr. George Suter  
2979 Lakeshore Drive  
P.O. Box 308  
Fulton, Indiana 46951

*Re: Formal Complaint 12-FC-299; Alleged Violation of the Access to Public Records Act by the Town Board of Macy*

Dear Mr. Suter:

This advisory opinion is in response to your formal complaint alleging the Town Board of Macy ("Board") violated the Access to Public Records Act ("APRA"), I.C. § 5-14-3 *et seq.* Our office forwarded a copy of your formal complaint to the Board. As of today's date, we have yet to receive a response.

## BACKGROUND

In your formal complaint you allege that on September 14, 2012, you requested a copy of the Board's meeting minutes from the September 13, 2012 public meeting. Shortly thereafter, Ms. Peggy Kerschner acknowledged the receipt of your request in writing. As of October 9, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you provide that you have yet to receive a copy of the minutes that had been requested.

## 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 Board 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 Board'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, the Board acknowledged receipt of your written request in writing within seven (7) days of its receipt. As such, it is my opinion that the Board complied with the requirements of section 9 of the APRA in responding to your request.

Effective July 1, 2012, 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 factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA 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 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 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*.

Without the benefit of a response from the Board to your formal complaint, it is unclear to me why it has yet to provide you with a copy of the September 13, 2012 meeting minutes. Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. *See* I.C. §§ 5-14-3-1, 5-14-3-9(f), (g). Exceptions to disclosure are narrowly construed. *See* I.C. § 5-14-3-1. Once created, draft or proposed minutes are public records and nondisclosure must be based upon one of the exceptions outlined in the APRA. *See Opinions of the Public Access Counselor 01-FC-65; 05-FC-23; 10-FC-264; 12-FC-80*. If the Board is concerned about releasing the minutes in draft form, the Board can include a disclaimer noting that the minutes are not yet approved and subject to revision. *See Opinions of the Public Access Counselor 01-FC-65 and 10-FC-264*. As applicable here, it is my opinion that the Board has acted contrary to the requirements of section 3(b) of the APRA by failing to demonstrate that it has produced a copy of the minutes from the September 13, 2012 meeting to you in a reasonable period of time.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Board complied with section 9 of the APRA by acknowledging the receipt of your request in writing within seven (7) days of its receipt. Further, it is my opinion that the Board acted contrary to the requirements of section 3(b) of the APRA by failing to demonstrate that it has produced a copy of the minutes from the September 13, 2012 meeting in a reasonable period of time.

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: Macy Town Board