



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
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March 29, 2012

David R. Snyder  
236 E Pendle St  
South Bend, Indiana 46637

*Re: Formal Complaint 12-FC-61; Alleged Violation of the Access to Public Records Act by the Town of Roseland*

Dear Mr. Snyder:

This advisory opinion is in response to your formal complaint alleging the Town of Roseland ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Peter J. Agostino, Attorney, responded on behalf of the Town. His response is enclosed for your reference.

## BACKGROUND

On February 12, 2012, you submitted the following public records request in writing to the Town:

1. Regarding Code Violation #888 written to David Sneyder (sic) Feb 7, 2012 and delivered to me on my front porch with a Roseland Police car's red lights flashing sitting in front of my house, and I was instructed by the RPF office to sign. This request includes but is not limited to: meeting agendas, meeting minutes, any types of correspondence to or from anyone in regards to this violation notice, insurance, policies, Reservation of Rights, letters, or any other documents, paper, electronic and or any other recording media records or reports that in any way pertain to aforesaid code violation allegation or the information giving rise to said writing of the code violation notice.
2. I request copies of all Roseland Code Violation Notices written in 2012, in addition to my prior FOIA request in January 2012 for Code Violation notices, which I have not yet received.
3. I request the minutes of 2008, probably Jan or Feb in which Ordinance No. 261-04 was repealed.

4. I request any types of correspondence to or from anyone in regards to this violation notice where Teddy Penn forgave Mike Shalk monies to be paid to the Town regarding code violations as referenced in the January 2007 Town Council Minutes.

5. I request any types of correspondence to or from anyone in regards to this violation notice of code violations referenced in the January 2007 minutes where Teddy Penn forgave thousands of dollars in outstanding code violation fines of parties that supported him in his election campaign of 2006, and meeting agendas, meeting minutes, insurance policies, Reservation of Rights, letters, or any other documents, paper, electronic and or any other recording media records or reports that in any way pertain to the aforesaid code violations actions or the information giving rise to said actions to forgive the code violations.

6. I request the personnel file of RPF Deputy M. Dodge, ID # 113.

7. I request an appeal hearing date for the allegations in the code violation notice #888 writing 2/7/2012.”

On February 17, 2012, Mr. Agostino responded to your request on behalf of the Town and provided the following:

1. The records would be provided to you.
2. If you are requesting items relating to violations pertaining to you, this will be provided. If I misunderstood your request, then let me know.
3. Minutes from January/February, 2008 will be provided if located. As you recall I have made a request to your attorney to produce Town records, but he has so far refused.
4. Minutes relating to January 2007 will be produced, again subject to availability.
5. To the extent the Town has documents response, we will provide.
6. The personnel file of Deputy M. Dodge will be produced after privileged information has been redacted.
7. You will be notified when a hearing date is set.

On February 17, 2012, you submitted an additional records request to the Town:

“1. Regarding letter written to David Snyder, Feb 17, 2012 by town attorney Peter Agostino containing false, malicious and libelous statements regarding my friend Craig Toner, which I find hurtful and



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consider a personal attack. My request regarding this letter includes but is not limited to: meeting agendas, meeting minutes, any types of correspondence to or from anyone in regards to Agostino's letter, insurance policies, Reservation of Rights, letters, recording media records or reports that in any way pertain to the aforesaid letter or the information giving rise to said writing of the vicious attack on me with this heinous communication. Because of the contents of this letter, I request copies of any copies sent to anyone by the Town or the Town Attorney and other documentation sent with the copies to anyone by the Town or the Town Attorney.

2. Agostino's unprofessional reprehensible, communications contains other bizarre falsehoods. #2 – As I believe the Clerk Treasurer must know that I have asked for ALL code violation notices for 2010, 2011 and 2012. My prior request was for code violation notices up to Jan. 5, 2012 which I have not received but now request all that may have been written through Feb 12, 2012. As with my prior request regarding copies of code violations notices, Agostino attempted to give reasons why they would not be provided just as he does in this letter. #3 – Another falsehood; as I have not retain Mike Lipsky, Attorney, so any records that he would retain that belong to the Town I have no knowledge, but it rests with the Clerk Treasurer's responsibility to retain minutes and records such as the repealing of town ordinances. #4 – My request was for communication from Council member Teddy Penn with assistance of the Town Attorney in which Penn notified the St. Joseph County Court that his power wash business employee Mike Schalk would not have to pay Roseland code violation fines that he had been found guilty of in court prior to Teddy Penn's election, which is a Peen 2006 illegal campaign commitment. #5 – These code violations and communications were found to exist by Det. Haywood of the St. Joseph County Prosecutor's office in 2011 showing the extent of Teddy Penn undertook to win election by forgiving tens of thousands of dollars owed by his 2006 campaign supporters, again illegally. In simple terms a financial bribe?

3. Because of the malicious, bullying, libelous falsehoods in Agostino's Feb 17, 2012 letter referencing my personal friend Craig Tower now deceased, I request that the Town of Roseland dismiss Mr. Peter Agostino from its employ as any further unprofessional actions on his part could cause the town further litigation."

On February 21, 2012, Mr. Agostino responded in writing to your request. Mr. Agostino specifically advised that as to your February 17, 2012 request:

1. The Town did not have any records to produce.
2. The Town had previously responded to this request.
3. Your request was not a matter Mr. Agostino or the Clerk Treasurer could act on.

You allege that you have not received any records that you have requested in 2012 and you would like the Clerk Treasurer to begin responding to your public records requests.

In response to your formal complaint, Mr. Agostino provided copies of the following records:

- A note sent by Mike Schalk of the Town Maintenance Department to Robin Ackerson along with a copy of a phone message slip dated February 3, 2012.
- Four notice violations issued by the Town to you
- Minutes from the January 4, 2007 Town meeting which Mike Schalk requested a review and appeals dismissal.

In addition, counsel for the Town has a CD containing video footage of the violations in progress which is available for your review at the counsel's offices. Mr. Agostino further provided that should the Town find any additional records that are responsive to your request, they will be forwarded to you.

#### 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).

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 twenty-four 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 days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, 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



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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). 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. Here, the Town responded to your request within the timeframes proscribed by section 9 of the APRA.

The APRA does not prescribe timeframes for the actual production of 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 of the request. 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 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.*

As to your February 12, 2017 request, the Town advised that it would provide all records that were responsive to your request after they have been retrieved and reviewed. You submitted your request to the Town on February 12, 2012; the Town responded to your request on February 17, 2012; you filed your formal complaint with the Public Access Counselor's Office on March 5, 2012. The Town is required to separate and/or redact confidential information in public records prior to their disclosure. The Town has provided various records that were responsive to your request and will continue to provide said records upon their retrieval and review. 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.* It is my opinion that the Town has provided records that were responsive to your February 12, 2017 in a reasonable period of time considering the breadth of your request, the requirements that the Town maintain the normal duties of its office, and by making the records available to you in periodic disbursements.

As to your February 17, 2012 request, 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*. The Town provided as to part (1) of your February 17, 2012 request, it did not have any records that were responsive to it. As such, the Town did not violate the APRA by failing to produce records that it does not maintain.

As to part (2) of your February 17, 2012 request, the Town provided that it had already previously responded to this portion of your request. The APRA provides that any person may inspect and copy the public records of any public agency, except as provided in the exceptions listed in section 4 of the APRA. See I.C. 5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). See I.C. 5-14-3-3(b). The public agency shall either:

- (1) provide the requested copies to the person making the request; or
  - (2) allow the person to make copies:
    - (A) on the agency’s equipment, or
    - (B) on his own equipment.
- IC § 5-14-3-3(b).

Indiana law provides the following regarding copies of public records:

If:

(1) a person is entitled to a copy of a public record under this chapter;

and

(2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the public record; the public agency must provide at least one (1) copy of the public record to the person. However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. A public agency may require that the payment for copying costs be made in advance. I.C. § 5-14-3-8(e).

The APRA would not require the Town to provide you with multiple copies of the same record. As such, it is my opinion that the Town did not violate the APRA as to part (2) of



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your February 17, 2012 request, if it had previously provided to you copies of said records.

As to part (3) of your February 17, 2012 request that the Town dismiss Mr. Agostino as its attorney, I do not interpret this as a request for records of the Town, as such the APRA would not be applicable. As to your request that the Clerk-Treasurer begin responding to your requests for records, the APRA does not maintain that a specific representative of the agency be required to respond to public records requests. As long as the public agency is complying with the requirements of the APRA, it is not acting contrary to the APRA by having its attorney respond to individual request for records.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Town did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage", written in a cursive style.

Joseph B. Hoage  
Public Access Counselor

cc: Peter Agostino