



STATE OF INDIANA

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May 29, 2013

Mr. Robert D. Kuzman
P.O. Box 40389
Indianapolis, Indiana 46240

Re: Formal Complaint 13-FC-135; Alleged Violation of the Access to Public Records Act by the City of East Chicago

Dear Mr. Kuzman:

This advisory opinion is in response to your formal complaint alleging the City of East Chicago ("Chicago") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* A. Scott Chinn, Attorney, responded on behalf of the City. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that you represent Siemens Industry, Inc. ("Siemens"), which supplied a water treatment system to the City pursuant to a 2008 Membrane Filtration System Contract ("Contract"). On December 31, 2013, you submitted a written request for records to the City. The request was principally directed to the project files related to the Contract. There are a limited number of custodians of such files, and on a project of this nature, project files are typically segregated on the computer hard drives of the relevant personnel. The documents are largely generated by technical personnel and will predominately consist of emails between the City's technical personnel and representatives of the City's supplier and engineers.

In late January 2013, the City made an initial production of records to Mr. Jan Feldman, an attorney who represents Siemens. At the time of production, the City provided that as to your request for electronic documents, its attorneys were working with IT personnel regarding the process of obtaining data related to the request and at that time did not anticipate any significant issues with accessibility to records that would be responsive to your request.

On February 2, 2013, Mr. Feldman contacted the City via email to inquire whether the City's original production of records consisted of all paper records maintained by the City that were responsive to the request that had been submitted. The impetus for the inquiry was that it appeared that certain documents were not included.

On February 20, 2013, after not receiving a response from the City, Mr. Feldman sent an additional email regarding the status of the request that had been submitted. The City's attorney's responded to Mr. Feldman's inquiry on February 21, 2013 and indicated that the City had not produced all paper records responsive to the request and was therefore producing additional files. The City's attorney advised that it was performing preliminary work with the City's IT staff to assess the ability to respond to your request as it pertained to electronically stored information. The attorney thereafter made reference to a recent Indiana Court of Appeals decision in *Anderson v. Huntington Cty. Bd. of Comm'rs*, 983 N.E.2d 613 (Ind. Ct. App. 2013), and suggested that your request had not been made with reasonable particularity. The City stated it reserved the right to object to your request and that its initial assessment of the electronic information would be forthcoming in the coming days.

On February 25, 2013, Mr. Feldman replied to the City's response and pointed out that at no time had the City ever raised any objection to the breadth of the request that had been submitted. Mr. Feldman further advised that the City had yet to identify any particular ambiguity in the request or that the request had been "overly general." The City's counsel responded to Mr. Feldman's reply on March 1, 2013 and stated that the City had for weeks been working to "determine the universe of information and the best way to determine its responsiveness." The attorney further advised that it cannot reasonably estimate a date by which the collection, review, and production would occur. In an attempt to reduce the breath of the request in hopes of obtaining some digitally stored documents, Mr. Feldman attempted to reduce the topics specific to the request. In response, the City asked that you identify the specific employees and outside individuals communicating with those employees on the request over a particular period of time. Without refinement, the City stated it would have to collect and review all email correspondence for every City employee. As of May 1, 2013, the date you filed your formal complaint, you further allege that the City has yet to produce any digital files or certain paper records that were not part of its initial two disclosures. You believe that the City has failed to provide all records responsive to your request in a reasonable period of time as required by section 3 of the APRA.

In response to your formal complaint, Mr. Chinn advised that there has been no denial of access to records maintained by the City. The City has already gathered and provided access to approximately 50,000 pages of documents in hardcopy form. As to those records maintained electronically, the City had been working diligently to locate and review all records that would be considered responsive. On May 22, 2013, the City provided 675 electronic records, and expects more to be produced in a reasonable period of time. The breadth and lack of specificity of the original request poses a burdensome and extensive challenge to the City. The reasonableness of the City's response should also be viewed in the context that Siemens and the City are in a legal dispute regarding Siemens failure to provide a working water filtration system at the City's new water plant. The records are thus being sought by an adverse party. In addition to working on Siemens' APRA requests, the City has also had to work on issues related to the dispute and to remedy said issues.

The City has determined that to fully respond to your request it must access electronic information, mainly email correspondence, for eight specific custodians within a five-year period. This process has already commenced and the City has produced those records that were easily accessible. However, the majority of the electronic records are comingled with millions of other documents on the City's systems. The City does not maintain reliable keyword search capabilities at that level of its data and is not required to supply Siemens with the entire mailboxes for multiple employees. To isolate the data that has been sought, the City must restore its archives and then identify specific custodians and domains with which the key custodians exchanged relevant information. In connection with its efforts to provide said information, an upgrade of the archive system was required. The City maintains one staff member in its IT Department to work on the request and the employee has numerous other obligations to manage.

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 City 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 City'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.

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 among the factors to be considered in determining if the requirements of section 3(b) 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 redacted prior to disclosure. 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.*

As applicable here, your original request for records was submitted to the City on December 31, 2012. The request that was submitted was quite broad, and covered both hard copy and electronic records maintained by the City. Since the time of the original request, the City has produced over 50,000 pages of records in hardcopy form. In addition, the City has provided 675 electronic documents, and will continue to provide further records upon recovery and review. Due to limited resources, the electronic search has been conducted by a single employee, who in addition to responding to your request, must maintain his normal duties and responsibilities. The City was required to upgrade its systems in the process of searching its electronic records which caused an even further delay. The employee estimates that an additional 16 hours of time are necessary to complete the retrieval process, at which point the records must be reviewed prior to disclosure. Although the City's has not always timely responded to your inquiries regarding the status of your request, it cannot be said that the City has ignored your requests or its duties under the APRA. Further, the City has made periodic disclosures of records as opposed to holding all records until the search process was complete. Based on these factors, it is my opinion at the present time the City has complied with the requirements of section 3(b) of the APRA in providing all records responsive to your request in a reasonable period of time. However, in light of the time that has passed since the original request, the City should ensure that it continues to work diligently in gathering all electronic records responsive to your request and make the completion of the process a priority for both its IT Department and outside legal counsel.

CONCLUSION

For the foregoing reasons, it is my opinion that the City has currently complied with the requirements of section 3(b) of the APRA in providing all records responsive to your request in a reasonable period of time.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: A. Scott Chinn