



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

August 28, 2013

Mr. Thomas A. Heller
410 Sixth Street, Suite 202
Columbus, Indiana 47201

Re: Formal Complaint 13-FC-224; Alleged Violation of the Access to Public Records Act by the Bartholomew County Auditor

Dear Mr. Heller:

This advisory opinion is in response to your formal complaint alleging the Bartholomew County Auditor (“Auditor”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Barbara J. Hackman, Bartholomew County Auditor, responded in writing. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on February 25, 2013, you submitted to the Auditor a written request for records seeking copies of Statements of Impact prepared in late 2004 in formation of two TIF districts. On July 8, 2013, you submitted a written request for records for the tax levy rates for all taxing districts for years 2004 through 2006. On July 3, 2013 and July 18, 2013, you submitted a written request for records for all substantiation of amounts as “contested assessed value of TIF area” on ‘TIF worksheet’ forms produced by the Auditor for two TIF areas in the years of 2010 and 2012. As of July 31, 2013, the date you filed your formal complaint with the Public Access Counselor’s Office, you allege that you have yet to receive any records in response to your requests.

In response to your formal complaint, Ms. Hackman advised that the Auditor maintains no records responsive to your February 25, 2013 request. As to your July 8, 2013 request, such information can be found on the County’s website and a copy was provided to you on August 5, 2013. As to your June 3, 2013 request (re-submitted July 18, 2013), Ms. Hackman advised that you would need to contact the County Assessor’s office for the required TIF information.

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 Auditor 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 Auditor’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 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*.

The information provided suggests that the Bartholomew County Auditor did not provide you the requested documents in a timely manner pursuant to your February 25, 2013 request. Since that time, however, a response has been given informing you that it is the position of the Auditor that the records sought do not exist. “[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. Therefore, if the Auditor’s statement is accurate, the denial of the public record does not violate the APRA.

The Auditor concedes that the response to your July 8, 2013 request was not handled in a timely manner. This response was sent to you outside the time limitations pursuant to Ind. Code § 5-14-3-9(b) and is deemed denied. On August 5, 2013, the public documents were disclosed and were made available. I trust that the eventual disclosure of those records satisfies your request.

Your June 3, 2013 and July 18, 2013 records request was not acknowledged by the Auditor and is deemed denied. A denial of records under the APRA is not a violation if the public agency upon which the request was made is not the custodian of the record. The Auditor has indicated to you that the County Assessor is the custodian of the records and therefore is the appropriate public agency upon which to make your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Bartholomew County Auditor did violate the APRA’s timeliness considerations, but did not violate the APRA in terms of the substantive records request.

Regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

cc: Barbara Hackman