

March 8, 2004

Ms. Carolyn Marsh  
1804 Oliver Street  
Whiting, Indiana 46394-1725

*Re: Formal Complaints 04-FC-18, 04-FC-19, consolidated; Alleged Violation of the  
Access to Public Records Act by the City of Whiting*

Dear Ms. Marsh:

This is in response to your formal complaints alleging that the City of Whiting, Office of the Clerk-Treasurer (City), violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3), when it responded to your requests for records. Specifically, you allege that the City violated the APRA when it denied you access to an Army Corp of Engineers' report (04-FC-18), and when it refused to produce on demand a copy of a separate and available Indiana Redevelopment Plan report (04-FC-19). The City has responded to your complaints in a single answer, and a copy of that response is attached for your review. I have consolidated these matters for disposition and, for the reasons set forth below, I decline to find a violation of the APRA.

#### BACKGROUND

On January 22, 2004, you appeared at the Office of the Clerk-Treasurer for the City of Whiting and made a request for two documents. Specifically, you requested a copy of an Army Corps of Engineers study regarding lake front development for a marina. The City requested that you prepare your request on a written form provided by the Clerk-Treasurer's Office, and then advised you in writing that no written study was then in existence as it was a "work in progress." More particularly, the written response stated that there was "no report at this time in the Clerk's Office." At the same time you made a verbal request to inspect a copy of the "City of Whiting, Indiana Redevelopment Plan for the Revitalization Area." You were apparently not required to prepare a written request to inspect that document, and you were immediately allowed to inspect the document, which was 99 pages in length. Upon inspection, you made a verbal request for a copy of the document. Again, you were apparently not required to make a written request for that document, but were advised that you could come back on the following day to pick up a

copy that would be made for you at your expense. You returned on the following day and at that time you tendered the copy fee and obtained a copy of the requested document.

On February 6, 2004, you signed and dated your complaints alleging that the City's responses to your public records requests violate the APRA. You allege that you were entitled to the immediate production of copies of both documents requested. In support of your claim regarding the marina study, you suggest that the study was available and should have been produced because the marina project had at that time been approved by various governing bodies. In support of your claim regarding the redevelopment study, you note that the document itself called for copies to be available for inspection and production to the public. In response, the City denies that the marina study was then or is now in existence, noting that the contract to "generate the report" was not even then in place and was still being negotiated on February 13, 2004, weeks after you made your request for that document. Again, the City states that the "report does not yet exist." With regard to the redevelopment study, the City notes that you were permitted to immediately inspect that document on demand, and that you were provided with a copy of that document within 24 hours of making your request.

#### ANALYSIS

Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as otherwise provided in the APRA. IC 5-14-3-3(a). A "public record" means any writing, paper, report, study, map, photograph, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. IC 5-14-3-2. A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in writing, the agency must respond to the request in writing. IC 5-14-3-9(c). Whether the request is oral or written, if it is delivered to the agency in person, the agency must respond to the request within 24 hours. IC 5-14-3-9(c). A timely response to the request does not mean that the public agency must produce or expressly decline to produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production.

A public agency is not required to create a record in response to a request, and it is not required to produce a record it does not have. If an agency does not have a responsive record, it should say so, but its failure to produce a record it does not have is not a denial under the APRA. A record is not a public record of a public agency unless and until it is received or maintained or filed by or with that agency. Here, the City asserts that it does not yet have the marina study you requested because the study has not yet been prepared and submitted to the City. In support, the City asserts that it has correspondence to establish that the contract to create the study is still under negotiation. That various governing bodies may have approved the marina development is not contrary evidence that the study presently exists. In any event, your allegation that the record exists in the possession of the City in light of the City's denial and evidence to the contrary creates a factual and evidentiary dispute that cannot be resolved in this forum. If you have evidence to dispute the City's assertion, you are, of course, free to pursue your civil remedies

under the statute. *See* IC 5-14-3-9, 9(i). Based on the evidence before me, I decline to find a violation of the APRA where the City failed to tender a record it claims does not exist.

Neither do I find a violation for the City's failure to produce a copy of the 99-page redevelopment study on demand. The APRA does not require that a public agency permit inspection or production of copies of documents on demand. While many agencies can and will do so, there are good and practical reasons for not requiring production of documents within a specific time period. A public agency may be able to produce public records immediately in some cases, but more time may be required for production when records are lengthy, not in a central repository, archived off-site, or that include nondisclosable information that the public agency must separate from disclosable information. The effect of interpreting Indiana Code 5-14-3-9 to require public agencies to produce records within a specific period of time would have the effect, in some cases, of requiring public agencies to stop activity on all other matters in order to provide the records requested. While providing information is an essential function of public agencies, the APRA also specifically provides that public agencies shall regulate any material interference with the regular functions or duties of their offices. IC 5-14-3-1; IC 5-14-3-7(a). In this case, the City immediately produced a copy of the 99-page report for your inspection. It was not required by the APRA to do so; rather, it could have responded to your request within 24 hours and scheduled an appointment for you to return for inspection at a time that was mutually convenient. In that same manner, the City was not required by the APRA to provide you with your own copy of the 99-page report on demand. Again, while doing so might have been the courteous and convenient course under the circumstances presented here, the City could have responded to your request within 24 hours and as its response either produced the report or identified a date certain, within a reasonable time, for you to pick up the report. The City produced a copy of the report within the statutory response time, and in this manner its production cannot be declared to be untimely or otherwise unreasonable under the APRA.<sup>1</sup>

#### CONCLUSION

For the foregoing reasons, I find that the City did not violate the APRA by failing to produce a document it claims does not exist, and did not violate the APRA when it produced a copy of a second document within 24 hours of receiving the request for that document.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Ms. Margaret Drewniak

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<sup>1</sup> I do not address your allegation that production on demand was required by the content of the document itself. Even assuming that the report contents contained a requirement that the City make copies of the report available to the public on demand, any violation of that requirement does not raise an issue under the APRA.

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