



STATE OF INDIANA

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October 7, 2010

Ms. Cheryl A. W. Musgrave
1216 S.E. First St.
Evansville, IN 47713

Re: Formal Complaint 10-FC-232; Alleged Violation of the Access to Public Records Act by the Evansville Department of Metropolitan Development

Dear Ms. Musgrave:

This advisory opinion is in response to your formal complaint alleging the Evansville Department of Metropolitan Development (the "EDMD") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* My office sent a copy of your complaint to the EDMD, but as of today we have not received a response. I note that I granted your request for priority status under 62 Ind. Admin. Code 1-1-3(3).

BACKGROUND

In your complaint, you allege that on August 25, 2010, you sent via email a request for information necessary to remonstrate against the creation of a tax increment financing ("TIF") district. The EDMD held a hearing regarding the issue on September 9th. To date, the EDMD has not provided you with any records. Additional public hearings will be held by the Evansville City Council and EDMD, but you are unaware of when such hearings will occur. You state that you cannot effectively remonstrate at the Area Plan Commission or prepare for the future hearings due to the EDMD's failure to respond to your request.

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." I.C. § 5-14-3-1. The EDMD does not contest that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the EDMD's public records during regular business hours unless the records are excepted

from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Without the benefit of a response from the EDMD, it is difficult to discern why the agency would deny you access to the records you requested. For several categories and types of records, the APRA provides exceptions to its general disclosure requirements. *See* I.C. § 5-14-3-4. However, it is not clear whether or not any exception to disclosure applies here. The burden of proof to show that an exception applies lies with the EDMD. *See* I.C. § 5-14-3-1. Further, if a 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. I.C. §5-14-3-9(b). When a request is submitted in writing - - such as via email -- and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c). Thus, if the EDMD neither responded to your request nor cited to a specific statute providing the EDMD with the authority to refuse to provide the records you requested, the EDMD violated section 9 of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the EDMD violated the APRA if it failed to respond to your request. I encourage the EDMD to either provide you with the requested records or cite a legal basis under the APRA or some other statute for withholding them. If you believe the EDMD continues to deny you access in violation of the APRA following the issuance of an advisory opinion from this office, you may file an action in court pursuant to Ind. Code § 5-14-3-9(e) to compel production of the records.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Tom Barnett