



STATE OF INDIANA

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August 21, 2009

Nora Powell
622 East Washington Street
Muncie, Indiana 47305

Re: Formal Complaint 09-FC-180; Alleged Violation of the Access to Public Records Act by the City of Muncie

Dear Mr. King:

This advisory opinion is in response to your formal complaint alleging the City of Muncie ("City") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access records. A copy of the City's response to the complaint is enclosed for your reference. It is my opinion the City's response to the request was deficient under the APRA but the City has not otherwise violated the APRA.

BACKGROUND

You allege that on July 13, 2009 you delivered to the City by electronic mail a request for a number of records related to fire station closings. You received a response to the request on July 18. In the July 18 response, the mayor indicated that she had been advised to refrain from discussing matters that could pertain to the lawsuit with the City's firefighters. You filed the present complaint on August 6 (postmarked August 4), alleging you have been denied access to records.

The City responded to the complaint by letter dated August 21 from attorney Jason Delk. The City contends that you requested three items. The mayor answered one of your questions in the July 18 electronic mail message. As to your request for data used by the administration in determining which fire stations would be closed, the City contends the records are nondisclosable at the discretion of the agency on the basis of I.C. § 5-14-3-4(b)(2) and (6). As to your second request, for a list of individuals making the decision, the City contends no such record exists.

ANALYSIS

The public policy of the APRA states, "[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 City is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the City during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail (or, as this office has said, electronic mail) and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. 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. I.C. § 5-14-3-7(c). Former public access counselors and I have stated that records must be produced within a reasonable period of time, based on the facts and circumstances.

Here, the City responded to the July 13 request on July 18, which is within the time prescribed by the APRA. I.C. § 5-14-3-9(b). The response, though, failed to provide information required by the APRA. The mayor indicated she had been advised not to discuss the matter. Nothing in the APRA allows a public agency to refuse to address a records request. Instead, since the request was made in writing and the City denied access, the denial should have contained a statement of the specific exemption(s) authorizing the nondisclosure. *See* I.C. § 5-14-3-9(c). The City's response was deficient under the APRA.

Substantively, though, it is my opinion the City has not violated the APRA by denying you access to the records. First, the City does not maintain the list of individuals involved in the decision. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. The City did not violate the APRA by declining to create a record.

Further, the City contends the records you requested related to the decision to close fire stations are nondisclosable at the discretion of the agency on the basis of the deliberative materials exception (I.C. § 5-14-3-4(b)(6)) and the attorney work product exception (I.C. § 5-14-3-4(b)(2)). Based on the City's description of the records at issue, it is my opinion the City could likely discharge the burden of proof to sustain the denial on the grounds provided.

CONCLUSION

For the foregoing reasons, it is my opinion the City's response to the request was deficient under the APRA but the City has not otherwise violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Jason Delk, Beasley & Gilkison LLP
Mayor Sharon McShurley, City of Muncie