

December 20, 2005

Sent Via Facsimile

Mr. Anthony M. Portone
2900 Gary Avenue
East Chicago, IN 46312

Re: Formal Complaint 05-FC-241; Alleged Violation of the Access to Public Records Act by the City of East Chicago and East Chicago Sanitary District

Dear Mr. Portone:

This is in response to your formal complaint alleging that the City of East Chicago and East Chicago Sanitary District (collectively, "City") violated the Access to Public Records Act by failing to give you any records concerning T.R.I., Inc., and by failing to disclose records requested in November, 2005. I find that the City violated the Access to Public Records Act.

BACKGROUND

On October 19, 2005, you requested of the City certain information concerning four companies, one of which was a company called T.R.I., Inc. You received some of the information, but the packet that you received omitted any information about T.R.I., Inc. You telephoned the City's attorney Nathaniel Ruff, and he sent you a letter on October 31, 2005, stating that the City did not have documents relating to T.R.I., Inc. You claim that this is patently false because you are aware that T.R.I., Inc. was awarded emergency demolition work for the City. You renewed your request for this information on November 15, 2005. You allege that Mr. Ruff has never responded to your renewed request.

In addition, on November 3, 2005 and November 15, 2005, you sent to the City two discrete requests for additional documents. The November 3 request was for records relating to Enterprise Trucking, Inc., Legacy Environmental, Inc., Jewell Harris, Sr., and Carl Lisak. The November 15 request was for information relating to Great Lakes Engineering, LLC, Garcia

Consulting, LLC, and John Garcia. You allege that you have not yet received any records relating to the November requests.

I sent a copy of your complaint to the City. The City, through its outside counsel Ethan Zelizer, sent a response, which I enclose for your reference. Mr. Zelizer stated as background that you and your company, Lake County Transfer, are in litigation with the City of East Chicago in Lake County Court. Mr. Zelizer did not describe the litigation. I assume for purposes of issuance of this advisory opinion that the lawsuit does not involve a matter under the Access to Public Records Act.

After laying out the background regarding the lawsuit, Mr. Zelizer recounted the correspondence between you and Mr. Ruff regarding the T.R.I., Inc. documents, without making any further averments regarding the existence of any records or your allegations about demolition work awarded to the company. With respect to both the November 3 and November 15 requests, Mr. Zelizer told me that following your November 3 request, the City became aware of an opinion of the Public Access Counselor in complaint numbered 05-FC-182, upholding the public agency's right to ask that a requester submit his request on or in a form provided to the requester by the public agency. Accordingly, Mr. Zelizer wrote to David Westland, an attorney in Schererville who is your attorney in the litigation. In this letter, Mr. Zelizer stated that in making your request, you had failed to use the proper form. The letter was dated and sent November 13, 2005. Mr. Zelizer enclosed the public record request form. On November 17, Mr. Zelizer renewed the City's request to use the proper form after receiving your November 15 request for records. Mr. Zelizer sent me copies of this correspondence. Included in the correspondence was a copy of your November 17 letter to Mr. Ruff acknowledging receipt of the City's requests that you submit future requests on the proper form and agreeing to submit future requests utilizing that form.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). A request for inspection and copying must be, at the discretion of the agency, in writing on or in a form provided by the agency. IC 5-14-3-3(a)(2). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). IC 5-14-3-3(b).

If a public agency receives a request for a record via U.S. Mail or facsimile, the public agency is required to respond within seven (7) days, or the request is deemed denied. IC 5-14-3-9(b). The Access to Public Records Act does not contain any limitation on a person's right to request and receive public records when the requester has engaged in litigation with the public agency.

You have complained that you have not received any of the information that you requested on November 3 and November 15, the former request including the records relating to T.R.I., Inc. that originally had been requested on October 19. The City's response to your complaint merely recounts that Mr. Ruff had told you in an October 31 letter that the City did not have any documents relating to T.R.I., Inc. Without a more substantive response, I must assume

that the City intends to reiterate that in spite of your allegations that a contract had been awarded to T.R.I., Inc., the City maintains no records on this matter.

A public agency has not denied a record in violation of the APRA if the agency does not maintain the record and informs the requester of that fact. If the City had offered a rejoinder to your allegation that the City gave T.R.I., Inc. a contract, you might have more confidence that the City is being forthcoming. Nevertheless, I cannot make any factual determination of whether there are responsive documents or not. If you believe that the City is withholding a record that it maintains, you may file an action in circuit or superior court to compel the City to disclose the record. *See* IC 5-14-3-9(e).

The City meets your allegations regarding the other records you requested by fax on November 3 and November 15 by stating that it sent a letter to your attorney informing him that you had not submitted your request on the proper form. The first letter was dated and sent November 13. The City violated the Access to Public Records Act because it did not timely provide you with a responsive letter to your November 3 request. A response stating that a requester must submit his or her request on a form provided by the agency must be sent within the seven days set out in the APRA, or the request is deemed denied. *See Opinion of the Public Access Counselor 03-FC-123.*

I also observe the following with respect to the City's response regarding use of the public record request form. First, Mr. Ruff did not ask you to submit your request on any form when he responded to your October 19 request, which was a mere two weeks prior to your November 3 request. It is possible that the City had recently implemented a change to its policy regarding how persons must submit public record requests. As a general rule, a public agency may change past rulings or policies, but such change must be explained and reasons for the change must be articulated. *Community Care Centers, Inc. v. Indiana Department of Public Welfare*, 523 N.E.2d 448 (Ind. Ct. App. 1988). As a practical matter, I advise public agencies to be consistent in their exercise of discretion to ensure that they are carrying out the APRA in a uniform manner.

In addition, the City did not ask the requester (you) to submit a request for records on the City's form or provide you with the form. Rather, it sent the letter and form to your attorney, even though your attorney did not submit the request for records. In the November 13 letter to your attorney, Mr. Zelizer suggested that you take advantage of the formal discovery process afforded under the Indiana Trial Rules when requesting documents. This suggests either that the City believes it is advantageous for you to use discovery, or that you ought to utilize discovery in lieu of the APRA. Again, the APRA is an independent means by which a litigant may receive records from a public agency, even records that are relevant to the litigation.

Finally, I wish to point out that the letter from Mr. Zelizer did not actually state that you were being required to submit a form for the November 3 request. Mr. Zelizer's letter does not make any reference to the dates of your requests or the records that you requested. It recites that Mr. Zelizer was writing in reference to "a series of letters that your client, Anthony Portone, has written to Al Velez and the City of East Chicago." The letter then states that in making your request, you had failed to use the proper form, and that "*in the future*, please direct your client to

use the proper form when making a request.” (My emphasis). This November 13 letter could well be interpreted not to apply to the November 3 request, at a minimum.

Because IC 5-14-3-3(a) allows the agency discretion with respect to use of a form to request records, and it appears that the City is now exercising its discretion to require you to submit your request on the form, I recommend that you resubmit your request on the form, if you have not already.

CONCLUSION

For the foregoing reasons, the City of East Chicago violated the Access to Public Records Act when it failed to timely respond to your November 3 request for records. I cannot determine whether the City is withholding a record regarding T.R.I, Inc., but if the City maintains the record, it must disclose it or explain why it is exempt. The City should exercise its discretion under the Access to Public Records Act in a uniform manner.

Sincerely,

Karen Davis
Public Access Counselor

cc: Ethan G. Zelizer