



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 21, 2009

Mr. Michael Rae
1734 Elderberry Circle SE
DeMotte, IN 46130

Re: Formal Complaint 09-FC-213; Alleged Violation of the Access to Public Records Act by the Town of DeMotte

Dear Mr. Rae:

This advisory opinion is in response to your formal complaint alleging the Town of DeMotte, Indiana ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code §5-14-3-1 *et seq.* For the following reasons, my opinion is that the Town did not violate the APRA because it never denied you access to public records and it produced your records within a reasonable period of time.

BACKGROUND

In your complaint, you allege that the Town violated the APRA by

(1) a denial of access that occurred on August 13, 2009 due to the Town's failure to provide the requested records within seven days after the request it received on August 6, 2009; (2) a denial that occurred on September 2, 2009 for failure to provide requested records within seven days of the request made on August 25, 2009; and (3) a denial that occurred on September 4, 2009 when the Town refused to permit copying of requested records and refused to direct Complainant to sufficiently to enable him to locate responsive records within a mass of records produced by the Town.

Formal Complaint 09-FC-213 at 1. You further allege that the Town's law firm, "using its representation of the Architectural Control Committee of Complainant's subdivision, has threatened suit against Complainant on a matter that has been fully resolved." You allege that such threat was in retaliation for your insisting on access to public records.

My office forwarded a copy of your complaint to the Town. Attorney for the Town, Emily S. Waddle, responded to your allegations. Her letter and attachments are enclosed for your review. Ms. Waddle states that you made a request for access to public records dated July 31, 2009. The Town received that request on August 6, 2009. The next day, on August 7, 2009, the Town responded to your request and informed you that the Town would provide the requested records to you for your review.

According to Ms. Waddle, on August 25, 2009, your attorney, Michael Muenich, communicated that you would come to the Clerk/Treasurer of the Town at 9:00 a.m. on September 4, 2009, for the purpose of inspecting the records. The next day, the Town responded that you could inspect the records at 10:00 a.m. on September 4, 2009. In a separate letter, the Town informed Mr. Muenich that it would require a notice in writing of any information that you would want to be copied. The Town would then provide a bill to Mr. Muenich's office for the appropriate copy fees.

On August 26, 2009, Mr. Muenich sent another letter to the Town in which he requested a list of the documents in possession of the Town, the number of pages, and the requested fee by 5:00 p.m. on Wednesday, September 2, 2009. On August 31, 2009, the Town responded to that letter by informing Mr. Muenich that no such list existed. On or about September 8, 2009, you sent Ms. Waddle a list requesting copies of certain documents. That day, Ms. Waddle sent Mr. Muenich a letter stating that the Town received the list of requested documents and would compile the copies for you. Ms. Waddle noted that it would take some time to prepare the copies because some of the records could not be copied by the Town's copy machine and would have to be taken to an off-site location to be copied.

Ms. Waddle states that on September 25, 2009, she wrote Mr. Muenich to inform him that the copies were ready to be picked up. The fee associated with the copying was \$72.20. According to Ms. Waddle, the copies had not been picked up by you as of October 5, 2009.

Ms. Waddle further responds by saying that the Town has "absolutely nothing to do with the Architectural Control Committee of your subdivision. The Town is a public entity and the Committee is a private organization. She denies that neither the Town nor its law firm has threatened suit against you for your access to public records.

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. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a). The Town is clearly 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 public records of the Town

during regular business hours unless the public records are exempt under the APRA. I.C. §5-14-3-3(a).

Your allegation that the Town violated the APRA by failing to provide records to you within seven (7) days is misplaced. Nothing in the APRA indicates that an agency's failure to provide a requester with "instant access" to requested records constitutes a denial of access. "It is the responsibility of the public agency to **respond** to requests for access to public records within a specified time period. The APRA does not set any time periods for **producing** public records, merely for responding to the request." *Opinion of the Public Access Counselor 02-FC-09* (O'Connor; advising that an agency's failure to produce requested documents within five days was not a denial under the APRA) (emphasis added). 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). Former public access counselors and I have opined that records must be produced within a reasonable period of time based on the relevant facts and circumstances.

The Town's actions in response to your request do not indicate a denial of access. The Town had seven (7) days to respond to your request from the day that it received it. I.C. §5-14-3-9(b). According to Ms. Waddle, the Town responded within one day of receiving the request and informed you that it would make all requested records available to you. After the Town agreed to provide you with copies of records, it noted that it would take some time to compile the copies. Within three weeks, the Town informed you that your copies were available. In my opinion, that amount of time was not unreasonable. Moreover, the Town did not have a copy machine capable of reproducing your records and was not obligated¹ to provide you with copies of certain records, but the Town went above and beyond what is required by the APRA by going off-site to copy all of your requested records. Based on these facts, it is my opinion that the Town has not violated the APRA.

As far as your allegation of retaliation by the Town, the Town denies that either it or its attorney ever threatened litigation against you for seeking access to public records. Moreover, the Town's actions do not indicate retaliatory intent inasmuch as the Town was more than willing to grant you access to the records you sought.

CONCLUSION

For the foregoing reasons, it is my opinion that the Town did not violate the APRA.

¹ If a public agency does not have reasonable access to a machine capable of reproducing the record, the person is only entitled to inspect and manually transcribe the record. I.C. §5-14-3-8(e).

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, prominent 'A' and 'K'.

Andrew J. Kossack
Public Access Counselor

Cc: Emily S. Waddle, Attorney for the Town of DeMotte