



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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March 2, 2011

Mr. Bernard R. Seegers
16413 N. 400 W.
Wheatfield, IN 46392

Re: Formal Complaint 11-FC-43; Alleged Violation of the Access to Public Records Act by the Wheatfield Volunteer Fire Department, Inc.

Dear Mr. Seegers:

This advisory opinion is in response to your formal complaint alleging the Wheatfield Volunteer Fire Department (“Department”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. The Department’s response from Chief David J. Witt is enclosed for your reference.

BACKGROUND

According to your complaint, on January 13, 2011, you submitted a request to Chief Witt for fire reports. After you did not receive a response, you called Chief Witt on January 18th. He informed you that he had not yet responded due to a serious family illness and his involvement in an accident. With regard to the substance of your request, Chief Witt told you that he would need to go through 14,200 pages of records and the cost to you would be \$15,000.00, which would need to be paid in advance. You state that Mr. Witt sent some information to you, but it is not the information you requested.

In response to your complaint, Chief Witt states that he acknowledged your request the same day you submitted it. He says that when he spoke with you over the phone, he informed you that your request for run reports produced 1,425 double-sided records and that the Department charges \$5.00 per page. Other records that you requested produced approximately 75 responsive documents. He claims that after discussing the applicable costs, the two of you came to a verbal agreement that you only needed run reports for your property. Following a telephone conversation, Chief Seegers mailed you three reports regarding your property. Chief Seegers claims that he sent you all of the records the Department has regarding your property.

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 Department 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 Department’s public records 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).

In response to your request, Chief Witt states that he communicated with you to narrow the scope of your request. Under the APRA, “[a] request for inspection or copying must: (1) identify with reasonable particularity the record being requested....” I.C. § 5-14-3-3(a). Thus, if Chief Witt could not identify the records you were requesting, he did not violate the APRA by asking you to provide clarification and narrow the scope of the request.

Chief Witt further claims that after narrowing your request to records regarding your property, he has now provided you with all relevant records. He states that the Department does not have any other records responsive to your request. If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Op. of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require public agencies to create any new or additional records to satisfy a request. See *Op. of the Public Access Counselor 10-FC-56* (“Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”). Consequently, if Chief Witt has now disclosed to you all records regarding your property that the Department maintains, he has satisfied the Department’s obligations under the APRA.

That said, with regard to the Department’s estimated charges for access to records you requested, the APRA provides the following regarding copy costs:

(d) This subsection applies to a public agency that is not a state agency. The fiscal body (as defined in IC 36-1-2-6) of the public agency, or the governing body, if there is no fiscal body, shall establish a fee schedule for the certification or copying of documents. The fee for certification of documents may not exceed five dollars (\$5) per document. The fee for copying documents may not exceed the greater of:

- (1) ten cents (\$0.10) per page for copies that are not color copies or twenty-five cents (\$0.25) per page for color copies; or
- (2) the actual cost to the agency of copying the document.

As used in this subsection, “actual cost” means the cost of paper and the per-page cost for use of copying or facsimile equipment and *does not include labor costs or overhead*

costs. A fee established under this subsection must be uniform throughout the public agency and uniform to all purchasers.

I.C. § 5-14-3-8, emphasis added. In the absence of another law that allows the Department to charge additional fees, ten cents per page is the highest per-page copy fee permitted by the APRA. Consequently, it appears that the initial cost estimate provided by the Department exceeded that allowed by the APRA. I would encourage the Department to limit copy costs to those permitted in section 8 of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that the Department did not violate the APRA if it provided you with all responsive records that the Department maintains on your property. If the Department charged a copy fee greater than the fees permitted in section 8 of the APRA, the Department exceeded the APRA's limits on copy fees in violation of the statute. The Department did not otherwise violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial "A".

Andrew J. Kossack
Public Access Counselor

cc: Chief David J. Witt