



STATE OF INDIANA

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April 19, 2011

Mr. Robert A. Markovich
1821 Davis Ave.
Whiting, IN 46394

Re: Formal Complaint 11-FC-76; Alleged Violation of the Access to Public Records Act by the Hammond City Controller and Hammond Law Department

Dear Mr. Markovich:

This advisory opinion is in response to your formal complaint alleging the Hammond City Controller (“Controller”) and Hammond Law Department (“Law Department”) (collectively, the “Agencies”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* My office forwarded a copy of your complaint to the Agencies on March 21, 2011, but we have not yet received a response.

BACKGROUND

In your complaint, you allege that the Agencies denied records requests you submitted on September 17, 2010,¹ March 3, 2011, and March 14, 2011. As of March 21, 2011, the date you submitted your complaint, the Agencies had not yet fulfilled your requests.

The Agencies did not respond to your complaint, but in a letter dated March 16, 2011, the Controller checked a box marked “APPROVED” regarding your records request and informed you that you would receive your documents “in approximately 90 - 150 days.” You note, however, that you have sent several requests to the Controller and the Law Department, so you are unsure to what request that letter refers.

¹ Formal complaints alleging violations of the APRA must be filed within 30 days of the denial of access. I.C. § 5-14-5-7. Consequently, that portion of your complaint relating to a denial that allegedly occurred in September of 2010 is untimely and cannot be addressed in this opinion.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. I.C. § 5-14-3-3(a). The Agencies are "public agencies" subject to the requirements of the APRA. I.C. § 5-14-3-2(1)(2)(C). Consequently, any person may inspect or copy the Agencies' records unless another provision of the APRA or some other law permits or requires the Agencies to withhold them. *See generally* I.C. §§ 5-14-3-3; 5-14-3-4.

Without the benefit of a response from the Agencies, it is unclear to me why your requests have not been satisfied. Under the APRA, a public agency that withholds a public record bears the burden of proof to show that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1. Because the Agencies have not provided a statutory justification for withholding the records at issue here, it is my opinion that the Agencies have failed to sustain their burden of proof.

The Agencies' March 16th response to you indicates a willingness to grant at least one of your requests. However, even that response informs you that you will not receive your records for "90 - 150 days." While section 9 of the APRA sets deadlines for initial responses to records requests, the APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. Due to the Agencies' failure to respond to your complaint and the fact that the ultimate burden lies with the public agency to show the time period for producing documents is reasonable, I must once again conclude that the Agencies failed to produce your records within a reasonable period of time by informing you that you would not receive them for 90 - 150 days. *Opinion of the Public Access Counselor 02-FC-45.*

If the Agencies cannot justify withholding the records under the APRA, I encourage them to release all responsive records to you as soon as possible. To the extent the Agencies persist in denying you access following the issuance of an advisory opinion from this office and you believe the Agencies are in violation of the APRA, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that the Agencies have not justified their denials of access in accordance with section 9 of the APRA. Moreover, the Agencies have failed to produce responsive records within a reasonable period of time. I encourage the Agencies to either release all responsive records as soon as practicable or cite to a provision of the APRA or some other applicable law as a basis for failing to do so.

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: Robert Lendi
Joe O'Conner