



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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April 13, 2012

Thomas A. Pappas Jr.  
5918 Newport Avenue  
Portage, Indiana 46368

*Re: Formal Complaint 12-FC-70; Alleged Violation of the Access to Public Records Act by the City of Portage*

Dear Mr. Pappas:

This advisory opinion is in response to your formal complaint alleging the City of Portage ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Gregory A. Sobkowski, Attorney, responded on behalf of the City. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you submitted a written request to the City's Clerk Treasurer on January 18, 2012 for the minutes and agendas of the City Council's Budget Committee meetings from 2010 and 2011. On January 18, 2012, Clerk-Treasurer Stidham responded in writing to your request and provided all records that were responsive. On January 19, 2012, you submitted a similar written request to Councilperson Modesto, where you sought all records related to the Budget Meetings since June 29, 2010. On January 25, 2012, Councilperson Modesto responded in writing and advised that she did not have any records that were responsive to your request as they have been turned over to the Clerk-Treasurer. As of March 18, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you allege that you have yet to receive any further records.

In response to your formal complaint, Mr. Sobkowski advised that Councilperson Modesto receive your request, dated January 19, 2012, for all documents related to the Budget Committee meetings held since June 29, 2010. Councilperson Modesto responded in writing to your request and provided that she did not maintain any records that were responsive to your request as they had been turned over to the City's Clerk-Treasurer.

## 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.” *See* I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the City responded to your requests submitted to the Clerk-Treasurer and Councilperson Modesto pursuant to the requirements of section 9 of the APRA.

Generally, 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.” *Opinion 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 a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. Here, the Clerk-Treasurer provided that all records responsive to your request for the minutes and agenda for the City’s Budget Committee meetings for 2010 and 2011 had been provided. In your subsequent broader request for all records submitted to Councilperson Modesto, she advised that she no longer maintained possession of any records that were responsive to your request, as they had been turned over to the Clerk-Treasurer. As the City has provided all records that are responsive to your request, it is my opinion that it did not violate the APRA.

The APRA does require that public agencies maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). A public agency shall protect public records from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). A public agency shall further taken precautions that protect the



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contents of public records from unauthorized access, unauthorized access by electronic device, or alteration. *See* I.C. § 5-14-3-7(b). I have not been provided with a copy of the City's retention schedule, a description of the records that were sought from Councilperson Modesto and how long they would be required to be retained, or whether the Clerk-Treasurer retained any records that would have been responsive to your request submitted to Councilperson Modesto (in addition to the agendas and minutes that have already been provided). If the City failed to maintain and preserve its records regarding its Budget Committee meetings in accordance with the applicable retention schedule, it violated the APRA when it failed to comply with the requirements of I.C. §§ 5-14-3-4(e) and 5-14-3-7(a).

## CONCLUSION

For the foregoing reasons, it is my opinion that that City violated the requirements of I.C. §§ 5-14-3-4(e) and 5-14-3-7(a) if it failed to maintain and preserve its records pursuant to the applicable retention schedule.

Best regards,

A handwritten signature in black ink that reads "J. Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Gregory A. Sobkowski