



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

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

June 19, 2014

Mr. Carlton Curry
11230 Winding Wood Ct.
Indianapolis, IN 46235

Re: Formal Complaint 14-FC-114; Alleged Violation of the Access to Public Records Act by the City of Lawrence Utility Service Board

Dear Mr. Curry,

This advisory opinion is in response to your formal complaint alleging the City of Lawrence Utility Service Board ("USB") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The USB has responded via Counsel Kevin M. Quinn, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on May 23, 2014.

BACKGROUND

Your complaint dated May 23, 2014 alleges the City of Lawrence Utility Service Board ("USB") violated the Access to Public Records Act ("APRA") by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On March 5, 2014 you made a request to the Secretary of the USB for records. Specifically, you were seeking copies of the following:

- 1) "the approved 2013 budget for each one of the Water and Sewer Utility",
- 2) "the year end 2013 fiscal performance for each of the 2013 line items for each one of the Water and Sewer Utility", and
- 3) "the approved 2014 budget for each one of the Water and Sewer Utility".

You state your request was acknowledged by the Secretary and Mr. Oscar Guitierrez, City Controller acting as the CFO for the USB, said "he would have to 'check' into providing these data." You allege USB violated the APRA by providing you with nothing further.

On June 13, 2014, the USB responded to your complaint via counsel. USB argues that with regards to items 1 and 3, no records exist responsive to your request. As to item 2, USB argues “it is not entirely clear what is being requested”, but the 2013 reports are not yet complete. Furthermore, USB states “[t]he USB has been cautious in releasing information until the professional advisors the City has engaged can confirm its accuracy”, and that the reasonable time requirement of Ind. Code § 5-14-3-3(b) has not been violated. However, USB did release documents responsive to your request along with their response.

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 Ind. Code § 5-14-3-1. The City of Lawrence Utility Service Board is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the USB’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 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 (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

You are entitled to the records you seek to the extent they exist and the agency can determine which records to release which are responsive to your request. From the USB’s response, it is clear the budgets requested are not required by law to be created or maintained and therefore do not exist. In relation to the request for “fiscal performance” of line-item expenditures, I agree this request could be determined to be not reasonably particular as contemplated by Ind. Code § 5-14-3-3(a)(1). In any case, the USB has produced records it believes to be responsive to your request and I trust they are satisfactory to your search. The USB has indicated it has released those records which are completed and may not reflect the budgets in the final form.

More troubling is the lack of responsiveness on the part of the USB. While it appropriately and timely acknowledged your request on March 7, 2014, you did not receive any further communication until June 13, 2014 – over three months after your initial public records request. According to Ind. Code § 5-14-3-3(b) an agency must produce records (if they are disclosable) within a reasonable time. The reasonable time standard is subjective and varies on a case-by-case basis, however, your request is not as complex as to justify a three-month waiting period.

I have stated on various occasions it is the best practice of an agency to be in semi-regular contact with a requester if the records sought will take a significant time to produce. Not only is this consistent with the spirit of the APRA, it is also good customer service. In light of the litigation between you and the USB, it is acknowledged this communication may not be practical. Additionally, I have stated *ad nauseum* that access to public records request may not be nearly as effective or efficient as a discovery request through the trial court when litigation is ongoing. Obtaining records during litigation are often muddled by confusion between discovery and public records requests.

That being said, the USB has not provided a compelling argument as to why it waited until after the filing of your formal complaint to produce documents – a time period of over three months. A reasonable person would consider the request denied after this period of time. While the non-existence of records or a lack of reasonable particularity is justifiable cause to deny a request, a public agency must still comply with Ind. Code § 5-14-3-9(d), which states:

if a request initially is made in writing,...a public agency may deny the request if:

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:
 - (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and
 - (B) the name and the title or position of the person responsible for the denial.

Your records request was effectively denied after a reasonable time following the USB's acknowledgement elapsed. It is my opinion three months is well past a reasonable time for a relatively simple request. Because the USB's actions did not conform to Ind. Code § 5-14-3-9(d), the denial was improper.

CONCLUSION

It is the Opinion of the Public Access Counselor the City of Lawrence Utility Service Board acted contrary to the Access to Public Records Act.

Regards,



Luke H. Britt
Public Access Counselor

Cc: Mr. Kevin M. Quinn, Esq.