



STATE OF INDIANA

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December 17, 2014

Mr. David L. McDowell
6535 N. 1225 W.
Monticello, IN 47960

Re: Formal Complaint 14-FC-285 (Consolidated); Alleged Violation of the Access to Public Records Act by the Carroll County Emergency Management Agency and the Carroll County Auditor

Dear Mr. McDowell,

This advisory opinion is in response to your formal complaint alleging the Carroll County Emergency Management Agency ("EMA"), and the Carroll County Auditor ("Auditor"), violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Auditor, Ms. Deborah K. Stevens has responded and her response is enclosed for your review. The EMA has responded via Mr. Ted Johnson, Esq., and Mr. Dana L. Jeffries. Their 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 November 24, 2014.

BACKGROUND

Your complaint against the Carroll County Emergency Management Agency dated November 23, 2014, alleges the EMA violated the Access to Public Records Act (Ind. Code § 5-14-3) by failing to produce required records.

Your complaint against the Carroll County Auditor dated November 24, 2014, alleges the Auditor violated the Access to Public Records Act by failing to produce required records.

On or about November 13, 2014, you submitted a public records request to the EMA requesting minutes and sign-in sheets from a public meeting held in 2010. The next day, you were told the records had been destroyed. Later, on November 17, 2014, you were told the records did exist but could not be found. On November 21, 2014 after offering to come and search the office yourself, you were told the County Commissioners instructed the EMA Director not to allow you to see the files.

The EMA responded by stating the records you sought from the EMA had indeed been destroyed. It clarifies by stating the Commissioner's did not intend to deny you access to the records, but merely deny you access to the office to search for the records.

Also on or about November 13, 2014, you submitted a public records request to the Auditor seeking records from the Carroll County Board of Commissioner's meetings. The Auditor states the records were provided to you on December 5, 2014.

ANALYSIS

The public policy of the APRA states that "a (p)roviding person 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 Carroll County Auditor's Office and the Porter County Emergency Management Agency are public agencies for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Any person has the right to inspect and copy those public official'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).

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....").

However, the APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. See Ind. Code § 5-14-3-4(h). A public agency shall protect public records from loss, alteration, mutilation, or destruction. See Ind. Code § 5-14-3-7(a). Here the records responsive to your request were required to be permanently kept by the EMA pursuant to Records Schedule found here: http://www.in.gov/icpr/files/county_general.pdf. While it is true the current director is not necessarily responsible for the action of a prior administration, it is a violation of the APRA nonetheless.

As for any denial of access to inspection, it appears there is a misunderstanding between allowing you to inspect the records and allowing you entry in the EMA's office to search for the records. Although you may have first-hand knowledge of where the records may be, it is not a right conferred upon the public to enter into a local government's place of business and search for records yourself. I hope this serves to clarify any misunderstanding on that particular issue.

As for the Auditor, it appears she acknowledged your request within seven days of your original request and made the records available to you within a reasonable time.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Carroll County Auditor did not violate the Access to Public Records Act. The Porter County Emergency Management Agency did violate the APRA by allowing the destruction of records; however, it appears as if the current director is not culpable for the destruction.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt
Public Access Counselor

Cc: Mr. Ted Johnson, Esq.; Ms. Deborah K. Stevens; Mr. Dana Jeffries