



STATE OF INDIANA

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September 1, 2016

Billy Haller
8161 Lisa Lane
Georgetown, Indiana 47122

Re: Formal Complaint 16-FC-176; Alleged Violation of the Access to Public Records Act by the Georgetown Clerk-Treasurer's Office

Dear Mr. Haller:

This advisory opinion is in response to your formal complaint alleging the Georgetown Clerk-Treasurer's Office ("Office") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. The Office responded via Brenton Fender. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on July 22, 2016.

BACKGROUND

Your complaint, dated July 20, 2016, alleges the Georgetown Clerk-Treasurer's Office violated the Access to Public Records Act by failing to acknowledge your request within twenty-four hours.

On July 1, you hand-delivered a records request to the Office, seeking to inspect E-Verify affidavits for town contractors and all who bid on town contracts. On July 12, you called the Office to follow up. You were told neither an acknowledgement nor a response was necessary because the Office did not possess the records requested.

On August 5, the Office responded, noting the affidavits did not exist.

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 Indiana Code § 5-14-3-1*. The Georgetown Clerk-Treasurer's Office 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 Office's disclosable public

records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

Your complaint raises two issues, a failure to acknowledge an APRA request and a failure to provide a substantive response to an APRA request.

You state in your complaint you hand-delivered your request to a secretary. With regard to in-person delivery of records requests, this Office has held on numerous occasions an in-person delivery which is accepted in-person by agency staff could be considered an acknowledgment simultaneous with your request. There is not necessarily a statutory need for written follow-up correspondence, as you insist, because you are already aware your request was received. Best practice would dictate you receive a written receipt of your request. This is not required by law – an acknowledgement can be oral – but, it is good customer service to follow-up with a written acknowledgment. I recommend the Town implement this practice going forward.

The larger issue is the Town's failure to provide a substantive response to your APRA request. Pursuant to Indiana Code § 5-14-3-9(d), a denial of access to public records requires a response that includes the name and title of the person responsible for the nondisclosure of the records and how that person may be contacted. Additionally, when a denial occurs the required response should include the statutory authority for the claim that the record is confidential or otherwise nondisclosable – if the records exist.

The Office informed you on July 12 it does not possess the records you are requesting. Under the APRA, a public agency is not required to provide records it does not possess. You assert the Office is required to possess the records but the APRA does not mandate a public agency create records. Instead, it requires a public agency protect and disclose the records that already exist. The Office's alleged failure to create records is not an issue this office can opine on.

While the APRA does not require a public agency to disclose records it does not possess, a response must still be given. The Office is required to inform you it does not possess the records in question. The phone call on July 12 met this requirement because even though original request was in writing. I do not see a statutory need for a written notice under Indiana Code § 5-14-3-9(d) because the Office does not have the records you seek. You may pursue another avenue for compliance pursuant to Ind. Code § 22-5-1.7, however, this office cannot compel the Treasurer's office to create any documents.

CONCLUSION

Based on the forgoing, it is the Opinion of the Public Access Counselor the Georgetown Clerk-Treasurer's Office not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', with a long, sweeping underline that extends to the left and then curves back under the main part of the signature.

Luke H. Britt
Public Access Counselor