



STATE OF INDIANA

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August 13, 2009

John Emry
62 West Jefferson Street
Franklin, Indiana 46131

Re: Formal Complaint 09-FC-164; Alleged Violation of the Access to Public Records Act by the City of South Bend Police Department

Dear Mr. Emry:

This advisory opinion is in response to your formal complaint alleging the City of South Bend Police Department violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records and by charging an excessive copy fee. The City's response to the complaint is enclosed for your reference. It is my opinion the City did not violate the APRA.

BACKGROUND

You allege that on July 2, 2009 you renewed a previous request for access to records maintained by the Department. In response you received records which satisfied part of the request and an invoice for \$.60 for paper copies. You allege three items you had requested were missing from the response. Further, you contend that the \$10 per video charged by the City is excessive under the APRA.

The City responded to the complaint by letter dated August 5 from Assistant City Attorney Thomas Bodnar. Mr. Bodnar indicates that the first response to your request was made on July 7. The City contends there was some difficulty locating some material you requested because the officer involved was not identified. Mr. Bodnar details the work the City did to locate the requested records. Regarding the copy of the ordinance you requested, Mr. Bodnar contends the omission was inadvertent and has now provided you the website where you can view the ordinance.

Regarding the fee associated with copies of the audio and visual records, the City contends those records are not "documents" as contemplated by I.C. § 5-14-3-8(d). Instead, the City contends that I.C. § 5-14-3-8(g) applies. This latter provision allows the City to charge the "direct cost" of providing the copy, and that cost can include 105% of the labor required to retrieve the data. The City sets forth calculations showing the

amount charged is less than the direct cost. Further, the City contends that former Counselor O'Connor agreed the fee charged for videos was reasonable.

ANALYSIS

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

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail or facsimile (or as this office has said, electronic mail) and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. § 5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. § 5-14-3-7(c). Former public access counselors and I have opined that records must be produced within a reasonable period of time, based on the facts and circumstances.

Here, the City initially responded to your July 2 request on July 7, well within the time allowed by I.C. § 5-14-3-9(b). You contend the City's response was not complete. The City contends the omission of the ordinance was inadvertent and has now provided you information regarding where you can find the ordinance online. Based on the inadvertent nature of the omission and the record's existence online for anyone to inspect, it is my opinion the City's response did not violate the APRA.

Regarding copy fees, you contend that the City cannot charge a fee for the recordings because there is no ordinance. As we know there is and has for many years been an ordinance in place, this issue is moot.

You also contend that the fee charged by the City for copies of the recordings is excessive. As you assert, the APRA prohibits an agency from charging labor and overhead costs for providing copies of documents. I.C. § 5-14-3-8(d). Here, though, subsection 8(d) is not the applicable provision regarding copy costs. Because the records at issue are not documents, it is my opinion subsection 8(g) applies. Subsection 8(g) provides the following, in part:

Except as provided by subsection (h), for providing a duplicate of a computer tape, computer disc, microfilm, or similar or analogous record system containing information owned by the public agency or entrusted to it, a public agency may charge a fee, uniform to all purchasers, that does not exceed the sum of the following:

(1) The agency's direct cost of supplying the information in that form. . .
I.C. § 5-14-3-8(g).

It is my opinion the records at issue are subject to this provision via the “similar or analogous records system” provision.

Direct cost is defined in the APRA:

"Direct cost" means one hundred five percent (105%) of the sum of the cost of:

- (1) the initial development of a program, if any;
- (2) the labor required to retrieve electronically stored data; and
- (3) any medium used for electronic output;
for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter.

I.C. § 5-14-3-2(c).

Here, the City has provided a detailed breakdown of the direct costs associated with supplying the information in the form requested. In both cases, the direct cost matches or exceeds the \$10 charged by the City and established by the City’s ordinance. It is my opinion the fee charged by the City is not excessive under the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion the City did not violate the APRA by not responding to a request it did not receive.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Thomas Bodnar, City of South Bend