



# STATE OF INDIANA

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May 6, 2009

Jim James  
6105 Welsh Landing  
Charlestown, Indiana 47111

*Re: Formal Complaint 09-FC-98; Alleged Violation of the Access to Public Records Act by the City of Charlestown Clerk-Treasurer*

Dear Mr. James:

This advisory opinion is in response to your formal complaint alleging the City of Charlestown Clerk-Treasurer ("Clerk") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the Clerk's response to the complaint is enclosed for your reference. It is my opinion the Clerk did not violate the APRA by failing to disclose a record her office did not maintain. Further, it is my opinion the City must provide you with a copy of the requested record unless an exception to disclosure applies to the record.

## BACKGROUND

You allege that on March 27, 2009 you submitted a request to the Clerk for copies of a number of records. You were provided copies of most of the records on April 3. One record, a water study report, was not contained in the packet of records. When you asked about the report, the Clerk replied that her office did not have a copy of the report because it had not yet been approved. You requested the record in the form in which it currently existed. The Clerk indicated she could not comply and that you could ask the mayor's office for a copy. You include a copy of an undated letter from the Clerk wherein the Clerk indicates the report would be available on April 9. You filed the present complaint, alleging you were denied access to the record and still had not been provided a copy of it. Your complaint was postmarked on April 6, and my office received it on April 13.

The Clerk responded to the complaint by letter dated April 14. The Clerk contends her office did not maintain a copy of the report at the time of the request. The Clerk contends that when she asked the Mayor for a copy, the Mayor indicated the Clerk would receive a copy of the report at the April 6 Council meeting. As such, the Clerk explained to you that she could make it available on April 9. The Clerk contends copies were available from her office on April 9.

## 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 Clerk 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 Clerk 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 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). If the request is delivered in person and the agency does not respond within twenty-four hours of receipt, the request is deemed denied. I.C. § 5-14-3-9(a).

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 stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material are necessary to determine whether the agency has produced records within a reasonable timeframe.

Here, the Clerk responded to the request within the timeframes established by I.C. § 5-14-3-9. Nothing in the APRA requires the Clerk to provide you copies of records by a date or time you demand. Further, nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. Here, the Clerk contends her office did not maintain a copy of the report at the time of the request. As this record was not a record created for or on behalf of the Clerk, nothing in the APRA would require the Clerk to obtain a copy of the record for you. The Clerk's suggestion that you request a copy of the record from the agency which maintained it was an appropriate response to the request. If the Mayor would not provide a copy of the report to the Clerk, the Clerk could not provide you a copy. In this case, it would be appropriate to submit your request directly to the office which maintains the record.

Regarding the denial of access from the mayor's office, certainly section 7 requires an agency to regulate any material interference with the regular discharge of

duties. At the same time, though, it is important to note that an agency may not deny access to a record on the basis that it has not yet been approved. See *Opinion of the Public Access Counselor 98-FC-8*, available at [www.in.gov/pac](http://www.in.gov/pac). To deny access to a record, an agency must rely upon an exception to disclosure. No exception exists which would allow an agency to deny access to a record on the sole basis that it has not yet been approved.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Clerk did not violate the APRA by failing to disclose a record her office did not maintain. Further, it is my opinion the City must provide you with a copy of the requested record unless an exception to disclosure applies to the record.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Donna Coomer, City of Charlestown Clerk-Treasurer