



STATE OF INDIANA

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August 13, 2012

Kathleen Van Arsdel
2551 High Sierra Drive
Valparaiso, Indiana 46385

Re: Formal Complaint 12-FC-213; Alleged Violation of the Access to Public Records Act by the City of Valparaiso's Planning Department

Dear Ms. Van Arsdel:

This advisory opinion is in response to your formal complaint alleging City of Valparaiso Planning Department ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Patrick Lyp, Attorney, responded on behalf of the City. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you made a request of the City for documents that were to be made available to you prior to a subsequent meeting. You have been informed by the City that all records responsive to your request have been provided. You challenge the City's assertion that all records have been made available.

On May 15, 2012, the City's Board of Zoning Appeals ("BZA") deferred ruling on a proposed variance until its June 19, 2012 meeting. The BZA asked the Petitioner to submit a variety of documents prior to the next meeting. You allege that the BZA further advised that the documents would be made available for your review prior to the June meeting in order for you to submit written comments. The BZA failed to provide you with any of the requested documents prior to the June meeting. When you inquired with the City's Planning Director, he stated that he was of the belief that the documents had been provided to you by the Petitioner.

At the June 19, 2012 meeting, the Petitioner submitted documents to the BZA prior to the start of the meeting. Mr. Lyp and Mr. Tyler Kent advised at that time the documents would be available to the public. You inquired why the BZA would "move forward in this manner", to which you allege the City responded that if you were not happy with its actions, you may file a legal suit.

On July 6, 2012, you contacted the City via telephone and requested copies of the records that were submitted at the June 19, 2012 meeting. On July 9, 2012, you were informed orally that the records were available to be picked up. On July 12, 2012, you retrieved the documents from City Hall. Upon receipt of the records, you provide that not all records that were responsive to your request were provided. You inquired with Sandy Biggs regarding this issue, to which she provided that the entire file had been produced. You then emailed Mr. Kent regarding this issue and he provided all records that you had previously received on July 12, as well as copies of minutes from BZA meetings, a copy of the petition, and copy of the BZA decision. Mr. Kent again stated you had received all records that were responsive to your request.

In response to your formal complaint, Mr. Lyp advised that all records that were responsive to your request were provided and the City in no way has denied your request. The City is not invoking any applicable statute that would allow it to deny your request, Mr. Lyp further advised that this is not a situation where the City has taken the position that the request was inartfully drafted or certain records are in the possession of a consultant or other City agency. Simply put, all records responsive to your request have been provided.

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

A request for records may be oral or written. *See* I.C. § 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* I.C. § 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* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply.

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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* The parties significantly disagree as to the existence of certain documents maintained by the City in connection with the variance. If the City failed to produce all records that were responsive to your request, it is my opinion that it violated the APRA. However, if all records have been produced, then it is my opinion that the City did not act contrary to the requirements of the APRA.

As to your allegations that the City and/or Mr. Kent violated the public access process by not holding the Petitioner accountable for failing to timely submit their requested records to you and by failing to deliver your documents to the BZA prior to the June 19, 2012 meeting, such issues would be outside the purview of this office. The APRA deals with the production of records by a public agency in response to a request. Mr. Lyp has advised that to the extent you disagree with the City's decision to grant the variance, several legal remedies are available for you to pursue.

CONCLUSION

For the foregoing reasons, it is my opinion that the City did not violate the APRA if all records that were responsive to your request were provided.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a stylized "H".

Joseph B. Hoage
Public Access Counselor

cc: Patrick Lyp