



STATE OF INDIANA

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June 28, 2013

Ms. Valerie S. Schey
1314 E. Wayne Street North
South Bend, Indiana 46615

Re: Formal Complaint 13-FC-160; Alleged Violation of the Access to Public Records Act by the City of South Bend

Dear Ms. Schey:

This advisory opinion is in response to your formal complaint alleging the City of South Bend ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Cristal Brisco, Corporation Counsel, responded on behalf of the City. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that you are a member of the City's Common Council ("Council"), Redevelopment Commission, and a member of the Century Center Board of Managers. You allege that beginning on January 28, 2013, you have submitted a series of public record requests to the City, to which you provide that the City has either failed to respond or alternatively, failed to provide all records in a reasonable period of time.

In response to your formal complaint, Ms. Brisco advised that in accordance with the APRA, the City requires the general public to follow three steps when requesting records: completion of an APRA form, submission of the form to the Office or Department having possession of the form, and after submission of the request, the Office or Department shall forward the request to the Department of Law to determine if the records are disclose, applicable fees, etc... Apart from the rules applicable to the general public, council members have been afforded a special procedure for APRA requests, designed to provide them with reasonably prompt access to necessary information. Under such procedures, Council members were able to communicate APRA requests without submitting an APRA form or requiring payment, provided the request was in writing, communicated by the Council Attorney to the City Attorney, and identified as an APRA request.

On the following dates, you submitted emails to individual city employees requesting information: March 7, 2013 (with follow-up on March 21); March 25, 2013, March 28, 2013, and April 23, 2013. The request failed to provide that you were making an APRA request and were not sent by the Council's attorney. Further, the request was not submitted on the City's APRA form and none of the emails were sent to the Mayor's office.

On April 19, 2013, Mayor Buttigieg sent a letter to Common Council At-Large member Karen White addressing communication between the legislative and executive branches of the City's municipal government. Mayor Buttigieg noted that Council members had increasingly been emailing department heads and city employees with requests, opinions, and questions. In the context of the daily operations of the City, such requests could interfere with the employees' regular duties and cause confusion. Mayor Buttigieg asked that the council members follow the aforementioned communication protocols or send the request directly to the Mayor's Office.

On May 6, 2013, you sent correspondence to the Mayor regarding your concerns. The correspondence was received on the Mayor's first day back in the office after returning from two weeks overseas on military duty. The Mayor responded to the letter on May 30, 2013. The Mayor apologized for not responding immediately and suggested that if you had concerns regarding the responsiveness to your requests, that you visit his office, call his cell phone, remind a member of his staff, or try another informal means as opposed to contacting the press of the Public Access Counselor's Office. For formal requests, he urged you to respect the agreed upon protocol for council members or working through the Council and Administration attorneys.

Specific to the requests cited in your formal complaint, all records and/or information was provided on May 30, 2013 and June 4, 2013:

- March 7, 2013 – Request directed to Deputy City Controller and was acknowledged by the City within twenty four hours of receipt. You submitted a follow-up inquiry on March 21, 2013. You sought “detailed information” on 2013 Blackthorn Fund 219 Budget Items, specifically regarding salaries, roster of employees, and job titles.” The request was fulfilled on May 30, 2013.
- March 25, 2013 – Request submitted to the Director of Animal control for “an update on purchase of bioliquidator.” All information was provided on May 30, 2013.
- March 28, 2013 – Request to the Assistant City Attorney regarding “what account the \$1,327,083.33 in fees due from Bosch from early termination will be deposited.” Information was provided on May 30, 2013.
- April 23, 2013 – Request for copy of South Bend Animal Control PetPoint Outcome Survey of January 1, 2013 through April 22, 2013. All records were provided on June 4, 2013.

Prior to filing your formal complaint and speaking with the press, Ms. Brisco advised that you never expressed either to the Mayor's Office or the City's Department of Law your concerns regarding the APRA and that the law had been violated by the City.

As an initial aspect, Ms. Brisco maintains that you do not have standing to file a formal complaint as to three of your requests. I.C. § 5-14-5-7 requires that a person denied access to public record who chooses to file a formal complaint must do so no later than 30 days after the denial. You filed your formal complaint on May 29, 2013. A request is deemed denied if it is not acknowledged by the agency within seven days of receipt. Thus, Ms. Brisco would argue that the April 23, 2013 request is the only request listed in your formal complaint that you have standing.

Section 3(a) of the APRA provides that public agencies are given discretion to require that a request for inspection or copying been made in a form provided by the agency. Dating back to 1999, the City has adopted and utilized its own request form to ensure that all public access requests are directed to the appropriate agency for response. For the convenience of council members, a separate protocol was established that was in effect at the time of your requests. You failed to follow the protocols established by the City in regards to submitting an APRA request.

Further, Ms. Brisco maintains that your requests were not made with reasonable particularity. As to your March 25, 2013 request, the request is vague and does not identify a record that is sought. Your March 28, 2013 request asks for information on when will an action be conducted. Neither of said requests provides the City with sufficient information to search for, locate, and retrieve the requested records. In addition, the City did not maintain any record responsive to your March 28, 2013 request. Further, the City is not required to create a new record in order to satisfy a public records request.

As to the remaining requests, despite your failure to submit a proper APRA request, the City has provided all records responsive to your requests, which you have acknowledged in recent correspondence to the Public Access Counselor's Office. The City has provided all records and/or information in a reasonable period of time and the APRA does not require instant access to public records. The City acknowledged your March 7, 2013 request within twenty-four (24) hours of receipt and you were informed that Mr. Murphy would follow up with the Department of Community Investment regarding your request. The same is true for your March 21, 2013 request, which related back to the March 7, 2013 request. Ultimately, over 80 pages of records were produced in response to the request and provided on May 30, 2013 at no charge. Much of the information sought required procurement from multiple sources. In addition to responding to your request, the requested individuals charged with gathering records responsive to your request were required to maintain the normal duties of their office.

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).

I would note that the APRA is universally applicable to all persons. A member of a governing body making a request for records, pursuant to the APRA, is not granted any additional rights or privileges under the law. Matters related to the internal governance of a public agency and what records are necessary for public officials to make informed decisions on public matters is separate and distinct from the APRA and outside the purview of this office. *See Opinions of the Public Access Counselor 06-FC-62; 08-FC-19; 08-FC-36; 12-FC-161*. Your formal complaint will be solely analyzed pursuant to the APRA; to the extent that you believe the City has failed to provide you with the appropriate records or information in order to fulfill your responsibilities as a public official or alternatively, failed to follow the internal procedures outlined by the Mayor Buttigieg for council members, you should make an inquiry directly with the City, Council, and/or Mayor.

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. At the agency’s discretion, a request to inspect and copy may be in writing or on a form provided by the agency. *See* I.C. § 5-14-3-3(a)(2). Counselor Neal addressed this issue in a 2009 opinion regarding the South Bend Police Department:

“The APRA provides that an agency may provide a form for requests. If the statute allowed an agency to require a request to be made in writing but not necessarily provide the form, subsection (2) would stop with “in writing.” But it does not. Instead, the statute provides that at the discretion of the agency, the request must be made in writing *on or in a form provided by the agency*. You argue that a form is not necessary and is an “absurd result.” The Department argues that it makes good sense for the agency to require the use of a form. Certainly the law sides with the Department in allowing an agency to require a requestor to submit a request utilizing the form provided by the agency. I.C. § 5-14-3-3(a).

As the Department contends, former counselor O'Connor addressed this issue in *Opinion of the Public Access Counselor 01-FC-34*, opining that requiring a requestor to utilize the agency's form does not constitute a denial of access. I agree. As such, it is my opinion the Department has not violated the APRA." See *Opinion of the Public Access Counselor 09-FC-110*.

I would agree with the analysis provided by both Counselor's Neal and O'Connor on this issue. As applicable here, pursuant to section 3(a) of the APRA, the City requires, and has required since 1999, that all requests for records made pursuant to the APRA be made on a form proscribed by the City. If your requests for records were not made on the requisite City form, then it is my opinion that the City did not violate the APRA in response to any of the requests that were submitted.

Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. See I.C. § 5-14-3-3(a). While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor and recently by the Indiana Court of Appeals. See *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012); *Anderson v. Huntington County Bd. of Com'rs.*, 983 N.E.2d 613 (Ind. Ct. App. 2013); See also *Opinions of the Public Access Counselor 99-FC-21 and 00-FC-15*. As to request made for information, rather than for a record maintained by the public agency, Counselor Hurst addressed a similar issue in *Opinion of the Public Access Counselor 04-FC-38*:

A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party's request. *Opinion of the Public Access Counselor 04-FC-38*.

I would agree with the City's assertion that your March 25, 2013 and March 28, 2013 emails are inquiries rather than the request of an actual record (e.g. "update on purchase of a bioliquidator" and "what account the \$1,327,083.33 in fees due from Bosch from early terminations will be deposited."). While the City has now answered and/or provided information regarding the inquiries, it is my opinion the City did not violate the APRA by not creating a record in order to answer the inquiries that had been submitted.

In regard to your March 7, 2013 and March 21, 2013 inquiry regarding salary information from employees at the Blackthorn Golf Course, the APRA provides that that certain personnel records may be withheld from disclosure:

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(8) Personnel files of public employees and files of applicants for public employment, except for:

(A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;

(B) information relating to the status of any formal charges against the employee; and

(C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion. If the employees that you seek information for are public employees of the City or any other public agency, the respective public agency that employs the individuals would be required to provide the compensation of the requested employees pursuant to section 4(b)(8) of the APRA. I do not have enough information before me to issue an opinion as to whether the employees of Blackthorn Golf Course are "public employees." Further, the City has indicated in its response to your formal complaint that all information was provided to you on May 30, 2013. If the employees in question are not employees of the City and the City does not maintain information regarding their respective salaries, the City would not violate the APRA by failing to provide a record that it was not otherwise legally obligated to maintain.

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of section 3(b) have been met include, the nature of the requests (whether they are broad or

narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* 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. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

As to your April 23, 2013 request for a copy of the South Bend Animal Control PetPoint Outcome Survey of January 1, 2013 through April 22, 2013, the records were provided to you on June 4, 2013. If your request, submitted pursuant to the APRA, was made on the City's proscribed form for public record requests, the City would have acted contrary to section 9(b) of the APRA as it failed to acknowledge the request within seven (7) days of receipt. Ms. Brisco has noted that in regards to all of your requests, the City was required to consult with a variety of different sources. Employees providing information responsive to your request were also required to maintain the normal duties of their office. Further, the April 23, 2013 request was not your sole request and the City was also required to address and respond to all other records requests that were received. Ms. DeRose has provided that the City received approximately 2,021 request for records in 2011, 1,911 in 2012, and 907 requests thus far in 2013. Further, the City has offered an alternative measures to members of the Council to submit requests so that they may more efficiently be addressed and responded to; which you elected not to follow. In light of all such factors, it is my opinion that the City provided records responsive to your April 23, 2013 request in a reasonable period of time.

CONCLUSION

For the foregoing reasons, it is my opinion that the City has not violated the APRA.

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 distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Cristal Brisco