



STATE OF INDIANA

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January 16, 2013

Donn Andrew Altmann
4116 Jason Avenue
Franklin, Indiana 46131

Re: Formal Complaint 13-FC-05; Alleged Violation of the Access to Public Records Act by the Jennings County Animal Control

Dear Ms. Altmann:

This advisory opinion is in response to your formal complaint alleging the Jennings County Animal Control ("Animal Control") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* James Brewner, Senior Officer, responded on behalf of Animal Control to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on December 20, 2011, you hand-delivered a written request for records to Animal Control. Thereafter, you made numerous attempts to contact Mr. Brewner via telephone regarding the status of your request. While you have received acknowledgment that the agency has received your request, as of January 4, 2012, you have yet to receive any records in response. On December 28, 2012, you further allege that you hand-delivered a separate public records request to Animal Control. As of January 4, 2012, you have yet to receive any response to your request.

In response to your formal complaint, Mr. Brewner advised that Animal Control acknowledged the receipt of your request in writing on January 2, 2013. In the agency's January 2, 2013 correspondence, Mr. Brewner advised that as to your December 20, 2011 request, Animal Control maintained no records that were responsive to your request. As to your December 28, 2012 request, Mr. Brewner advised that the records could be accessed and obtained from Animal Control between the hours of 8:00 a.m. and 4:00 p.m. on Friday, January 11, 2013. If said date was not compatible with your schedule, you were informed that an alternative date would be found. Mr. Brewner's January 2, 2012 correspondence was sent to you via certified mail. As of January 15, 2012, Mr. Brewner has yet to receive confirmation that you have received the January 2, 2012 correspondence.

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. Animal Control 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 agency’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 twenty-four 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 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 information regarding how or when the agency intends to comply. Here, you hand-delivered a written request for records to Animal Control on December 20, 2011 and December 28, 2012. Animal Control was thus required to respond, in writing, within twenty-four hours of receipt of your hand-delivered written request. Animal Control orally acknowledged the receipt of your December 20, 2011 request and responded in writing to your December 28, 2012 on January 2, 2013. As such, it is my opinion that the Animal Control acted contrary to the requirements of section 9 of the APRA in not responding to a hand-delivered, written request in writing within twenty-four hours of receipt. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63*. Please note however, that the following is only in reference to the requirements of an agency in responding to a public records request; section 9 of the APRA does not provide that the failure of a public agency to provide all records within either twenty-four hours or seven days is a violation of the APRA. 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).

As to the substance of your December 20, 2011 request, if a public agency has no records responsive to a public records request, the agency generally 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*. Animal Control has provided that it does not maintain any records that are responsive to the request that was submitted on December 20, 2011. As such, it is my opinion that Animal Control did not violate the APRA by failing to produce a record that was responsive to your request that it was not otherwise obligated to maintain.

As to your December 28, 2012 request, as noted *supra*, 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 factors to be considered in determining if the requirements of section 3(a) under the APRA 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 edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. 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*.

Animal Control received your written request for records on December 28, 2012. On January 2, 2012, the agency advised you in writing that all records that were responsive to your request would be available on January 11, 2013. Animal Control sent its correspondence via certified mail, to which Mr. Brewner he has yet to receive confirmation that you are in receipt of said correspondence. Mr. Brewner further advised that you have also not contacted the agency regarding any attempt to retrieve the records that you have requested. As such, it is my opinion that Animal Control complied with the requirements of I.C. § 5-14-3-3(b) in providing all records that were responsive to your request in a reasonable period of time. As the records have been available since January 11, 2013, I would encourage you to contact Mr. Brewner in an attempt to facilitate the disclosure of the records that you have requested.

CONCLUSION

For the foregoing reasons, it is my opinion that the Animal Control acted contrary to the requirements of section 9 of the APRA in not responding to a hand-delivered, written request in writing within twenty-four hours of receipt. As to all other issues, it is my opinion that Animal Control complied with the requirements of 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: James Brewner