



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

August 16, 2013

Mr. Paul M. Allen
315 Cobblestones Court
Avon, Indiana 46123

Re: Formal Complaint 13-FC-212; Alleged Violation of the Access to Public Records Act by the West Central Conservancy District

Dear Mr. Allen:

This advisory opinion is in response to your formal complaint alleging the West Central Conservancy District ("District") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Alan Hux, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that you submitted a written request to the District for a copy of detailed cell phone records for a District employee. You allege that the records produced by the District only include a summary of the dates requested.

In response to your formal complaint, Mr. Hux advised that the District received your written request on June 24, 2013. On June 27, 2013, Mr. Hux confirmed in writing that the District was in receipt of your request for records. Ultimately, the District has provided all records responsive to your request that are maintained by the agency. The invoices provided to you were the only records of the employee's cell phone that the District has received from the cell phone provider.

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 District 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 District'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. Here, the District complied with the requirements of section 9(b) of the APRA in acknowledging the receipt of your request, in writing, within seven days of its receipt.

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....”). Further, an agency is not required to create a record in order to satisfy a request. Here you requested detailed cell phone records from a specific District employee. In response, the District has provided that you have been given all records received, retained, or maintained by the District that are responsive to your request. The District is not required to create a new record to satisfy your request, nor is it required to request that one of its vendors create a record or report to satisfy your request. As such, it is my opinion that the District did not violate the APRA by failing to produce a record that does not exist.

CONCLUSION

For the foregoing reasons, it is my opinion that the District did not violate the APRA by failing to produce a record that does not exist.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Alan Hux