

November 29, 1999

Mr. Michael Duke
5180 E. 100 N
Marion, Indiana 46952

Re: Advisory Opinion 99-FC-13;
Denial of Access to Public Records by the City of Marion.

Dear Mr. Duke:

This is in response to your formal complaint, which was received October 29, 1999. You have asked whether the failure to allow inspection of public records and the failure to provide a copy of one public record by the City of Marion, Indiana (hereinafter "City,") violate the Indiana Access to Public Records Act (hereinafter "APRA.") The City, through its Corporate Counsel, Mr. Randall L. Johnson, responded in a letter dated November 15, 1999, that the City did not violated the APRA in dealing with the written public records requests submitted by yourself, Mr. Fred Troxell and Ms. Carol Bone. A copy of his response is enclosed.

For the reasons stated below, it is my opinion that the City should have provided you with an opportunity to inspect the original public records under the APRA. Further, it is my opinion that the City's failure to produce the letter of January 1999 in response to the first public records request was an improper denial of access under the APRA. The failure to produce public records that were properly withheld under Indiana Code section 5-14-3-4(b) or that did not exist at the time of the request, however, were not violations of the APRA.

BACKGROUND

According to the information you provided, Mr. Troxell hand delivered a request on October 21, 1999, to inspect, and if necessary, copy all public records relating to the proposal by Wackenhut Corporation or any other person or entity to place a private prison in Grant County, Indiana. On the same day, Mr. Troxell was informed that Mr. Johnson compiled the public records he requested on his own behalf, for the mayor and the community development director. When Mr. Troxell arrived, he was provided with a stack of photocopies, and allegedly not given the opportunity to inspect the original files of the city offices. You question the fact that no documents were produced for a time period prior to May 17, 1999. In particular, a letter dated January 8, 1999 from the mayor to Wackenhut Corporation, and documentation concerning expenses for travel of city officials on December 21, 1998 and May 27, 1999 were not produced.

In an effort to obtain the public records you believe were not properly produced in response to

Mr. Troxell's request, you and Ms. Bone made a virtually identical request on October 25, 1999, which included a specific request for the letter dated January 8, 1999. The next day, the City made public records available in response to your request. Ms. Bone appeared at the City's office and was allegedly told by the community development director that the failure to include the copy of the January 8, 1999 letter when responding to Mr. Troxell's request was an oversight. When she asked to see the public records at that time, she was told that she could not see the original file containing the letter because the Corporation Counsel, Mr. Johnson, had that file.

In his response, Mr. Johnson noted that his written response of October 21, 1999, clearly stated that certain public records were not required to be disclosed under Indiana Code section 5-14-3-4, specifically intra-agency and interagency advisory or deliberative material and personal notes and diaries. Mr. Johnson states that in a telephone conversation with Mr. Troxell, he indicated that you could examine the public records or obtain copies at \$0.10 per page. In addition, Mr. Johnson informed Mr. Troxell in this telephone conversation that they did not make copies of certain public records, such as a videotape and packet of marketing materials, but that he was welcome to examine them. In addition, Mr. Johnson also directed Mr. Troxell to the location where the video could be viewed.

With respect to the January 8, 1999 letter, the mayor instructed his secretary to notify Sheriff Oatis Archey that a copy of the letter was going to be given to Mr. Troxell and the media, since the letter specifically mentioned the sheriff. Due to a clerical error, the letter was not included in the packet of materials prepared for Mr. Troxell on October 21, 1999, but was produced in response to the second public records request from yourself and Ms. Bone. Further, with respect to the conversation between Ms. Bone and the community development director on October 26, 1999, the files that were reviewed in order to respond to the public records requests were in Mr. Johnson's office on that date and he was attending a continuing legal education seminar. The community development director could not have shown the complete original file upon request because the file was in Mr. Johnson's office. Despite your allegations, Mr. Johnson indicates that all disclosable public records have now been produced in response to the two public records requests.

With respect to expense payment documentation for travel by City officials on December 21, 1998 and May 27, 1999, Mr. Johnson states that as of the date of the public records requests, and his response to your formal complaint, there were no records of reimbursement. While there was a verbal agreement that the City and its officials would reimburse the Wackenhut Corporation, no reimbursement has been made.¹ The City, therefore, could not produce such records, as they did not exist at the time of your requests.

The questions presented in your complaint, therefore are:

- Did the City violate the APRA when it failed to allow the inspection of public records as requested in the two written public records requests?
- Did the City violate the APRA by failing to produce a public record, specifically the letter of January 8, 1999 that did exist at the time of the first public records request or by

claiming certain records were not required to be disclosed under Indiana Code section 5-14-3-4(b)?

- Did the City violate the APRA by failing to produce public records reflecting travel reimbursement to Wackenhut Corporation?

ANALYSIS

There is no question that the City of Marion is subject to the provisions of the Access to Public Records Act (hereinafter, "APRA.") "It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government." Ind. Code rc 5-14-3-1. Further, the Indiana General Assembly has provided that the APRA is to be liberally construed in favor of this policy and the burden of proof for nondisclosure of a public record lies with the public agency, not the person seeking access to the public record. *Id.*

A public record is defined to include any information, in whatever form, that is filed with, created, received or maintained by a public agency. Ind. Code rc 5-14-3-2. Public records are to be available for copying and inspection unless the public record is confidential under Indiana Code subsection 5-14-3-4(a) or nondisclosable at the agency's discretion under Indiana Code subsection 5-14-3-4(b). A public agency, therefore, is obligated to produce any disclosable public record that is maintained by the agency.

Right to Inspect Public Records

Under the APRA, "(a)ny person may inspect and copy the public records of a public agency during the regular business hours of the agency, except as provided in section 4 [Indiana Code section 5-14-3-4] of this chapter. Ind. Code rc 5-14-3-3(a). Further, a public agency may not deny or interfere with the exercise of the right to inspect and copy public records. Ind. Code rc 5-14-3-3 (b).

"Inspect" includes the right to do the following:

(1) *Manually transcribe and make notes, abstracts, or memoranda.*

(2) *In the case of tape recordings or other aural public records, to listen and manually transcribe or duplicate, or make notes, abstracts, or other memoranda from them. . .*

* * *

"Copy" includes transcribing by handwriting, photocopying, xerography, duplicating machine, duplicating electronically stored data onto a disk, tape, drum, or any other medium of electronic data storage, and reproducing by any other means.

Indiana Code section 5-14-3-2. (Emphasis added.)

Under the facts presented, the public records requests clearly stated that you and your colleagues wanted an opportunity to inspect and, if necessary, copy the public records requested. The City responded to your request by making photocopies of the documents, and, according to Mr. Johnson's account, you were provided an opportunity to examine the records or pay the copy fee of \$0.10 per page for the photocopies made. With respect to the videotape and marketing materials, for which no copies were made, the City responded that arrangements could be made to view these documents at your convenience.

The APRA does not directly address the issue, but it is clear that the intent of the General Assembly was to permit the inspection and copying of original public records. Public agencies are charged with the dual responsibility of providing access to these public records and with preserving the same under Indiana Code section 5-14-3-7(a)-there would be no need to preserve photocopies of original public records unless some statute required multiple copies to be maintained by the public agency. While the facts surrounding the conversation between Mr. Troxell, Ms Bone and city officials are not clear, the City should be commended for its prompt response and production of public records after receipt of both the first and second public records requests. The APRA does not require production of public records within any specific time period, only a response to the request. See, Ind. Code α 5-14-3-9. The City should have provided you with an opportunity to inspect the original public records, and while the City did so with respect to the videotape and the marketing materials, it did not do so with other documentation.

While it is my opinion that they City did not comply with your request to inspect the public records for which photocopies were made, the City did conform to the spirit of the APRA by providing access. In order to remedy this problem, it is my opinion that the City should provide you with an opportunity to inspect the original public records at issue.

Failure to produce public records upon request

In your complaint you allege that the City failed to produce a letter from the mayor to Wackenhut Corporation from January, 1999, a public record that you knew to be in its possession, and failed to produce any records concerning the reimbursement for travel by city officials on two particular dates. The City responded that there was a clerical error in its failure to produce the January letter, certain records were not required to be disclosed under Indiana Code section 5-14-3-4(b) and that, at the time of the two requests, they had no records reflecting the reimbursement of travel expenses. The question is whether the City denied access to these public records in violation of the APRA.

- a. A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document and:
 - (1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or
 - (2) twenty-four (24) hours elapse after any employee of the public agency refuses to

permit inspection and copying of a public record when a request has been made; whichever occurs first.

Indiana Code section 5-14-3-9. Public agencies are only required to produce public records that exist; there is no duty to produce public records in order to respond to a public records request. *See generally*, Ind. Code α 5-14-3-3.

The City should have produced the letter of January 1999 upon your request, as it clearly was a document that was described with more than reasonable particularity in both public records requests. Ind. Code α 5-14-3-3(a). It is my opinion that the failure to produce the letter in response to the first public records request was a violation of the APRA. The City, however, did provide this letter in response to your second public records request.

The City also claimed that certain records were not produced under the discretion granted public agencies under Indiana Code section 5-14-3-4(b).² Specifically, Mr. Johnson claimed that certain public records were not produced in response to the public records requests because the records were intraagency or interagency deliberative materials and diaries or other personal notes. Ind. Code α 5-14-3-4(b)(6) and (7). The APRA permits public agencies discretion in the disclosure of certain categories of public records listed at Indiana Code section 5-14-3-4(b) and the burden is on the public agency to prove that such records have been properly withheld. Ind. Code α 5-14-3-1 and 5-14-3-9(f). The City, therefore, was authorized to withhold from disclosure intraagency or interagency deliberative materials or diaries or other personal notes from disclosure under the APRA.

With respect to your requests for travel reimbursement documents that the City had concerning travel by city officials in connection with the private prison proposal, the City has responded that, at the time of your requests, there were no public records of reimbursement. It is my opinion that the City did not violate the APRA by failing to produce records that did not exist. As was noted in Mr. Johnson's response on behalf of the City, as of November 5, 1999, there is at least one public record that may be responsive to your request-you may therefore, make a request to inspect and copy that public record.

CONCLUSION

It is my opinion that the City of Marion should have provided you with an opportunity to inspect the original public records under the APRA. The failure to produce the letter of January 1999 in response to the first public records request, was an improper denial of access. The failure to produce public records for which an exception for disclosure is available under Indiana Code section 5-14-3-4(b), or documents that did not exist at the time of the public records requests, such as travel reimbursement records, was not a violation of the APRA.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Randall L. Johnson, Corporate Counsel
City of Marion

¹According to Mr. Johnson's letter, on November 5, 1999, the mayor's secretary did request and receive a fax from the Wackenhut Corporation outlining the cost of the chartered jet.

²In your complaint, you did not specifically reference the City's denial of access under Indiana Code section 5-14-3-4(b), but this may account for some of the documents you believe to have been in the City's files and were