



# STATE OF INDIANA

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June 9, 2008

William Rees  
213 South High Street  
Rising Sun, Indiana 47040

*Re: Formal Complaint 08-FC-122; Alleged Violation of the Access to Public Records Act by the City of Rising Sun*

Dear Mr. Rees:

This advisory opinion is in response to your formal complaint alleging the City of Rising Sun ("City") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by failing to completely fulfill your request for records; specifically, you allege the City has not produced the records you request in a reasonable period of time. I have enclosed a copy of the City's response to the complaint for your reference. It is my opinion the City should make every effort to finish providing records pursuant to this request as soon as possible. In my opinion, one year is a considerable amount of time to review thirty boxes and provide "nine inches" of records.

## BACKGROUND

In your complaint you allege you have been requesting copies of records from the City since July 26, 2007. Specifically, you have sought and not received information related to "the Col. Pepper property and how it was paid off." You allege the City continues to partially produce records but has not provided all the records you have sought. You allege the City continues to tell you it is working on the request. You have most recently submitted renewed requests on April 25 and May 7, 2008. You filed this complaint on May 13, alleging you still have not received all the requested records.

The City provided this office a copy of a response it sent to you dated May 16. In that correspondence, Kay Fleming, attorney for the City, set forth a list of records being provided to you. Ms. Fleming indicated that because the City had only received records relating to the Revolving Loan Fund Board in the "last half of 2007", the City has been separating the records as it goes through the thirty boxes of files. Ms. Fleming contends the City "did not deem it an efficient use of time to go through all boxes looking for only those records involving the Pavey Building and Colonel Peppers."

You provided this office a copy of your response to the City dated May 22. You contended you still had not received many of the records you have repeatedly requested.

The City provided this office a copy of another letter dated May 23. In the letter the City provided a list of additional documents being sent to you with the letter.

The City responded to the complaint by letter to this office dated May 29 from Ms. Fleming. The City provides background regarding the Rising Sun Revolving Loan Fund Board ("Board"), which has been operating since 1996. The City contends that the Indiana State Board of Accounts did not audit the Board. Further, the City contends that the counsel for the Board provided an opinion indicating the Board was not subject to the APRA. As a result, the Board continued to maintain the loan records. After your 2007 request, the City contact Ms. Fleming's firm for an opinion regarding the matter, and Ms. Fleming's firm counseled the City that the Board was indeed subject to the APRA.

Ms. Fleming contends that since July 2007, the City has worked toward complying with your request. The Board delivered its records to the City, but the records were not sorted or labeled in a way that would assist in retrieval of particular documents. The records, spanning a time period of eleven years, were contained in more than thirty boxes. The Clerk-Treasurer determined that the records would be pulled as they were reviewed box by box rather than attempting to sort and organize documents prior to responding to any portion of your request. The City indicates the Clerk-Treasurer continues to maintain the same staff as it did prior to the shift of administration of the Board to the City. Ms. Fleming provides a list of duties of the Clerk-Treasurer.

Further, Ms. Fleming provides a list of correspondence regarding your request and indicates "nine inches" of records have been provided. Because the records were not reviewed or sorted for confidentiality or nondisclosable information before now, the records must be reviewed by Ms. Fleming's firm prior to disclosure. Ms. Fleming indicates her firm is now in possession of and is reviewing the final two to three boxes of records and anticipates completing the review by the end of July.

The City contends that on at least one occasion you were asked whether any of the records you requested were need for a time-sensitive matter, to which you responded they were not. Further, the City asked you in an August 31, 2007 letter to advise the City in writing if any time-sensitive matters arose. The City contends you have not provided any such indication.

## ANALYSIS

The public policy of the APRA states, "(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." I.C. § 5-14-3-1. The City is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. As such, any person has the right to inspect and copy the public records of the City

during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), §5-14-3-9(c). 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. I.C. § 5-14-3-9(b).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. 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 APRA. I.C. § 5-14-3-7(c). The public access counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of 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 are necessary to determine whether the agency has produced records within a reasonable timeframe.

This office has often suggested a public agency make portions of a response available from time to time when a large number of documents is being reviewed for disclosure. See *Opinion of the Public Access Counselor 06-FC-184* and *Office of the Public Access Counselor Informal Inquiry Response May 10, 2006*. The burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*.

Here your initial request was made nearly one year ago. The City contends it received the records in July 2007, the records were contained in more than thirty boxes, and the documents were maintained in no particular order. As such, the City had to review each record in each box to determine whether the records are disclosable and to locate records responsive to your request.

It is my opinion the City has demonstrated it is working to produce the documents you requested, as evidenced by the fact the City has contracted outside counsel to assist in the review and preparation of records for production. The City has provided portions of the records to you as they have been reviewed and photocopied. The City has indicated the Clerk-Treasurer has not added any staff since receiving these records and cannot suspend all other duties to focus solely on your request.

Your request seeks a large number of records which requires a search through an even larger number of disorganized records. Considering that volume, it is not unreasonable to assume it would take some time for the City to compile the requested records. Having said that, I find it problematic the Clerk-Treasurer “did not deem it an efficient use of time to go through all boxes looking for only those records involving the Pavey Building and Colonel Peppers.” While the APRA provides that an agency must

regulate any material interference with the regular discharge of duties, that provision may not be used to deny access to the records. I.C. § 5-14-3-7. This statement regarding the efficient use of time, provided to you in a letter from the City, seems to indicate the City does not believe searching for the records you requested is an efficient use of time. To the extent your request identified with reasonable particularity the records being requested (*See* I.C. § 5-14-3-3(a)), and the City does not argue this point, the City is *required* to produce records responsive to the request which are not excepted from disclosure, even if it means searching through a number of records to locate them. The APRA does not provide an exception to disclosure where records are disorganized or difficult to find.

Pursuant to the APRA (*See* I.C. § 5-14-3-3) and previous opinions from this office, the City must endeavor to provide records in a reasonable amount of time. While the City has demonstrated its intent to provide the requested records, it is my opinion the City should make every effort to finish providing records pursuant to this request as soon as possible. In my opinion, one year is a considerable amount of time to review thirty boxes and provide “nine inches” of records.

#### CONCLUSION

For the foregoing reasons, it is my opinion the City should make every effort to finish providing records pursuant to this request as soon as possible. In my opinion, one year is a considerable amount of time to review thirty boxes and provide “nine inches” of records.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: Kay Fleming, Ice Miller LLP  
Mayor William Marksberry, City of Rising Sun