



STATE OF INDIANA

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June 17, 2008

Seth Slabaugh
The Star Press
345 South High Street
Muncie, Indiana 47305

Re: Formal Complaint 08-FC-134; Alleged Violation of the Access to Public Records Act by the City of Muncie

Dear Mr. Slabaugh:

This advisory opinion is in response to your formal complaint alleging the City of Muncie ("City") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to a record. I have enclosed a copy of the City's response to the complaint for your reference. It is my opinion the City has provided a number of problematic reasons for denial of access, and the City Controller has likely violated the APRA and state records retention laws by not retaining the record. The City may not have violated the APRA if the deliberative materials exception to disclosure applies but ultimately bears the burden of proving the list of proposed street paving projects is intra-agency deliberative material and as such excepted from disclosure at the City's discretion.

BACKGROUND

You made several requests to the City for a copy of a list of proposed street paving or street resurfacing projects under consideration for 2008. You allege you were told by a City employee that the City had a list but the employee who prepared it could not release the list because it had not been approved by the Mayor and the money for the projects had not been appropriated by the state. You allege the City Controller denied access to the list on the basis that the City had no certified local road and street budget from the state yet, so the City could not count on the amount of money it would receive.

You further allege that on May 16, 2008 you personally delivered to the Mayor a request for a copy of the list. The Mayor denied you access to the list, claiming she preferred the list not be published because she had not yet reviewed it nor had she had time to develop criteria to determine street paving priorities. Further, she indicated that because the budget was not yet known, the list was tentative and subject to change. She

contended that release of the City would do nothing but create controversy and headaches for the City in the form of telephone calls from citizens. You indicate that notwithstanding those comments, the Mayor indicated she would telephone the City Controller and instruct her to release the list.

You allege that the City Controller telephoned you on May 16 and indicated she had destroyed the list because it was tentative, premature and meaningless. You spoke with the Mayor again on May 20 and asked her to instruct the engineer to release the list. You allege the Mayor indicated she had recently consulted with the City Attorney, who advised her the list was a "working document" and not subject to the APRA. Finally, you allege that on May 20 you spoke to the City Attorney, who advised you the paving list did not exist and as such was not a record. He contended the list was "like working papers" and not ready for publication until finalized because it could generate controversy and anger among citizens. You filed this complaint on May 20, alleging denial of access.

The City responded to the complaint by letter dated June 4 from City Attorney Frank Gilkison. The City contends the list is deliberative material and as such excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(6). The City contends the list was one person's opinion which was the beginning of the deliberative process, ending with the Mayor's final decision. If I understand the response made by Mr. Gilkison, I believe the City continues to contend the draft document is not a public record and only the final document is a public record.

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. Accordingly, 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).

"Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.
I.C. § 5-14-3-2(m).

You allege that the City has made a number of claims regarding its reasons for not disclosing the list of proposed street paving projects to you. Several of the claims made by the City are problematic. First, the City has contended on more than one occasion that the list is tentative, premature, and not ready for publication. None of these reasons can be found in the APRA as appropriate exceptions to disclosure. The APRA definition of

public record is “any writing . . .” It does require the writing to be completed or finalized. *See* I.C. § 5-14-3-2(m).

To the contrary, my predecessors and I have repeatedly advised and opined that draft documents are public records just as completed or finalized documents are public records. *See Opinions of the Public Access Counselor 01-FC-65 and 07-FC-45* for a discussion of draft meeting minutes. The City is free to mark the list with a “draft” designation, but the City may not withhold the list on the basis it is a draft or unapproved document.

Second, the City has alleged it does not yet know the budget for street paving. Again, this is not a listed exception to disclosure of records, and as such the list may not be withheld from disclosure on that basis. Third, this is also true for the Mayor’s contention that she has not yet had time to determine the criteria for street paving. Again, this is not a statutory exception to disclosure.

Finally, both the Mayor and the City Attorney have indicated the list is not ready for publication because it will generate controversy and create headaches for the City in the form of citizens calling the office. Not only is an invalid reason for denying access to public records, but it is contrary to the public policy of the APRA, which 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. This public policy statement does not apply only to records which will not cause controversy. In my opinion this is a clear violation of the APRA.

You further allege that the City Controller telephoned you on May 16 to indicate she had destroyed the proposed paving list because it was tentative, premature, and meaningless. This is likely not only a violation of the APRA, which requires agencies to protect records from loss, mutilation, or destruction (*See* I.C. § 5-14-3-7(a)), but also of state records retention laws.

The APRA definition for public record applies to any record which has already been created, received, retained, maintained, or filed by or with a public agency. *See* I.C. § 5-14-3-2(m). The list at issue here was created by a City employee and retained or maintained by a City department, namely the City Controller. As such, it is a public record. Regardless of whether it is must be disclosed, it remains a public record.

Because the list is a public record, the City shall protect the record from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). Further, the City is required by I.C. 5-15-6 to retain the record for a certain period of time. Many records of local agencies must be retained for three years. *See* I.C. § 5-15-6-3. It is my opinion the City is required to retain the list pursuant to state records retention laws.

The City now contends the list is excepted from disclosure pursuant to I.C. § 5-14-3-4(b)(6), which excepts from disclosure records that are intra-agency or interagency

advisory or deliberative material that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making. The City contends that because this record started the deliberative process, it is deliberative material. The deliberative materials exception does not allow the agency discretion to withhold a record only on the basis it is a record which started the deliberative process. Instead, the record must be an expression of opinion or speculative in nature and communicated for the purpose of decision making. See I.C. § 5-14-3-4(b)(6). I do not argue the list was not communicated for the purpose of decision making. The premise with which I cannot agree with certainty is that the list is an expression of opinion or speculative in nature. While I understand the list is a proposed list of street projects and the City contends it is one person's opinion, I do not have information regarding how the list was created and whether it reflects an expression of opinion or is instead statement of fact.

The City bears the burden of proof to sustain the denial of access. See I.C. § 5-14-3-1. If the City can bear the burden here to show the list is an expression of opinion or speculative in nature, it may withhold the list from disclosure. If it cannot, it must disclose the list. Ultimately, a court would view the document *in camera* if you or anyone else filed a lawsuit to compel the City to disclose the list. See § I.C. 5-14-3-9(h).

CONCLUSION

For the foregoing reasons, it is my opinion the City has provided a number of problematic reasons for denial of access, and the City Controller has likely violated the APRA and state records retention laws by not retaining the record. The City may not have violated the APRA if the deliberative materials exception to disclosure applies but ultimately bears the burden of proving the list of proposed street paving projects is intra-agency deliberative material and as such excepted from disclosure at the City's discretion.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Mayor Sharon McShurley, City of Muncie
Frank Gilkison, Beasley & Gilkison LLP