



# STATE OF INDIANA

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June 27, 2008

Dorothy Snyder  
236 East Pendle Street  
Roseland, Indiana 46637

*Re: Formal Complaint 08-FC-145; Alleged Violation of the Access to Public Records Act by the Town of Roseland Clerk-Treasurer*

Dear Ms. Snyder:

This advisory opinion is in response to your formal complaint alleging the Town of Roseland Clerk-Treasurer ("Clerk") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Clerk's response to the complaint for your reference. It is my opinion the Clerk violated the APRA by not providing a statement of the specific exemption authorizing withholding of the attorney electronic mail messages but did not otherwise violate the APRA.

## BACKGROUND

You allege that on March 27, 2008 you submitted a request for access to records to the Clerk. You allege the Clerk did not respond to the request until April 14, at which time she indicated she would provide the information to you in May. You filed this complaint on June 2, alleging the Clerk had not yet provide you with the requested records. You requested priority status but did not allege any of the reasons for priority status listed in 62 IAC 1-1-3, so priority status was not granted.

The Clerk responded to the complaint by letter dated June 26 from Town Attorney Michael Lipsky. The Clerk understands your request to be for the following:

1. Copy of all claims paid in March 2008 and April 2008;
2. Copy of all bank statements received in March 2008 and April 2008
3. Copy of attorney Lipsky's emails;
4. Copy of ordinance passed in 2008 to encumber funds to pay claims from 2007 and 2006.

Mr. Lipsky provides a copy of a facsimile transmission he sent to the Clerk indicating his objection to providing copies of his electronic mail messages ("emails"). Mr. Lipsky contends the emails are excepted from disclosure as attorney-client privileged communications (I.C. § 34-46-3-1) and attorney work product (I.C. § 5-14-3-4(b)(2)).

The Clerk contends a computer problem has prevented her from printing the information in the format you requested and indicates the records will be available by July 20. The Clerk further contends she provided you a copy of the cash statement. Regarding the bank statements, the Clerk indicates you have not been to the office to retrieve the copies or pay the fees for copying or postage. The Clerk indicates the records are available once the fees are paid.

## 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 Clerk 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 Clerk 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 electronic 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). If a request is delivered in person and the agency does not respond to the request within twenty-four hours of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(a). Here, your request is dated March 27. If the Clerk received the request on or about March 27 and did not respond to the request until April 14, the response was untimely under the APRA. If the Clerk did not receive the request until April 14, as she indicates in her April 14 response to you, the response was timely under the APRA.

If you made your request on March 28 and requested records from April 2008, it is my opinion the request for the April records was not valid. As I indicated in *Opinion of the Public Access Counselor 07-FC-259*, a request is not valid if it is made for records which do not yet exist.

The definition of public records required to be disclosed under the APRA includes 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. I.C. § 5-14-3-2. The definition does not include records yet to be created, and as such the Town is under no obligation to produce records that have not been created.

*Opinion of the Public Access Counselor 07-FC-259*

Regarding your request for the emails of Mr. Lipsky, who serves as Town Attorney, an agency may not disclose records declared confidential by state statute unless access to those records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery. I.C. § 5-14-3-4(a). To the extent the emails fall

under one or both of the exceptions cited by Mr. Lipsky, they would not be disclosable. However, the Clerk's response regarding this item was inappropriate. While 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 (*See* I.C. § 5-14-3-2(m)), the Indiana Court of Appeals has further added to the definition records created for or on behalf of a public agency. *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). Records created by Mr. Lipsky for or on behalf of the Town would be considered public records, and as such the Clerk would have a duty to obtain those records upon request, to the extent they are disclosable. If all the emails are excepted from disclosure under one of the two exceptions submitted by Mr. Lipsky, the Clerk has a duty pursuant to I.C. § 5-14-3-9(c) to provide you with the specific exemption authorizing withholding of all or part of the records.

To the extent the Clerk has provided you a copy of the cash statement you requested, the Clerk is not required to provide you with another copy of that record. It is my opinion, and the opinion of previous counselors, that I.C. § 5-14-3-8(e) requires an agency to provide only one copy of a record and does not require an agency to provide multiple copies. *See Opinion of the Public Access Counselor 07-FC-83, 07-FC-349 and 08-FC-140.*

Regarding the remainder of the copies you have requested, the Clerk asserts you have not been to the office to retrieve the records or to pay the associated fees. The APRA allows a public agency to charge the copying fee established pursuant to I.C. § 5-14-3-8(d) in advance of providing the copies. *See* I.C. § 5-14-3-8(e). As such, it is my opinion you cannot expect to receive the copies until you have remitted payment for the copy fees.

Finally, you allege the Clerk does not maintain posted hours of business. The Clerk contends the hours of the office are posted on the door. Those hours are Monday through Thursday from 11:00am to 4:00pm.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Clerk violated the APRA by not providing a statement of the specific exemption authorizing withholding of the attorney electronic mail messages but did not otherwise violate the APRA.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Michael Lipsky, Roseland Town Attorney  
Susan Hammons, Roseland Clerk-Treasurer