



# STATE OF INDIANA

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December 19, 2008

Jason Valtos  
Osborne Law Offices, P.C.  
4301 Connecticut Avenue NW #108  
Washington, D.C. 20008

*Re: Formal Complaint 08-FC-241; Alleged Violation of the Access to Public Records Act by the Town of West Baden Springs*

Dear Mr. Valtos:

This advisory opinion is in response to your formal complaint alleging the Town of West Baden Springs ("Town") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. A copy of the Town's response to the complaint is enclosed. In my opinion the Town must provide access to any records it maintains which are responsive to your request unless an exception to disclosure applies. Further, it is my opinion the Town can likely bear the burden of proof to sustain the denial of access to the payroll records.

## BACKGROUND

You filed the present complaint on November 19, 2008. You allege that on August 20 you requested from the Town access to a number of records related to the New Town Hall Project. You received a response from the Town dated August 22, wherein the Town indicated that the only item it maintained responsive to your request was a copy of a report. The Town provided you a copy of the report with the August 22 letter. The Town further asserted it does not maintain copies of the certified payroll records but would claim "privilege" on that material even if it did. You sent a follow-up letter to the Town on November 6, asking the Town to look again for the records. You do not indicate whether you received a response to that letter.

The Town responded to the complaint by letter dated November 24 3 from attorney James Tucker. The Town contends it relies on a July 22, 2008 opinion from my office regarding certified payroll records and as such is excepted from disclosure. Regarding the remainder of the records, the Town claims 675 IAC 13-1-8 deletes the requirement for maintaining test and drawing information.

## 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 Town is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Town 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).

You have requested a number of records related to the New Town Hall Project. Among those, you have requested copies of certified payroll records. The Town contends it relies on an opinion from my office to Don Sherry dated July 22, 2008 in claiming an exception to disclosure exists for those records. I am not familiar with an opinion written to Mr. Sherry on July 22, 2008, but I have issued previous opinions regarding certified payroll records, wherein I have opined that the agencies involved can bear the burden of proof to sustain the denial of access to certified payroll records. For your reference, three of those opinions can be found on my office website at [www.IN.gov/pac](http://www.IN.gov/pac): *Opinions of the Public Access Counselor 08-FC-45 and 08-FC-174* and an informal opinion dated January 4, 2008. So long as the Town can demonstrate the records are like those at issue in these opinions, I agree the certified payroll records are nondisclosable.

Further, you have requested a number of records related to drawings and tests associated with the New Town Hall Project. The Town asserts that 675 IAC 13-1-8 deletes the requirements for maintaining test and drawing information. Regardless of a lack of statutory requirement for maintaining the records at issue, if the records were indeed created or received by the Town, those would be public records subject to disclosure unless an exception to disclosure applies. *See* I.C. § 5-14-3-2(m), defining "public record." Any public record subject to Ind. Code 5-15 may be destroyed only in accordance with approved retention schedules. I.C. § 5-14-3-4(e).

If, however, the Town never created, received, retained, or maintained the records at issue and was not required to do so by statute or rule, the Town is not required to provide access to records it does not maintain.

## CONCLUSION

For the foregoing reasons, it is my opinion the Town must provide access to any records it maintains which are responsive to your request unless an exception to disclosure applies. Further, it is my opinion the Town can likely bear the burden of proof to sustain the denial of access to the payroll records.

Best regards,

A handwritten signature in cursive script that reads "Heather Willis Neal".

Heather Willis Neal  
Public Access Counselor

Cc: James Tucker, Tucker and Tucker, P.C.  
Cathy Carnes, Town of West Baden Springs Clerk-Treasurer