



STATE OF INDIANA

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July 27, 2011

Mr. C. Franke
11715 Fox Road 400-202
Indianapolis, Indiana 46236

Re: Formal Complaint 11-FC-162; Alleged Violation of the Access to Public Records Act by the Marion County Auditor

Dear Mr. Franke:

This advisory opinion is in response to your formal complaint alleging the Marion County Auditor (“Auditor”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* City of Indianapolis Chief Deputy Corporation Counsel Andrea L. Brandes responded on behalf of the Auditor. Her response is enclosed for your reference.

BACKGROUND

On July 1, 2011, you filed a formal complaint with the Office of the Public Access Counselor alleging that you submitted an oral request to the Auditor on or about June 22, 2011 for information as to whether the Auditor had “submitted a request for payment to the accounting department for processing pursuant to a court order signed on June 15, 2011, and what steps were being taken to insure compliance.” You allege that the Auditor denied your request stating that you were not entitled to any information held by the Auditor concerning the court order for payment because your name was not on the court order.

In response to your formal complaint, Andrea Brandes advised that on June 21, 2011, you appeared in person at the Auditor’s office and requested a live check representing a surplus from the 2008 Marion County property tax sale for Parcel No. 4002205. Drew W. Carlson, Director of Budget and Legislation for the Auditor, stated that the check for payment for the surplus has not been generated or issued on June 21, 2011. The Auditor denies that you requested information as to whether the Auditor has submitted a request for payment to the accounting department for processing pursuant to the court order signed on June 15, 2011 and what steps were being taken to insure compliance. The Auditor stated if you had made this particularized request, the only document that would have been responsive would have been a copy of the check, which was not in existence on June 21, 2011.

Ms. Brandes further provided that Marion County Circuit Court issued an Order on June 15, 2011 concerning the surplus payment you requested. I have enclosed a copy of the Order. The Auditor alleges that you were advised on June 21, 2011 that they would not be able to release any subsequent check to you in connection with the property as you were not authorized by the court's order to receive any proceeds.¹

ANALYSIS

The public policy of the APRA states that "(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 Auditor is 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 Auditors' public records during regular business hours unless the 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 in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. §5-14-3-9(a). Under the APRA, if a request is made orally, either in person or by telephone, a public agency may deny the request orally. IC 5-14-3-9(c).

As noted by your formal complaint and the Auditor's response, all prior interactions between you and the Auditor were done orally, either in person or on the telephone. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. You allege that you requested information as to whether the Auditor had submitted a request for payment to the accounting department for processing pursuant to a court order and what steps were being taken to ensure compliance. The Auditor denies you made this particularized request and alternatively alleges your only request was for a live check representing a surplus from the 2008 Marion County property tax sale for Parcel No. 4002205.

Under the ARRA, a request for inspection or copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a). While the term "reasonable particularity" is not defined in the APRA, it has been addressed by the public access counselor in a number of prior opinions. *See Opinions of the Public Access Counselor 99-FC-21 and 00-FC-15* for two examples. Counselor Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-38*:

A request for public records must "identify with reasonable

¹ The issue as to whether you are entitled to the funds disbursed pursuant to the court's order falls outside the purview of this office and will not be addressed.

particularity the record being requested.” IC 5-14-3-3(a)(1). While a request for *information* may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party’s request.

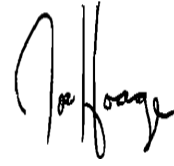
Opinion of the Public Access Counselor 04-FC-38 (2004). In reviewing your version of the events, it appears that you requested information rather than records. Public agencies are not obligated to create records in response to a request or to answer generalized inquiries. *See Op. of the Public Access Counselor 10-FC-120*. The Auditor stated under your version of the events, the only record responsive to your request that could have been provided would have been a copy of the check, which as of June 21, 2011 had not been generated or issued. As the Auditor was not obligated to answer generalized inquiries under the APRA, it is my opinion that the Auditor did not violate the APRA in response to your version of the events.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Pursuant to the Auditor’s version of the events, you requested a live check representing a surplus from the 2008 Marion County property tax sale for Parcel No. 4002205. Since the Auditor has no such record at the time of your request, the Auditor did not violate the APRA by failing to respond to your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Auditor did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Andrea L. Brandes