



STATE OF INDIANA

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OPINION OF THE PUBLIC ACCESS COUNSELOR

**THERESA M. BIRLSON AND
GERALD L. SWETS**

Complainants,

v.

TOWN OF ST. JOHN

Respondent.

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17-FC-110

ADVISORY OPINION June 16, 2017

This advisory opinion is in response to the formal complaint alleging the Town of Saint John—through Town Manager Steve Kil—violated the Access to Public Records Act (“APRA”). Ind. Code §§ 5-14-3-1—10. On June 5, 2017, the Town of Saint John responded by counsel, David Austgen. In accordance with Indiana Code section 5-14-5-10, I issue the following advisory opinion to the formal complaint filed by the Complainant with the Office of the Public Access Counselor on May 16, 2017.

BACKGROUND

The two Complainants filed separate formal complaints alleging the Respondent violated APRA by failing to fulfill their individual public records request. Central to each records request is an economic development agreement between the Town of St. John and SJ-96, LLC. The Town has been in discussions for some time with SJ-96 regarding a potential development project to improve a commercial area of St. John. On July 28, 2017, the Town Council approved an agreement concerning the project. There is no dispute that the Town provided both Complainants with a copy of the economic development agreement the town approved. Instead, the Complainants allege that two exhibits contained the agreement—“Exhibit A and Exhibit B”—were withheld by the Town in violation of APRA.



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The Respondent submitted a response denying the Complainants' allegations of an APRA violation. Essentially, the Respondent claims there is no violation because the agreement it approved is a "specimen agreement," designed to illustrate the town's commitment to the project despite the need to agree on additional details. Put differently, the Town contends that it approved a non-binding version of the economic development agreement where the two exhibits at issue did not yet exist; and thus, could not be disclosed to the Complainants.

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." Ind. Code § 5-14-3-1. Indeed, the Town of Saint John is a public agency for the purposes of APRA. *See* Ind. Code § 5-14-3-2(n). So, any person has the right to inspect and copy the Town's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See* Ind. Code § 5-14-3-3(a).

Here, the Complainants do not dispute that the Town has provided each of them with a copy of the economic development agreement as approved by the town council on July 28, 2017. Rather, the Complainants assert that two exhibits from the agreement were withheld from public disclosure—perhaps intentionally to hide information from interested parties—in violation of APRA. The Respondent has denied the allegation on the basis that the agreement, as approved and signed, merely represents the Town's satisfaction with the agreement and its commitment to proceed with the project. Toward that end, the Respondent asserts that the exhibits at issue in these complaints have not yet been presented to the Town; and thus, not integrated in the agreement approved by the town council.

It is, of course, possible that the agreement approved by the council contains placeholder pages for the two future exhibits to be provided by SJ-96 LLC, if the parties enter a final agreement on the project. Even so, the parties in this matter did not submit the agreement at issue to my office. Moreover, the Complainants offered no counter availing evidence that the two exhibits at issue actually exist and are being unlawfully withheld by the town.

Under APRA, "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." Ind. Code § 5-14-3-2(q).



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Although I will not speculate on the existence of the two exhibits at issue here, I will say that *if* such exhibits are, or have been “created, received, retained, maintained, or filed by or with” the Town of Saint John, then the exhibits are certainly disclosable public records that the Town should disclose.

If not, the reverse becomes true. The APRA’s disclosure requirements do not apply to public records that do not yet exist on the day of the request. Here, I have no evidence indicating that the two exhibits exist. Conversely, both sides agree that the Town complied in a timely manner with the Complainant’s requests for the agreement as approved by the council.

CONCLUSION

Based on the foregoing, it is the Opinion of the Indiana Public Access Counselor that the Town of St. John did not violate the Access to Public Records Act.

Regards,

Luke H. Britt

A handwritten signature in black ink, appearing to read "LHB", written over a white background.

Public Access Counselor

Cc: David M. Austgen