



STATE OF INDIANA

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September 20, 2012

Joe S. Jargella
8420 E. 137th Avenue
Hebron, Indiana 46341

Re: Formal Complaint 12-FC-251; Alleged Violation of the Access to Public Records Act by the Lake County Surveyor's Office

Dear Mr. Jargella:

This advisory opinion is in response to your formal complaint alleging Lake County Surveyor's Office ("Surveyor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John S. Dull, Attorney, responded on behalf of the Surveyor. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you submitted a written request to the Surveyor for copies of the certain performance, cash, or property bonds. You were informed by Gregory Sanchez that the Surveyor could not provide a copy of the property bonds because there was a lean against the owner. You provide that you need copy of a real bond, containing the proper language and terms. You further requested email correspondence between Dan Gossman and Craig Zandstra, which you have yet to receive. Lastly, you believe that the Surveyor's copy fees are too costly.

In response to your formal complaint, Mr. Dull advised that the Surveyor has produced approximately 150 documents in response to your six (6) separate requests received between August 6, 2012 and August 21, 2012. As to the five (5) requests submitted on August 6, 2012 for performance/property bond records, Mr. Sanchez advised you on August 6, 2012 that the records would be provided in a reasonable period of time. The Surveyor thereafter provided all documents on August 14, 2012 and August 20, 2012. As to the Brown Levee and Kaiser Ditch requests, a performance, property, or cash bond was not produced because the Surveyor did not maintain a copy of any such record on the date of your request. For the Spring Street and McConnell Ditch and the Brown Levee Ditch Phase I, a copy of the property bond, consisting of the Certificate of Title and Quit Claim deed were provided; said records are the only documents related to the requests that are maintained by the Surveyor.

All records that were responsive to your request for performance/property bond records have been provided. The APRA does not require that an agency create a new record in response to a request. Pursuant to I.C. § 36-9-27-78(e), the successful bidder shall provide a bond not less than the amount of the bid, conditioned upon the faithful performance of the contract. The bond can be with a corporate surety licensed to do business in Indiana. I.C. § 36-9-27-79.1 provides that for contract estimates below \$75,000, the Drainage Board may for good cause waive the furnishing by the successful bidder of a performance bond.

As to your request for email correspondence, you were informed on August 21, 2012, the date of your request, that the records would be provided in a reasonable period of time. On August 31, 2012, you were informed that records were available for pick up.

As to the fees, Mr. Dull advised that you were charged copy fees pursuant to Lake County Ordinance # 1334(c), a copy of which has been enclosed. The APRA permits a public agency to charge a fee for copies of public records. The fiscal body shall establish a fee for copies provided the fee shall not exceed the greater of 10 cents per page for not color copies or the actual cost of the agency of copying the document. *See* I.C. § 5-14-3-8(e). Public agencies may require that a person pay the copying fee in advance. *Id.* Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124.* The fees charges by the Surveyor were based on actual costs and the Ordinance prescribing such costs was passed by the Lake County Council on April 12, 2011.

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.” *See* I.C. § 5-14-3-1. The Surveyor is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Surveyor’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* 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. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record;

and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c).

Generally, if a public agency has no records responsive to a public records request, the agency generally 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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. As applicable here, the Surveyor has advised that it has produced all records that are responsive to your request. As such, the Surveyor did not violate the APRA by failing to produce a record that it did not maintain or not creating a record in response to your request. I would agree with the Surveyor in that, if you do not agree with form of the performance bond documentation maintained by the Surveyor, such issues would be outside the purview of the Public Access Counselor’s Office.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency’s failure to provide “instant access” to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

As applicable here, the Surveyor has provided all records that are responsive to your request within approximately two weeks of receiving your requests. You submitted six (6) separate records requests, for multiple documents, over the course of August 6, 2012 to August 21, 2012. You filed your formal complaint with the Public Access

Counselor on August 30, 2012, only nine (9) days after your last request was submitted to the Surveyor. The Surveyor has provided that approximately twenty-nine (29) man hours were needed to produce all records that were responsive, in addition to the task of maintaining the normal duties of the agency. As such, it is my opinion that the Surveyor clearly complied with the requirements of providing all records that were responsive to your request in a reasonable period of time.

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Public agencies may require a person to pay the copying fee in advance. *See* I.C. § 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124*. For public agencies that are not state agencies, the fiscal body of the public agency, or the governing body, if there is no fiscal body, shall establish a fee schedule for the certification and copying of documents. *See* I.C. § 5-14-3-8(d). The fee for copying documents may not exceed the greater of ten cents (\$0.10) for black and white copies or the “actual cost” to the agency. *Id.* “Actual cost” is the cost of the paper and the per-page cost for use of copying or facsimile equipment and does not include labor or overhead costs. *Id.*

The Surveyor has provided a copy of the Lake County Council Ordinance and Fee Schedule adopted by the Council on April 14, 2011. As such it is my opinion that the fees adopted by the Surveyor comply with the procedures established by I.C. § 5-14-3-8. I would take note that for 8.5 x 11 black and white copies, the Schedule that has been adopted provides for a fee that is five times greater than the fee charged by the State and twice as much for any copy fee that I have reviewed that has been adopted by a fiscal body for a non-state agency. While the public access counselor is not a finder of fact, the Surveyor must ensure that only the “actual cost”, as defined *supra*, is computed in charging a fee for 8.5 x 11 black and white copies. The additional fees contemplated by I.C. § 5-14-3-8(j) and I.C. § 5-14-3-8.5, would only be applicable for electronic map requests.

CONCLUSION

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

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: John S. Dull