



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

March 30, 2016

Mr. Thomas E. Mason
4800 South 930 East
Wolcottville, Indiana 46795

Re: Formal Complaint 16-FC-41; Alleged Violation of the Access to Public Records Act by Twin Lakes Regional Sewer District

Dear Mr. Mason:

This advisory opinion is in response to your formal complaint alleging the Twin Lakes Regional Sewer District ("District"), Mr. Mike Darter and Mr. Donald Tribbett violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. The Department has responded via Mr. Donald J. Tribbett, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on February 26, 2016.

BACKGROUND

Your complaint dated February 24, 2016 alleges the Twin Lakes Regional Sewer District violated the APRA by improperly denied your records request.

On February 12, 2016 you requested from the District copies of:

1. Legal services agreements "for all District projects, past and or current that were funded by USDA/RUS grants and loans."
2. Closing instructions documents "for all District projects, past and or current that were funded by USDA/RUS grants and loans."
3. Opinion of Counsel Relative to Rights-of-Way RD Form 442-22 "for all District projects, past and or current that were funded by USDA/RUS grants and loans."

On February 19, 2016 the District responded to your records request, informing you it had prepared all but one document for your review. The District did not discover one agreement which had been sent by the District, but apparently was no longer maintained in District files. Counselor Tribbett informed you the District would continue to search for the agreement. In the meantime, the remaining documents were available to you to inspect and copy at the District office.

You contend the District is placing an unreasonable burden upon you, because you would have to drive over 280 miles to the District office, despite the fact previous requests had been mailed or faxed to you. The District apparently decided to do this at the advice of Counselor Tribbett. You also contend the District is required to have a copy of the missing legal services agreement and that its failure to have such a copy is a violation of the APRA.

On March 8, 2016 Counselor Tribbett responded for the District. The District acknowledges it will not fax or mail the documents to you; however, it argues that Ind. Code § 5-14-3-3 gives it the option of choosing how to provide documents to you. It states that its previous manner of providing documents does not create a precedent which requires it to mail or fax documents to you.

The District also rejects any assertion it violated the APRA for not providing the legal services agreement.

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 Ind. Code § 5-14-3-1. The Twin Lakes Regional Sewer District is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the District’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).

Under Ind. Code 5-14-3-3(b) a public agency “shall either provide the requested copies to the person making the request; or allow the person to make copies on the agency’s equipment; or on the person’s own equipment.”

Permeating the entirety of the APRA is the concept of reasonableness and access. When an agency has discretion to choose between two methods of fulfilling its statutory duty, it is expected the agency will choose the more reasonable when compared against the burden on the agency and the burden on the requestor.

In this case, the District has discretion to choose the method of delivery. However, the burden on the district to mail the documents is lessened considering you are offering to pay for mail. On the other hand, the burden for you to comply with the District’s demand that you appear in person is quite high considering you would have to drive almost 300 miles round-trip to the District Office. The District may not have been aware of the full burden it is placing on you previously, but is fully aware of the fact now that it has your complaint. Considering the fact the District previously was quite willing to mail documents to you, leaves me with the impression the District’s actions are arbitrary and capricious. I addressed a similar scenario in *Opinion of the Public Access Counselor 14-FC-108*. In it I wrote:

The spirit of the APRA is to allow access to everyone no matter where or how they are situated. Public agencies routinely receive out-of-state records requests and mail them out of courtesy, recouping their cost by charging the actual cost of postage. In some cases, “provide” may mean merely making available. However, some individuals who lack the ability to collect records at an agency’s place of business (inmates,

shut-ins, out-of-state requestors) may require a heightened level of service. I encourage agencies to use sound judgment and mail records whenever possible.

The same applies here. The District should mail you the records and bill you for postage.

Your other complaint is the District failed to provide a copy of the legal services agreement. There is no violation of the APRA for failure to provide a document which the public agency does not possess. You subscribed several motives as to why the agreement was not provided; however, this Office is not the proper forum for such matters. If the District does possess a copy of the agreement and failed to provide it or the District did possess a copy and improperly destroyed it, then there would be a violation of the APRA. However, the Public Access Counselor is not a finder of fact and cannot determine whether the District did in fact have a final copy of the Agreement you seek. The Department has stated it does not possess a copy of the Agreement and therefore has met its duty under the APRA if it performed a reasonable search. If there was a failure to create a document under a different statute of Indiana Code, such a claim would have to be taken to another regulatory authority.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Donald Tribbett, Esq.