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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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JAMES H. O'DONNELL,  
*Complainant,*

v.

ST. JOSEPH COUNTY ASSESSOR,  
*Respondent.*

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Formal Complaint No.  
19-FC-102

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the St. Joseph County Assessor's office violated the Access to Public Records Act.<sup>1</sup> Attorney Frank J. Agostino filed an answer on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 4, 2019.

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<sup>1</sup> Ind. Code § 5-14-3-1, to -10.

## **BACKGROUND**

This case involves a dispute over access to information regarding tax appeals.

On June 13, 2019, James H. O'Donnell ("Complainant") filed a public records request with the St. Joseph County Assessor seeking the following:

Listing of all open appeals filed by me for clients from 2009 through 2018 ranked by year, state key number, property owner name and action(s) taken.

Separately, I request listings of all currently open appeals for each year from 2009 through 2018.

That listing should be ranked by year, state key number, property owner name, address, status, and actions taken, including appeal to the Indiana Board of Tax Review (if any).

O'Donnell contends that he did not receive a response, so he resubmitted the same request to the assessor on August 20, 2019. O'Donnell asserts that he again received no response from the county.

As a result, he filed a formal complaint on October 4, 2019, alleging the county violated the Access to Public Records Act.

On October 23, 2019, the St. Joseph County Assessor ("Assessor") filed a response with this office disputing O'Donnell's claim of an APRA violation. Although the Assessor acknowledges receipt O'Donnell's requests for records, the Assessor contends she denied the requests in accordance with APRA by making no response within seven days.

What is more, the Assessor relies on Indiana Code section 5-14-3-3(f) as one authority for the denial. The statute says,

in part, that a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. Ind. Code § 5-14-3-3(f).

The Assessor argues that the agency maintains appeal records from 2009 to 2018 by form (e.g., Form 130, Form 131, etc.), not tax representative name. As a result, the Assessor contends that her office did not and does not compile these appeal records into a new record sortable by any fields, let alone a field for tax representative.

Consequently, the Assessor concludes that APRA does not require the creation of records responsive to O'Donnell's request.

Moreover, the Assessor argues that O'Donnell's request for all records over a period of ten years suggests that he is "using this information for a commercial purpose to solicit his services as a tax representative." The Assessor asserts that under Indiana Code section 5-14-3-3(e), public request information may not be used for commercial purposes.

Finally, the Assessor notes that O'Donnell's request is "unduly burdensome" because it asks that the Assessor "create records it does not maintain without even an offer to compensate [them] for producing such records." The Assessor also notes that O'Donnell may compile his own list of appeal results by examining property records cards available on the agency's website and by accessing the Indiana Board of Tax Review's website.

## ANALYSIS

### 1. The Access to Public Records Act (“APRA”)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

The Access to Public Records Act (“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.” *Id.* The St. Joseph County Assessor’s office is a public agency for the purposes of APRA; and thus, is subject to the act’s requirements. Ind. Code § 5-14-3-2(q). Unless otherwise provided by statute, any person may inspect and copy the Assessor’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

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(r). Although public records are presumptively disclosable, APRA contains both mandatory and discretionary exceptions to disclosure.<sup>2</sup>

## **2. Creation of New Records**

O'Donnell requested a "listing" of all open appeals that he filed on behalf of clients from 2009 through 2018 ranked by year, state key number, property owner name and action(s) taken. He separately requested another "listing" of all currently open appeals for each year from 2009 through 2018.

In essence, the Assessor argues that the agency did not and does not maintain the listings requested by O'Donnell and, APRA does not require the agency to create it for him.

This office agrees.

APRA does not require a public agency to extract and aggregate information from multiple sources and amalgamate it into a new, separate record to satisfy a public records request.

If the Assessor had the listings as requested, they would be disclosable under APRA. Additionally, if the Assessor had the information compiled or stored in a way that allowed the agency to sort it as requested—perhaps in a database—with reasonable effort, this office recommends that approach.

Here, based on the information provided, that does not appear to be the case. Since this issue is dispositive, this opinion will not address the Assessor's argument concerning the use of public records for commercial purposes.

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<sup>2</sup> Ind. Code § 5-14-3-4(a) and (b).

### 3. The Denial

The Assessor argues that she denied O'Donnell's requests by making no response within seven days.

Under APRA, if a person requests by mail or by fax a copy or copies of a public record, a denial of disclosure does not occur until seven days have elapsed from the date the public agency receives the request. Ind. Code § 5-14-3-9(c).

So, the Assessor is correct that failing to respond to a request for more than seven day after receiving it deems it denied by operation of law. But that is only part of the story.

APRA also expressly states that a public agency may deny a written request if:

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:
  - (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 the title or position of the person responsible for the denial.

Ind. Code § 5-14-3-9(d).

Here, O'Donnell submitted both requests in writing. The Assessor admits she received the requests and made no response, which deemed the requests denied under APRA.

It is true that a written request for records is deemed denied after seven days go by with no response from the agency.

Even so, APRA also expressly states that an agency may deny a written request if denial is in writing and includes a

statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record and the person responsible for the denial.

That did not happen here.

Subsections (c) and (d) operate in harmony to avoid an agency simply ignoring a request for records. An agency's failure to respond for seven days triggers a denial and, the denial triggers the requirement for a written explanation by the agency.

This office recommends the St. Joseph County Assessor's office modify its approach to denials to comply with Indiana Code section 5-14-3-9(d).

Based on the requests, the Assessor only needed to issue a written denial stating the agency did not maintain the lists requested by O'Donnell and identify the person responsible for the denial.

This approach not only complies with the statute but also makes good sense because it will likely curtail (or even prevent) a requester from submitting the same thing more than once. In other words, if an agency just ignores a request, then yes it is deemed denied under the law but the requester does not know why. They might believe the request was lost, misplaced, or overlooked, which may prompt them to resubmit the request.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the St. Joseph County Assessor should have provided O'Donnell with a written denial in accordance with Indiana Code section 5-14-3-9(d). Otherwise, the Assessor acted in accordance with the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor