

February 19, 2001

Mr. Hans L. Markland
58 W. 1000 N
Wheatfield, IN 46392

Re: *Advisory Opinion 01-FC-08*; ;Allegations of Denial of Access to Public Records by the Porter County Surveyor's Office.

Dear Mr. Markland:

This is in response to your formal complaint, which was received on February 1, 2001. You have alleged that the Porter County Surveyor's Office ("Surveyor's Office") violated the Indiana Access to Public Records Act, ("APRA") Indiana Code chapter 5-14-3, by denying you access to public records.¹ Mr. Herbert K. Douglas, attorney for the Porter County Drainage Board, responded in writing to your complaint in a letter faxed to this Office on February 7, 2001. A copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that the Surveyor's Office did respond to you within the time period required under Indiana Code section 5-14-3-9(a) and that there was no denial under the APRA. It is also my opinion, however, that the Surveyor's Office should have communicated more clearly to you that they did not have three (3) of the items you requested when you inspected their files.

BACKGROUND

According to your complaint, on January 26, 2001, you hand-delivered a written public record request to the Surveyor's Office requesting the opportunity to inspect and copy the following public records:

1. The request for proposals to clean the Reeves Ditch.
2. Contract specifications for cleaning the Reeves Ditch, including clearing the banks.
3. Contracts for cleaning the Reeves Ditch.
4. Payments to contractors for cleaning the Reeves Ditch.
5. Insurance policies and/or bonds for performing work on the Reeves Ditch.
6. Bids to clean the Reeves Ditch.
7. Inspection reports for work done on the Reeves Ditch, including county, state, and federal.
8. Permits to clean the Reeves Ditch, including county, state, and federal.
9. Correspondence used to obtain the above mentioned permits.

According to your complaint, Mr. Kevin D. Breitzke, Porter County Surveyor, left a message for you on your answering machine the evening of January 26th advising you that the records would be made available for inspection the following Monday, January 29th. You state that on Monday January 29th you went to the Surveyor's Office. You were then directed to a stack of folders and were told that you could review the files to find the public records that what you wanted. However, according to your complaint, you only found about a fourth of what you requested. You then filed your formal complaint.

In response to your complaint, Mr. Douglas stated that the Surveyor's Office did not deny you access to public records because you were given an opportunity to inspect and copy the files as you had requested. With respect to three (3) of the nine (9) public records you requested, specifically your requests numbered 1, 5 and 7, Mr. Douglas indicated that you were not denied access to these records because the Surveyor's Office does not possess any such public records.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and 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. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1. The Surveyor's Office is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Surveyor's Office during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

A denial of access to public records may occur in one of two ways: the public agency may fail to respond in a timely manner to your request or the public agency may affirmatively deny you access to public records. With respect to the first type of denial, it is the responsibility of the public agency to respond to requests for public records within a specified time period. Since you hand-delivered your request, the Surveyor's Office was obligated to respond to your request within twenty-four (24) hours of receiving it. Ind. Code §5-14-3-9(a). The Surveyor's Office did respond within twenty-four (24) hours of your request when Mr. Breitzke called and left a message for you within a few hours of receiving your request on January 26, 2001. In that message, Mr. Breitzke stated that the public records would be available for inspection in his office on January 29th. You do not deny that you received this response, in fact, this prompted you to visit that Office on January 29th to inspect the files in question. It is my opinion, therefore, that the Surveyor's Office did provide a timely response to your January 26th public records request and that there was no denial under the APRA based upon the public agency's failure to respond.

The second type of denial under the APRA may occur if the public agency affirmatively denies you access to the public records requested. As you noted in your complaint, your January 26th request

set forth nine (9) separate items and you claim that you only obtained one-quarter of them after inspecting the files on January 29th. Mr. Breitzke confirmed in a telephone conversation with my Staff Attorney Sandy Barger that his office has public records to satisfy only six (6) of the nine (9) items you requested. He advised her that, to his knowledge, all of the six (6) items that the Surveyor's Office has in response to your request were in the files when they were made available to you on January 29th.

Since conflicting facts have been presented to me about the contents of the files, I cannot clearly determine whether you were actually denied access to any of the public records you requested that were in the possession of the Surveyor's Office at the time of the inspection on January 29th. It is my opinion, however, that since the burden for nondisclosure lies with the public agency, you should have been informed by the Surveyor's Office that they did not have three (3) of the items you requested. The failure to produce public records that do not exist is not a denial by a public agency. Because you have raised a question about your ability to inspect and copy the public records you requested and that are in the Surveyor's Office, Mr. Breitzke has agreed to make available to you a copy of all the existing records you requested.

CONCLUSION

It is my opinion that the Porter County Surveyor's Office did not deny you access to public records in violation of the APRA. You were permitted an opportunity to inspect the public records of the Surveyor's Office, as you had requested. It is also my opinion that the Surveyor's Office should have informed you that they did not have all of the items you requested in your January 26th request, but that the failure to produce public records that do not exist is not a denial under the APRA.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Mr. Herbert K. Douglas
The Honorable Kevin D. Breitzke

¹ In your complaint, you indicate that you were denied access on several occasions prior to January 29, 2001, but you only provided information about the January 29th matter. This Opinion, consequently, is limited to this alleged denial.