

September 9, 2003

Mr. Martin Hensley  
15 Wood St.  
Greenfield, IN 46140

Re: 03-FC-70; *Alleged Denial of Access to Public Records by the Rush County Area Plan Commission/Board of Zoning Appeals*

Dear Mr. Hensley:

This is in response to your formal complaint, which was received on August 11, 2003. You have alleged that the Rush County Area Plan Commission/Board of Zoning Appeals ("APC/BZA") has violated the Indiana Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, you allege that the denial of access to public records in response to your July 23, 2003 request violated the APRA. Mr. David R. Butsch, Attorney for APC/BZA, responded in writing to your complaint. A copy is enclosed for your reference. For the reasons set forth below, it is my opinion that the APC/BZA failed to respond to your request for public records within the seven (7) days as required under the APRA. However, it is my opinion that you were not denied access to public records in violation of the APRA because the APC/BZA either does not possess the records you requested or because you failed to provide enough specificity for the APC/BZA to retrieve the records you requested.

#### BACKGROUND

According to your complaint, you sent a request for access to public records to APC/BZA dated July 23, 2003. You asked for the opportunity to inspect or obtain copies of the following:

1. All phone records related to William Todd, the BZA or the APC of Rush County from January 2000 to present. All bills, records, payments, of any line or lines, cellular telephone line or lines or any other telephone record related to William Todd, the APC or the BZA.
2. All documents copied by William Todd or by any other person from documents in files related to Martin Hensley or property he wished to

place towers on in Rush County. Copies for viewing of each document provided and to whom the documents were provided and how the costs for these copies were paid and from which budget. Specific requests for copies provided to any individual with the last name Henderson, Helms, Korfman, or any other person not specifically disclosed. Copies of information provided to WKWH Radio or any other local organization.

3. Records that document all copies made by any agency using the copying machine used by the BZA and the APC and Todd that would document specific charges for any machine, how many copies were made, and what account the copies were charged to from Jan 2000 to present.
4. Postal records from the APC and BZA and Todd detailing what was mailed, to who, and how much the charges were from Jan 2000 to present. Any notation or document detailing what was mailed and how the funds were disbursed and from what account the mailings were made is requested.
5. Any writ of certiorari or other legal filing against the BZA APC in local or state court from Jan 2000 to present and copies of all correspondence between the parties including supplemental filings briefs, or any other document.

When you did not receive a response as of August 11, 2003 you filed your complaint with this Office.

In response to your complaint, Mr. Butsch advised that the Board of Zoning Appeal does not maintain separate telephone or postal records from the county at large nor does it document the use of its copying machine. As for item five (5) Mr. Butsch advised that the records you requested are filed either alphabetically by name or chronologically by date and that it is impossible for the Board to comply with your request without knowing the names and dates under which the requested records are filed.

#### 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. 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.

APC/BZA 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 APC/BZA 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).

It is the responsibility of the public agency to respond to requests for access to public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. A denial is deemed to have occurred if seven (7) days elapse after the agency receives the request by U.S. Mail and there has been no response. Ind. Code §5-14-3-9(b). Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code § 5-14-3-9(d).

According to the information provided, the APC/BZA did receive your request, but failed to respond within the seven (7) day period after receiving that request. For this reason, it is my opinion that the APC/BZA did deny you access in violation of the APRA and that this denial is actionable under Indiana Code section 5-14-3-9(b). While it does not alter my opinion concerning the timeliness of the APC/BZA's response, Mr. Butsch has now responded to your request.

It is my opinion that you have not been improperly denied access to public records in violation of the APRA. According to Mr. Butsch the "Board of Zoning Appeals does not maintain separate telephone or postal records from the county at large nor does it document the use of its copying machine." It is my opinion that it is not an improper denial of access to public records to advise a requestor that the public agency does not maintain the records requested.

Additionally Mr. Butsch advised that with respect to you request for legal documents you have failed to make your request with reasonable particularity. Under the APRA, a requestor is obligated to state his or her request for access to public records "with reasonable particularity" so that the public agency understands what public records are being requested. Ind. Code §5-14-3-3(a)(1). Since the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, then the agency should contact the requestor for more information if it is necessary to respond to the request. See generally, Ind. Code § 5-14-3-1. Therefore, it is my opinion that it is not a violation of the APRA for a public agency to advise a requestor that the request is not reasonably particular; however, the agency should advise the requestor of additional information necessary in order to provide access to the records sought by the requestor. According to Mr. Butsch's response to this Office you must provide the name of the party involved and the date the action was filed in order for the APC/BZA to be able to retrieve the records you requested.

#### CONCLUSION

It is my opinion that the Area Plan Commission and the Board of Zoning Appeals failed to respond to your public records request within the seven (7) days as is required under the Access to Public Records. However, it is also my opinion that you have not

been denied records in violation of the APRA since the APC/BZA does not possess many of the records you requested and because you have not provided enough specificity to allow the APC/BZA to retrieve the records you requested.

Sincerely,

Sandra K. Barger  
Acting Public Access Counselor