



# STATE OF INDIANA

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October 26, 2005

Kenneth Roe  
3068 NW Lakeshore Drive  
Macy, IN 46951

*Re: Formal Complaint 05-FC-195; Alleged Violations of the Access to Public Records Act by the Nyona South Mud Lake Conservancy District*

Dear Mr. Roe:

This is in response to your formal complaint alleging that the Nyona South Mud Lake Conservancy District ("District") violated the Access to Public Records Act ("APRA") and the Open Door Law ("ODL").

### BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor on September 26, 2005. Your complaint was assigned formal complaint number 05-FC-195. In your complaint you state that on September 6, 2005, at a public meeting of the District, you made a written request to obtain a copy of a new sewer ordinance that had just been read. You allege that you were told that you could not have a copy of the ordinance until it was adopted. Additionally, you requested a copy of the July meeting minutes, in writing, at the August 1, 2005 meeting of the District. You state that the District responded that, while they had extra copies with them, you could not have a copy at that time. You were told that the District had twenty-four (24) hours to respond to your request. Three weeks later the District phoned you to inform you that the minutes were available; you picked up the minutes on September 6, 2005. On September 6, 2005 you also requested a copy of the August minutes and received them that same day.

Ron Roe, Chairman of the District, responded to your complaint by letter on October 11, 2005. A copy of the letter is enclosed for your reference. Mr. Roe states that when you requested a copy of the sewer ordinance at the meeting on September 6, 2005 that you were told that no copies would be given out at that time, but that the District would check on when copies could be given and would reply to your request. Regarding your request for the July meeting minutes, Mr. Roe indicated that he attempted to deliver the records to your home on August 5, 2005 and August 9, 2005. When he did not find you at home, the District phoned on August 15, 2005 to inform you that the records were available. Mr. Roe also provided copies of your written record requests with hand-written notes on them. One note on your request for the sewer ordinance, dated September 6, 2005, stated, "[o]r ordinance to be given after copies are made and

adopted?" and included an indication to "check on this." Mr. Roe indicated that a copy of the sewer ordinance was delivered to you on September 29, 2005.

As a preliminary matter, I note that you have raised two issues for which you have not provided sufficient information to address whether a violation has occurred. You checked the box indicating an Open Door Law violation in your formal complaint. You wrote "reg. monthly meeting" without further explanation as to how you believe the District has violated the ODL. Therefore, I make no determination regarding whether the District has violated the ODL. Additionally, regarding the APRA, you checked the box marked "other" on the complaint form and indicated "no office with records." You did not provide any further explanation as to what violation of the APRA you are alleging the District has committed; therefore, I will not address this issue in this opinion.

A formal complaint regarding violations of the APRA and ODL must be filed with the Office of the Public Access Counselor within 30 days of the date upon which the denial occurred. Your complaint regarding your August 1<sup>st</sup> request for records is therefore untimely. However, I may issue an informal inquiry response pursuant to IC 5-14-4-10(5), which I incorporate into this opinion.

#### ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). If a public agency receives a request for records that is delivered in person, the agency must respond within twenty-four (24) hours. IC 5-14-3-9(a). A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in writing, the agency must respond to the request in writing. IC 5-14-3-9(c). A response may be an acknowledgment that the request for records was received, and a statement of how and when the public agency intends to comply.

The District may not deny your request for a copy of the ordinance on the basis that it is not yet approved. "[E]ven a draft public record is a public record subject to the disclosure requirements of the APRA." *Opinion of the Public Access Counselor*, 04-FC-49. See also IC 5-14-3-2(m). There is a dispute as to whether the District told you that you could not have a copy of the sewer ordinance until it is adopted or whether you were told that you could not have a copy at that time, but the District would check on when it could give you a copy and would reply to your request. You are entitled to the draft ordinance prior to approval of the ordinance by the District. If the District denied your request for a copy of the sewer ordinance on the basis that it had not yet been adopted it violated the APRA.

The APRA does not specify a time for production or inspection of responsive records, but this office has stated that records must be produced within a reasonable time. Often, this office is asked to make a determination as to the reasonableness of the time for production by a public agency. What is a "reasonable" time period under one circumstance may not be reasonable under other conditions. Production need not materially interfere with the regular discharge of the functions and duties of the public agency. IC 5-14-3-7(a). The determination of what is a reasonable time for production depends upon the public records requested and the circumstances surrounding the request.

The District did not provide you with a copy of the sewer ordinance until twenty-three (23) days after you made your request. Given the many times this office has stated that draft records are not nondisclosable merely because they are drafts, it was not reasonable that the District found it necessary to inquire as to whether it could provide you with the draft prior to adoption. Even if the inquiry was justifiable, the inquiry into whether the record was disclosable should not have delayed its production over three (3) weeks. It was not necessary for the District to search for the 18 page record; in fact, the record was readily available. The District has provided no other explanation as to why the record could not have been produced more quickly. It is my opinion that the District did not produce the sewer ordinance within a reasonable time.

You requested the July minutes at the August meeting and were told that the District had extra copies of the minutes with them, but that you could not have them at that time. The District did not respond to this allegation other than to indicate that Mr. Ron Roe tried to deliver the minutes to your home on August 5<sup>th</sup> and 9<sup>th</sup>. The agency did not contact you to let you know that you could pick up the records until August 15<sup>th</sup>, nearly two weeks after the initial request. While it is laudable that the District tried to deliver the records to your home, the question remains: if the District had extra copies on hand when you made your request, why it did not provide you with a copy at the meeting. The agency does have twenty-four (24) hours to respond to a hand-delivered request. IC 5-14-3-9(a). However, it is not the intent of the APRA that an agency delay making available a readily available document for twenty-four (24) hours merely because the APRA allows that long to respond. If the District had an extra copy on hand when the request was made, the District should have provided it to you. Although the District tried to deliver the requested minutes to your home you were not actually notified that the minutes were available until August 15, 2005. The District should have notified you when the records were available on August 5<sup>th</sup> in order to avoid undue delay. Under these circumstances I find that the time to produce the July minutes was unreasonable.

#### CONCLUSION

For the foregoing reasons, I find that if the Nyona South Mud Lake Conservancy District denied you access to the proposed sewer ordinance on September 6, 2005 on the basis that the ordinance had not yet been adopted, the District violated the Access to Public Records Act. Additionally, I find that the time in which the Nyona South Mud Lake Conservancy District produced both the July minutes and the sewer ordinance was unreasonable.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Ron Roe