

January 3, 2007

Jeffrey Bringle
3465 Virginia Street
Columbus, IN 47203

Re: Formal Complaint 06-FC-210; Alleged Violation of the Access to Public Records Act by the Bartholomew County Drainage Board and Surveyor

Dear Mr. Bringle:

This is in response to your formal complaint alleging that Bartholomew County Drainage Board (“Board”) and the Bartholomew County Surveyor (“Surveyor”) violated the Access to Public Records Act.

BACKGROUND

Your consolidated complaint consists of two parts. In the first part, you allege that the records provided to you by the Board were incomplete and non-responsive to several of the items that you requested. Upon my calling you to clarify what specific records were missing, you stated that you believed that none of the four part request was satisfied completely. In particular, you take issue with the notation made by the Board on your request letter indicating that “since the Drainage Board members are appointed by the County Commissioners, [the Board] suggests you talk to the Commissioners’ Office about this info.”

For the second part of your complaint, you allege that a request that you hand-delivered on Monday, November 6 at 3:20 p.m. was not timely responded to by the Surveyor, presumably because the responsive records were not made available until after Tuesday, November 7. In addition, there had been no response from the Board at all. Finally, you complain that the Surveyor would not release the responsive records unless you signed an acknowledgment that you have received the records, including the date and time you received the records. It appears that you did sign the acknowledgement, but you question whether this practice should be permitted.

I sent a copy of your complaint to the Board and the Surveyor. I received a response on behalf of the Board and Surveyor, authored by Attorney J. Grant Tucker. Mr. Tucker affirmed that you had received responsive documents relating to proposals submitted by contractors, and that you had received copies of all four proposals. Your second request for all commissions, oaths, bonds, and proof of damage responsibilities for Wells Excavating was fulfilled by disclosing the declarations page from the Commercial General Liability Policy. Your third request for all commissions, oaths, and bonds for all Drainage Board members, advisors and supervisors, was fulfilled with respect to the Surveyor, who is the only individual for whom a bond is maintained. Finally, for your request for “the documentation that all appointed Drainage Board members are resident freeholders of the County” and are knowledgeable in drainage matters was responded to in the notation made on your request form, indicating that the Commissioners’ Office may have that documentation, since the Commissioners appointed the Board. The Surveyor’s office does not maintain this documentation.

In response to your second complaint, Mr. Tucker stated that the Board is a volunteer Board for which the Surveyor’s office renders administrative, technical, and staff assistance. Hence, the Surveyor’s response to your request for records of the Board was on behalf of the Board. Your complaint that the response was untimely is unfounded because the Surveyor’s office was closed for Election Day on Tuesday, November 7. In fact, the information was copied and available to you the following day, November 8, prior to 3:20 p.m. In addition, the 24 hour requirement is for response, not for production of the records. You did not retrieve the records until November 9 at 3:45 p.m.

Mr. Tucker does not dispute that you were required to sign an acknowledgement form prior to receiving the records. Mr. Tucker answers your complaint by stating that nothing in the Access to Public Records Act prohibits such a condition, and requiring such an acknowledgement appears to be a prudent practice.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a). A public agency is not required to create a record to fulfill a request for information. If the agency to whom a request is directed has no responsive record, the agency should so state. This prevents confusion with respect to whether the agency has denied a record, or cannot produce one that it does not have.

If a person requests a record in person at the agency’s office, a denial occurs if the agency refuses to permit inspection and copying within 24 hours of receiving the request. IC 5-14-3-9(a). Our office has stated that no denial occurs if the agency has not had the opportunity to respond to a request received within 24 hours of a weekend or a legal holiday, since the agency’s office is closed during those times. Accordingly, no denial occurred by the Surveyor when your request was hand-delivered on Monday, November 6, 2006 at 3:20 p.m., the day before Election Day, when the Surveyor’s office was closed for the legal holiday. The request was handled expeditiously the following day by making the records available to you. In addition, the public agency is required to respond to a request within 24 hours, not necessarily produce the records.

Not only did the Surveyor not violate the APRA, the Surveyor complied in an expeditious manner.

Also, I see no violation of the APRA in the Surveyor's handling of the response of the Board, to which the Surveyor provides technical support and assistance. The authority of an agency to act on behalf of a board is not addressed in the Access to Public Records Act. The only provision that may apply in such a situation would require an agency to specify the name and title of the person who is responsible for denying a record on behalf of the agency. IC 5-14-3-9(c)(2). In this case, the Surveyor did not deny a record, but stated that the Commissioners' Office should have the records concerning the qualifications of the Drainage Board members. The Surveyor should have qualified this statement by making it clear that the Board has no responsive records. Because the Board did not have these records, the Board was under no obligation to provide them to you.

Because you did not specify what records you believe were missing from the records that were produced, I can offer no other guidance concerning what you regard as an incomplete response. Perhaps you expected that the Board or Surveyor would keep certain oaths, commissions, and bonds, but the fact that none exists does not set forth a denial of access under the APRA.

Finally, I offer the following with respect to your allegation that you were required as a condition of receiving the records to sign an acknowledgment. A public agency may not deny or interfere with the exercise of the right to records under the APRA. IC 5-14-3-3(b). Although it is true that no provision of the APRA specifically prohibits a public agency from requiring a person to sign an acknowledgement, there is no provision permitting this practice *as a condition for receiving records*. Because the public policy of the APRA places the burden of proof for the denial of a record on the public agency, the public agency would have to sustain its denial of records whenever a person refuses to sign the acknowledgement. In the absence of a specific law allowing such a condition to be placed on the receipt of records, the agency would be unable to sustain the denial. *See* IC 5-14-3-1. You signed the acknowledgement, perhaps in the belief that you would be required to in order to receive the records. The agency violated the Access to Public Records Act if the acknowledgement was required in order to receive the records.

While I see nothing in the APRA that would prohibit a public agency from *asking* a person to sign an acknowledgement, the public agency may not withhold the records if the person refuses to sign the acknowledgement. If the public agency needs to document that records were made available or disclosed on a certain date and time, the agency is free to make a contemporaneous notation in its files that should meet the public agency's need for verification at a later date.

CONCLUSION

For the foregoing reasons, I find that a public agency may not require that a person requesting records sign an acknowledgement of receipt of the records as a condition to the person receiving copies of records. In all other respects regarding your complaint, the Bartholomew County Surveyor and Drainage Board have not violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: J. Grant Tucker