

July 16, 2007

Brad Bohrer, Senior Counsel
First American Real Estate Solutions
4 First American Way
Santa Ana, California 92707

Re: Formal Complaint 07-FC-163; Alleged Violation of the Access to Public Records Act by the Owen County Auditor

Dear Mr. Bohrer:

This is in response to your formal complaint alleging the Owen County Auditor (“Auditor”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying your request for an electronic copy of the most recent tax/assessment roll. I find that the Owen County Auditor is required by the APRA to provide you an electronic copy of the most recent tax/assessment roll, with direct costs to be paid by you, unless the Auditor can show you would use the information for purposes prohibited by Resolution 2007-20.

BACKGROUND

You allege you first requested an electronic copy of the most recent tax/assessment roll from the Auditor on August 16, 2006. During a telephone conversation following the request, the Auditor denied the request and indicated the county would permit only on-site inspection and transcription by hand of the records. You submitted a renewed request on May 9, 2007. On May 10, the county attorney, Mr. Richard Lorenz, responded, indicating the county would attempt to process the request within thirty days. You left a voice message for Mr. Lorenz on May 17 but have not heard from the Auditor or Mr. Lorenz since May 10.

You submitted your complaint to this office on June 14, 2007. The Auditor responded by letter from Mr. Lorenz on July 2 and again on July 11. Copies of both are enclosed for your reference. In his July 2 correspondence, Mr. Lorenz asserts that upon the May 9 request, First American Real Estate Solutions was told “no single file, electronic or paper, contains the information you seek to recover from the Owen County Auditor.” Mr. Lorenz further indicates the timing of the request corresponded with the regular first installment of tax payments due with the county, thus inundating the Auditor with questions and customers.

Mr. Lorenz further asserts the county has two inconsistent software programs, and providing data in the format you request would require the hand manipulation of thousands of records to interface data from the two incompatible systems. Mr. Lorenz further indicates you were given the option of paying \$300 for the necessary reprogramming but declined that option.

Furthermore, Mr. Lorenz encloses a copy of Resolution 2007-20, passed by the Own County Board of Commissioners, prohibiting the dissemination of electronically-formatted database information by authority granted in IC 5-14-3-3(e).

In its July 11 supplemental response, the Auditor further submits that Manatron, its records management vendor, has the ability to generate the electronic report you request but there will be a cost. The county further claims the assertions made by Christy Hogue of First American Real Estate Solutions, specifically that Manatron was capable of exporting the data at issue with no difficulty, were untrue.

ANALYSIS

The Owen County Auditor's office is a public agency for the purposes of the Access to Public Records Act. IC 5-14-3-2(l).

The public policy of the APRA is 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. Providing persons with the 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. IC 5-14-3-1.

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. IC 5-14-3-3(a). "Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, 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. IC 5-14-3-2(m).

If (1) a person is entitled to a copy of a public record under this chapter; and (2) the public agency which is in possession of the record has reasonable access to a machine capable of reproducing the record; the public agency must provide at least one copy of the public record to the person. IC 5-14-3-8(e). The public agency may charge a fee, uniform to all purchasers, that does not exceed the agency's direct cost of supplying the information in that form. IC 5-14-3-8(g). Here the Auditor contracts with an outside vendor for maintenance of its records management system

A public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a

request a copy of all disclosable data contained in the records on paper, disk, tape, drum or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system. IC 5-14-3-3.

The primary issue here seems to be the format in which you have request access to records and the format by which the county can deliver those records.

It is my understanding you have requested the records in an electronic format (via 4mm, DAT, CD-ROM, email or FTP). Further, I understand from your complaint and attachments you claim the Auditor's vendor, Manatron, indicated it would be relatively easy able to create a copy of the public records you request. I understand the county has a different understanding and indicates Manatron has asserted it did not make that claim to your employee. It does seem to be the case now the programming necessary to provide the records in the format you request can indeed be done, but there is a cost associated with such. The Auditor may charge you a fee not to exceed the direct cost of supplying the information in the requested form. IC 5-14-3-8(g).

To the extent the records you request have already been created, a public agency is required by the APRA to provide you with a copy, subject to the fee provision in the preceding paragraph. I am unclear, though, as to whether the data is maintained in the format you request. To the extent you are asking for access to a record that does not exist, nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created.

The Auditor makes an assertion the records you request are not disclosable pursuant to Resolution 2007-20, passed by the Own County Board of Commissioners on June 22, 2007. Resolution 2007-20 relies on the authority in IC 5-14-3-3(e) to prohibit the use of information obtained under the APRA for commercial purposes. "Specifically, a person who receives information on disk or tape or in any electronic format under IC 5-14-3-3(d) is prohibited from: (a) selling that information, (b) advertising the information; (c) soliciting the purchase of merchandize [sic], goods or services with that information; or (d) selling, loaning, giving away or otherwise delivering the information obtained by the request to any other person for these purposes . . ."

A public agency may not deny a request because the person making the request refuses to state the purpose of the request, unless such condition is required by another applicable statute. IC 5-14-3-3(a). However, a political subdivision may enact an ordinance prescribing the conditions under which a person who receives information on a disk or tape may or may not use the information for commercial purposes. IC 5-14-3-3(e). A person who uses information in a manner contrary to a rule or ordinance adopted under this subsection may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d). IC 5-14-3-3(e). The county is within its statutory authority in denying a copy of the information in electronic format if it can prove you would use this information in a manner contrary to the resolution.

CONCLUSION

For the foregoing reasons, I find that the Owen County Auditor is required by the APRA to provide you an electronic copy of the most recent tax/assessment roll, with direct costs to be paid by you, unless the Auditor can show you would use the information for purposes prohibited by Resolution 2007-20.

Best regards,

Heather Willis Neal
Public Access Counselor

cc: Angie Lawson, Owen County Auditor

N.B. The nature of the complaint in 07-FC-163 is similar to several other complaints filed by your office on the same date, specifically 07-FC-158, 07-FC-159, 07-FC-160, 07-FC-164, and 07-FC-165. Because the facts as well as responses from the County Auditor differ in each case, I have issued separate opinions. To the extent there are similar facts from one complaint to another not necessarily provided by the Auditor, my finding in the respective complaint should be construed as being the same as that in the complaint with the most similar fact pattern. For instance, if another county has an ordinance similar to that in 07-FC-163, the presence of such an ordinance prohibiting commercial use of the information would change my opinion.