

August 31, 2007

Thomas Mason
4800 South 930 East
Wolcottville, Indiana 46795

Re: Formal Complaint 07-FC-229; Alleged Violation of the Access to Public Records Act by the LaGrange County Auditor's Office

Dear Mr. Mason:

This is in response to your formal complaint alleging the LaGrange County Auditor ("Auditor") violated the Access to Public Records Act ("APRA") (Ind. Code §5-14-3) by not maintaining copies of written requests for records submitted to the Auditor. A copy of the Auditor's response is enclosed for your reference. It is outside the purview of the public access counselor's office to determine whether the Auditor has committed a criminal act related to retention of records.

BACKGROUND

In your complaint you allege that in January 2007 you requested from the Auditor a copy of any ATV ordinance. You were referred to the county attorney's office when the Auditor's office indicated it did not possess a copy. On July 24 you personally appeared at the Auditor's office and asked to see any copies of requests for access to records maintained by the Auditor. You indicate the only request in the file was a request submitted by you. You filed your complaint on August 1 asking whether the Auditor has committed a crime by not retaining copies of requests for access to public records.

The Auditor responded to your complaint by letter from attorney Kurt Bachman dated August 16. Mr. Bachman indicates the Auditor has no record of your January 2007 request for records. Mr. Bachman further asserts that if your January 2007 request was not written, the Auditor had no duty to provide access to a record it does not maintain and is not required to maintain. Mr. Bachman further asserts it is beyond the purview of this office to determine whether a record is a record for the purposes of Ind. Code §5-15 and as such whether it should be retained or destroyed in the ordinary course of business. Mr. Bachman then lists reasons the documents in question (copies of requests for access to records) are not records. Finally, Mr.

Bachman asserts that to the extent your complaint relates to your January 2007 request, it is untimely under the APRA.

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. The Auditor is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Auditor during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2.

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile, the agency must respond to the request within seven days of receipt. I.C. §5-14-3-9(b). A request for records must be, at the discretion of the agency, in writing on or in a form provided by the agency. I.C. §5-14-3-3(a).

The issue you pose in your complaint is whether the action you outline (the Auditor not maintaining copies of requests for public records) is a criminal act. Certainly the determination whether an act might constitute a criminal act is not within the purview of the public access counselor, the duties of which are listed in I.C. §5-14-4-10. As such, I cannot issue an opinion addressing your specific question.

It is my duty, though, to issue advisory opinions to interpret public access laws upon the request of a person or a public agency. I.C. §5-14-4-10. Because I believe there are questions related to the interpretation of public access laws presented in the series of events related by you and by Mr. Bachman, I am providing my informal opinion regarding these matters.

First is the issue of whether the Auditor is required to maintain the records you request. As my predecessor opined in *Opinion of the Public Access Counselor 07-FC-48*, it is not within my purview to determine whether a specific public record is a record for purposes of I.C. §5-15, which addresses the preservation of public records. Rather, the county commission on public records has the authority to set forth the records management practices of the public agencies within that county, consistent with I.C. §5-15 and in accordance with record retention schedules approved by the oversight committee on public records. *See generally* I.C. §5-15-6. *Opinion of the Public Access Counselor 07-FC-48*.

As it relates to requests for records submitted to the Auditor, however, it is my opinion that if you did request a document orally, the Auditor had the duty to inform you the Auditor requires requests to be submitted in writing pursuant to I.C. §5-14-3-3(a). And if the Auditor has

prescribed a form for requesting records, the Auditor has the duty to provide you with a copy of that form. I.C. §5-14-3-3(a).

Regarding your January 2007 request, your complaint that the Auditor inappropriately denied you access to records is untimely filed. A person or public agency that chooses to file a formal complaint with the counselor must do so no later than thirty days after the denial. I.C. §5-14-5-7(a).

Finally, regarding Mr. Bachman's assertion to you in his letter dated July 13, 2007 that any documents maintained in his office are not required to be disclosed because his office is not a public agency, I would like to clarify that opinion. While Mr. Bachman's office is not generally subject to the APRA because it is not a public agency, a public agency cannot deny access to public records by indicating they are maintained by a private entity. The Indiana Court of Appeals addressed this issue in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). There, the Court did not find that the language "created, received, retained, maintained or filed by or with a public agency" in I.C. §5-14-3-2 excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room and completely deny the public access. *Knightstown Banner, LLC*, 838 N.E.2d at 1133. Where records are created or maintained for a public agency but kept in the possession of an outside entity, the agency must retrieve the documents pursuant to a request for access to public records. As such, if Mr. Bachman is in possession of a public record you request, the public agency is required to retrieve it from him in order to respond to your request.

CONCLUSION

For the foregoing reasons, I find that it is outside the purview of the public access counselor's office to determine whether the Auditor has committed a criminal act related to retention of records.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Kurt Bachman