

September 6, 2007

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

Re: Formal Complaint 07-FC-241; Alleged Violation of the Access to Public Records Act by the Steuben County Recorder

Dear Mr. Bohrer:

This is in response to your formal complaint alleging the Steuben County Recorder (“Recorder”) violated the Access to Public Records Act (“APRA”) (Ind. Code §5-14-3) by denying your request for digital images corresponding to daily recordings for Steuben County. It is my opinion the Steuben County Recorder has a duty to provide the requested records to First American as a bulk form user.

BACKGROUND

You allege that on April 18, 2007 First American requested via telephone an electronic copy of the digital images corresponding to daily recordings for Steuben County beginning on that date and going forward. The Recorder, Dani Parish, acknowledged during that conversation the images could be delivered on 16mm film but verbally denied the request. First American renewed the request in writing on July 3 pursuant to I.C. §36-2-7-10.1(i), regarding bulk form copies. On July 10 Ms. Parish indicated via telephone that the county attorney would investigate First American’s use of the records and forward an ordinance for your review by July 17.

You filed your complaint on August 10 after hearing nothing further from Ms. Parish or the county attorney and after your telephone inquiries went unanswered.

The Recorder responded to your complaint by letter dated August 14. The Recorder outlined the telephone conversation between you and her on July 9, wherein you discussed the yet to be passed ordinance as well as First American’s intended use of the records. The next day Ms. Parish met with the county attorney who took information from her and drafted the ordinance regarding commercial use of records obtained through enhanced access.

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." I.C. §5-14-3-1. The Recorder 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 Recorder 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).

“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. I.C. §5-14-3-2(m).

At issue here is First American’s ability to obtain records under the bulk form copies section of the Indiana Code (I.C. §36-2-7-10.1), pertinent provisions of which follow:

(a) As used in this section, "bulk form" means:

- (1) a copy of all recorded documents received by the county recorder for recording in a calendar day, week, month, or year;
- (2) the indices for finding, retrieving, and viewing all recorded documents received by the county recorder for recording in a calendar day, week, month, or year; or
- (3) both subdivisions (1) and (2).

(b) As used in this section, "bulk user" means an individual, a corporation, a partnership, a limited liability company, or an unincorporated association that purchases bulk form copies. However, "bulk user" does not include an individual, a corporation, a partnership, a limited liability company, or an unincorporated association whose primary purpose is to resell public records.

(g) Except as provided by subsection (h), the county recorder shall charge bulk users the following for bulk form copies:

- (1) Seven cents (\$0.07) per page for a recorded document, including the index of the instrument number or book and page, or both, for retrieving the recorded document.
- (2) Seven cents (\$0.07) per recorded document for a copy of the other indices used by the county recorder for finding, retrieving, and viewing a recorded document.

(i) The county recorder shall provide bulk users with bulk form copies in the format or medium in which the county recorder maintains the recorded documents and indices. If the county recorder maintains the recorded documents and indices in more than one (1) format or medium, the bulk user may select the format or medium in which the bulk user

shall receive the bulk form copies. If the county recorder maintains the recorded documents and indices for finding, retrieving, and viewing the recorded documents in an electronic or a digitized format, a reasonable effort shall be made to provide the bulk user with bulk form copies in a standard, generally acceptable, readable format. Upon request of the bulk user, the county recorder shall provide the bulk form copies to the bulk user within a reasonable time after the recorder's archival process is completed and bulk form copies become available in the office of the county recorder.

(j) Bulk form copies under this section may be used:

- (1) in the ordinary course of the business of the bulk user; and
- (2) by customers of the bulk user.

(k) The bulk user may charge its customers a fee for using the bulk form copies obtained by the bulk user. However, bulk form copies obtained by a bulk user under this section may not be resold. I.C. §36-2-7-10.1

(l) This section does not apply to enhanced access under I.C. §5-14-3-3.

You have requested the documents as a bulk user. You have indicated you do not intend to resell the public records. You have provided to me and to the Indiana Recorders Association a letter verifying First American's intended use of the bulk form copies, and in such statement you have indicated again that First American will not resell the bulk form copies. You do provide some clarification to the recorders in a letter to the president of the Recorders Association dated July 30. There you indicate that although another subsidiary of your parent company provides copies of recorded images, the images First American acquires through this request will not be made available for resale. The statute does not indicate a bulk user cannot use the records for commercial purposes. To the contrary, it allows the bulk user to use the records in the ordinary course of business and allows the customers of a bulk user to use the copies. I.C. §36-2-7-10.1(k).

While I understand that the Recorder and many other recorders around the state have expressed their concern that if this type of request is granted they could see a decrease in their perpetuation fund (the fund to which fees collected for the sale of copies is deposited and through which the offices are funded), I find no statute allowing a recorder to deny a requester status as a bulk user based on this issue. A bulk user may not resell the records, but a bulk user may charge its customers a fee for using the bulk form copies, and nothing prohibits a bulk user from selling the information or data contained therein.

The Recorder submits that Steuben County Ordinance Number 766, adopted August 6, 2007, restricts the commercial use of the records you have requested. Pursuant to I.C. §5-14-3-3(e), a political subdivision has the authority to enact an ordinance prescribing the conditions under which a person receiving information on disk, tape or in any electronic format under I.C. §5-14-3-3(d) may or may not use the information for commercial purposes. It is my understanding, though, that you are requesting the bulk form copies under I.C. §36-2-7-10.1 and not requesting enhanced access to records under I.C. §5-14-3-3(d). If that is true, the ordinance does not apply to the request made under the bulk form copies statute, I.C. §36-2-7-10.1.

Furthermore, I.C. §36-2-7-10.1(l) provides that this section does not apply to enhanced access under I.C. §5-14-3-3(d). As I see it, these are two different types of requests, and the request at issue cannot be denied pursuant to Ordinance Number 766 when I.C. §36-2-7-10.1 expressly acknowledges and allows commercial use of the records but not resale of the records.

CONCLUSION

For the foregoing reasons, it is my opinion the Steuben County Recorder has a duty to provide the requested records to First American as a bulk form user.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Dani Lou Parish, Steuben County Recorder