

September 24, 2007

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

Re: Formal Complaint 07-FC-255; Alleged Violation of the Access to Public Records Act by the Wabash County Recorder

Dear Mr. Bohrer:

This is in response to your formal complaint alleging the Wabash 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 Wabash County. A copy of the Recorder’s response is enclosed for your reference. It is my opinion the Wabash County Recorder has a duty to provide the requested records to First American as a bulk form user.

BACKGROUND

You allege that on June 20, 2007 First American requested via telephone an electronic copy of the digital images corresponding to daily recordings for Wabash County beginning on May 1 and going forward. The Recorder, Nancy Gribben, acknowledged during that conversation the images could be delivered on CD but verbally denied the request on the basis that she understood First American to be a subscription-based company.

First American renewed the request in writing on July 18 pursuant to I.C. §36-2-7-10.1(i), regarding bulk form copies. You received a response to that request from Ms. Gribben on July 19. Ms. Gribben indicated she would not provide the requested records because she believed First American and its subsidiaries resell document images obtained from recorders’ offices on a subscription basis. You spoke with Ms. Gribben that same day and told her First American was aware of the statutory prohibition on image resale and First American does not resell images. Ms. Gribben indicated she was denying access at the direction of the Indiana County Recorders Association and suggested you contact the association’s president, Terri Rethlake. You have provided a copy of a letter you submitted to Ms. Rethlake indicating the association has likely confused First American with Data Tree, LLC, an independent subsidiary

of your parent company, which provides access to Indiana records which are obtained from public agencies without restriction. You further indicated the images being sought would not be resold nor provided to Data Tree. You filed your complaint with this office on August 24.

The Recorder responded to your complaint by letter from attorney Albert Schlitt dated September 7. Mr. Schlitt indicates his belief First American will resell the images and points to a web page promoting First American CoreLogic, Inc. as a "value added reseller." Mr. Schlitt further asserts the APRA is intended to require public agencies to provide access to records only to citizens of Indiana.

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

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).

Regarding the web page Mr. Schlitt included in his response, it is my understanding you assert that while First American may resell some images, it only does so when there are no restrictions placed on those images by the public agency or statutory authority by which they are obtained. Since there is statutory authority here restricting First American's use, it is my understanding First American will not resell the images.

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.

Regarding Mr. Schlitt's assertion that the public policy of the APRA would restrict First American's rights to access since First American is not an Indiana citizen, I do not agree with this assertion. While the policy statement of the APRA indicates 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," at no point in the APRA is access to records restricted to citizens of the state. I.C. §5-14-3-1. Furthermore, a "person" is defined as an individual, corporation, limited liability company, partnership, unincorporated association or governmental entity. I.C. §5-14-3-2(j). The APRA provides that "any person may inspect and copy the records of a public agency . . ." I.C. §5-14-3-3. Again, no preference or limitation is created based on the citizenship of the person. For this reason, I cannot agree with the Recorder's assertion that First American's request should be treated any differently from a request by an Indiana citizen.

CONCLUSION

For the foregoing reasons, it is my opinion the Wabash 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: Nancy Gribben, Wabash County Recorder