

December 5, 2007

Michael Stephens
128 Pinto Way
Bloomington, Georgia 31302

Re: Formal Complaint 07-FC-345; Alleged Violation of the Access to Public Records Act by the Elkhart County Board of Commissioners

Dear Mr. Stephens:

This advisory opinion is in response to your formal complaint alleging the Elkhart County Board of Commissioners (“Commissioners”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by failing to respond to your request for access to records. A copy of the Commissioners’ response to your complaint is enclosed. It is my opinion that while the response was untimely, the Commissioners have not otherwise violated the APRA.

BACKGROUND

You allege that you mailed a request for copies of several records to the Commissioners on October 25, 2007. Hearing no response, you filed this complaint on November 9.

The Commissioners responded to your complaint by letter dated November 21 from attorney Craig Buche. Mr. Buche indicated that the Commissioners have been working with the Elkhart County Auditor (“Auditor”) to provide the records you requested. The Auditor has identified five agencies involved with the request, demonstrating that this is a complex request. Mr. Buche apologizes that you were not notified how long it would take to process the request. Mr. Buche further provided a copy of a letter sent to you dated November 30, which I understand was included with the records you requested. Finally, Mr. Buche has indicated that the county is not required to perform calculations, prepare breakdowns, analyze information, or prepare documents which do not exist.

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

Board of Commissioners 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 Commissioners 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 and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). Here the Commissioners received the request but did not respond until after receiving a copy of this complaint. The Commissioners were required to respond to your request within seven days of receipt. I.C. §5-14-3-9(b).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). The public access counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Here, the Commissioners should have responded to your request within seven days of receipt of the request to indicate they were working to comply with the request. It is my opinion the Commissioners have produced the records you requested in a reasonable period of time.

It is my understanding the Commissioners has now provided you with the records you requested. It is my opinion that while the response was untimely, the Commissioners have not further violated the APRA since they have provided you with the requested information.

Regarding Mr. Buches contention that the county is not required to perform calculations, prepare breakdowns, analyze information, or prepare documents which do not exist, I agree. 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.

Finally, I note that your request was submitted to the Board of Commissioners. Many of the records you requested are maintained by the Auditor’s office. Under the APRA, a public agency is only responsible for providing access to records it maintains. I.C. §5-14-3-3; I.C. §5-14-3-2. I applaud the diligence of the Commissioners and Auditor in working together and coordinating with at least five other agencies to answer your request when under the law the Commissioners could have responded that the Commissioners do not maintain records responsive to your request.

CONCLUSION

For the foregoing reasons, it is my opinion that while the Commissioners' response was untimely under the APRA, the Commissioners have not otherwise violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Tom Byers, Elkhart County Administrator
Craig Buche, Yoder, Ainlay, Ulmer & Buckingham, LLP