

March 10, 2008

Craig Franke  
PO Box 421195  
Indianapolis, Indiana 46242

*Re: Formal Complaint 08-FC-54; Alleged Violation of the Access to Public Records Act by the Elkhart County Auditor*

Dear Mr. Franke:

This advisory opinion is in response to your formal complaint alleging the Elkhart County Auditor (“Auditor”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Auditor’s response to the complaint for your reference. It is my opinion the Auditor violated the APRA by denying you access to records unless the Auditor can provide statutory authority exempting the requested record from disclosure.

#### BACKGROUND

In your complaint you allege that you submitted a request to the Auditor by telephone on February 13, 2008 for a copy of a property deed prepared by an outside vendor and submitted to the Auditor for review. You allege the Auditor denied the request, indicating you could request a copy of the deed from the property owner or wait for the deed to be recorder at the County Recorder’s office to obtain a copy. You filed this complaint on February 13, alleging denial of access. You requested priority status but did not allege any of the reasons for priority status listed in 62 IAC 1-1-3, so priority status was not granted.

The Auditor responded to your complaint by letter dated February 27. The Auditor indicates the record you request was created by SRI, a contract agent for the county. SRI manages tax sales and prepares tax lien certificates and deeds. The Auditor indicates that the deeds are prepared and sent electronically to the Auditor for review and correction. The final document is then sent for signatures by the County Treasurer and County Auditor. After the signature process, the tax deed is sent to the entity that holds the tax lien certificate. The Auditor contends it is the entity or individual’s responsibility to record the deed in the Recorder’s office.

The Auditor indicates that once the deed is recorded it is a public document. The Auditor contends that prior to the deed being sent to the holder of the tax lien certificate, it exists only in electronic format.

## ANALYSIS

The public policy of the APRA states, "(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 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(m).

Here you requested a copy of an unrecorded deed. The Auditor denied you access to the deed, indicating you could obtain a copy of the deed once it had been recorded in the Recorder's Office. The Auditor cites two reasons for the denial.

First, the Auditor contends that the deed is a public document once it is recorded. The Auditor does not provide any statutory authority for the proposition that the record is not a public document until it is recorded. The APRA requires disclosure of any record created, received, retained, maintained or filed by or with a public agency unless an exception to disclosure applies. I.C. §§ 5-14-3-3(a), 5-14-3-2(m). The public agency bears the burden of proof to sustain the denial of access. I.C. § 5-14-3-9(f). Here the Auditor may sustain the denial by providing the statutory authority exempting the record from disclosure. The record is not exempted from disclosure merely by the fact that it is a draft or incomplete record. The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request.

Second, the Auditor contends the record is available only in electronic format when it is first sent to the Auditor's office. Based on the definition of public record found at I.C. § 5-14-3-2(m), an electronic record is a record just as a paper document is. Further, an agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide a requester a copy of all disclosable data contained in the records on paper or other medium if the medium requested is compatible with the agency's record keeping system. I.C. § 5-14-3-3(d). The Auditor has a duty to provide access to a record even when the record does not exist in a paper format.

## CONCLUSION

For the foregoing reasons, it is my opinion the Auditor violated the APRA by denying you access to records unless the Auditor can provide statutory authority exempting the requested record from disclosure.

Best regards,

*Heather Willis Neal*

Heather Willis Neal  
Public Access Counselor

cc: David Hess, Elkhart County Auditor