



STATE OF INDIANA

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September 20, 2010

Mr. Steven D. Buse
4170 N. Walnut St.
Richland, IN 47634

Re: Formal Complaint 10-FC-188; Alleged Violation of the Access to Public Records Act by the Luce Township Regional Sewer Board

Dear Mr. Buse:

This advisory opinion is in response to your formal complaint alleging the Luce Township Regional Sewer Board ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* My office sent a copy of your complaint to the Board, but as of today we have not received a response.

BACKGROUND

In your complaint, you allege that you requested that the Board provide you access to "complete lists of users for the sewer, a list of those who have signed easements, and a list of those who have not signed easements." You claim that, in response, Board president John Wood "started raising his voice . . . and very loudly saying that he was NOT [sic] going to [grant you access to the information]." You state that he later told you he would provide you with the records if you signed an agreement that the Board could charge you \$30 per hour plus mileage and a "paper fee." You acknowledge that the Board has charged \$.10 per page for copies in the past, but allege that the other fees the Board attempted to charge are excessive.

You also note that you requested that the Board provide you with "the names of those people who have donated \$5000 [sic] to the sewer board." Board member Nora Lou Yeager told you she was given the donations and then deposited the money into the Board's general fund. Board members told you that they did not have to tell you anything about the donations.

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 is 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 Board’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Without the benefit of a response from the Board, it is difficult to discern why the Board would deny you access to the records you requested. The APRA does contain an exception to disclosure for the telephone number, address, and social security number of customers of municipally owned utilities. *See* I.C. § 5-14-3-4(b)(20). However, it is not clear whether or not that exception applies here. The burden of proof to show that the exception applies lies with the Board in accordance with section 1 of the APRA. Because the Board does not explain why it has denied you access to the information regarding sewer customers, it is my opinion that the Board has failed to meet its burden of proof.

With regard to your request for information about donations to the Board, I note that the APRA permits public agencies to withhold the “identity of a donor of a gift made to a public agency if: (A) the donor requires nondisclosure of the donor’s identity as a condition of making the gift; or (B) after the gift is made, the donor or a member of the donor’s family requests nondisclosure.” I.C. § 5-14-3-4(b)(15). Again, however, because the Board has not explained its basis for withholding such information, it is my opinion that the Board has not met its burden of proof to sustain its denial of access.

As to your allegation that the Board attempted to charge you an excessive fee for producing records, the APRA permits a public agency to charge a fee for copying a record, but sets certain limits on the amount of the copying fee depending upon the type of public agency. *See* I.C. § 5-14-3-8. The APRA also provides that notwithstanding other provisions within section 8 of the APRA, a public agency shall collect any certification, copying, facsimile machine transmission, or search fee that is specified by statute or is ordered by a court. I.C. § 5-14-3-8(f). Thus, where a specific statute other than the APRA provides a public agency with the authority to charge a fee that exceeds the “actual cost,” the public agency may charge the statutory fee without violating the APRA. Here, I do not have sufficient information regarding the type of record subject to the fee or the statutory basis (if any) for the Board’s charging you the fees you specify. If the Board cannot cite to a statute that provides it with the authority for the “paper fee,” the City has charged you an excessive fee and, therefore, violated section 8 of the APRA. Moreover, the APRA specifically prohibits an agency from charging a requester for labor or overhead expenses. I.C. § 5-14-3-8(d). Thus, the Board violated the APRA if it attempted to charge you the \$30/hr. labor charge and mileage fees.¹

¹ It is unclear why the Board attempted to charge you for mileage costs. Generally, such a cost would be included in the “overhead costs” that are specifically prohibited by the APRA. I.C. § 5-14-3-8(d). Without an explanation from the agency, I issue this opinion with that assumption.

CONCLUSION

For the foregoing reasons, it is my opinion that the Board has failed to show that it had a statutory basis for denying your requests. Moreover, unless the Board can cite to a specific statute that allows it to charge the fees it attempted to, the Board violated the APRA by attempting to charge you fees that are not authorized by section 8 of the APRA. I encourage the Board to either provide you with the requested records or cite a legal basis under the APRA or some other statute for withholding it. If you believe the Board continues to deny you access in violation of the APRA following the issuance of an advisory opinion from this office, you may file an action in court pursuant to Ind. Code § 5-14-3-9(e) to compel production of the records.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: John Wood