STATE OF INDIANA

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May 10, 2010

Mr. Yianni Pantis
First American
2308 Garfield Ave.
Suite A
Carmichael, CA 95608

Re: Formal Complaint 10-FC-85; Alleged Violation of the Access to Public Records Act by the Marion County Assessor

Dear Mr. Pantis:

This advisory opinion is in response to your formal complaint alleging the Marion County Assessor (the "Assessor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. A copy of the Assessor's response to your complaint is enclosed.

BACKGROUND

In your complaint, you allege that the Assessor violated the APRA by refusing to provide a paper copy of certain electronic records on the basis that the request is being made to "avoid the effects" of an ordinance prohibiting the commercial use of public records received on disk or tape. You believe the ordinance does not apply to paper copies because it only lists records produced by disk or tape.

My office forwarded a copy of your complaint to the Assessor. Chief Deputy Corporation Counsel Drew Carlson responded on behalf of the Assessor. Mr. Carlson argues that the Assessor need not produce paper copies of the data to you because nothing in the APRA requires an agency to create a record in response to a request and because the Assessor has already provided the records to you in electronic format via email. Further, he maintains that the Assessor may restrict your right to use the information for commercial purposes under INDPLS. CODE § 285-311 and Ind. Code § 5-14-3-3(e).

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 Assessor is a "public agency" under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Assessor's public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Because the Assessor's position relies, in large part, on an informal opinion that the Assessor received from this office on March 16, 2010, I incorporate relevant portions of it here:

> The Assessor produced the records to the requester by attaching a spreadsheet file to an email. Marion County has enacted an ordinance under I.C. § 5-15-3-3(e) restricting the use of electronically stored public data. INDPLS. CODE § 285-311. You ask whether the fact that the information was submitted via email -- as opposed to by "disk or tape" under section 3 of the APRA -- changes the effect of the restrictions anticipated by the ordinance. On a related note, you ask whether the Assessor would be able to refuse further requests for electronic information if the recipient of the request uses it for commercial purposes if it was transmitted via email. Your view is that, under the spirit of the statute, email transmission should be treated the same as if the information were transmitted by disk or tape.
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> I agree with your interpretation of section 3 of the APRA. The relevant portion of the statute reads:
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> [A] public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system. I.C. § 5-14-3-3.
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> * * *
>
> A state agency may adopt a rule under IC 4-22-2, and a political subdivision may enact an ordinance, prescribing the conditions under which a person who receives information on disk or tape under subsection (d) may or may not use the information for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person for these purposes. . . .
>
> I.C. §§ 5-14-3-3(d), (e).
>
> There is some precedent for this office to consider electronically stored records that are delivered via email as "information on disk or tape" within the meaning of subsection 3(e). In *Opinion of the Public Access*

> *Counselor 07-FC-163*, Counselor Neal considered the effect of section 3 of the APRA on information that was requested "in an electronic format (via 4mm, DAT, CD-ROM, email or FTP)." *Id.* at 3. In that opinion, Counselor Neal concluded that the public agency was "within its statutory authority [under subsection 3(d) of the APRA] in denying a copy of the information ***in electronic format*** if it can prove [the requester] would use this information in a manner contrary to the [agency's locally enacted] resolution." *Id.* at 4 (emphasis added). Counselor Neal apparently did not deem it necessary to subdivide the requested format into those on "disk or tape" and those produced by other means. I see no reason to distinguish information transmitted via email from "information on disk or tape" either. This interpretation seems to effectuate the purpose of subsections 3(d) and (e), which is to permit state and local agencies to enact rules prescribing the conditions under which electronically stored records and information may or may not be used for commercial purposes. If we were to consider only that information that is transmitted by "disk or tape" as subject to these subsections, their legal effect would be negated with each technological advance in electronically stored data. In my opinion, that would run contrary to the General Assembly's intent.
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> As to your other question regarding a requester that violates Indpls. Code § 285-311, the APRA provides that a person who uses information in a manner contrary to a rule or ordinance adopted under subsection 3(e) may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d). I.C. § 5-14-3-3(e). Thus, the Assessor acts is within its statutory authority if it denies access to information in electronic format if it can prove the requester has previously used information in a manner contrary to the resolution. *Id.; see also Opinion of the Public Access Counselor 07-FC-163*.

Informal Opinion 10-INF-6; Records of the Marion County Assessor (March 16, 2010).

As the Assessor notes, there is some conflict between *Informal Opinion 10-INF-6* and Counselor Davis' opinion in *Opinion of the Public Access Counselor 07-FC-131*. There, Counselor Davis opined:

> The provision of subsection 3(e) for limiting by ordinance the use of data for commercial purposes applies only to data provided on disk or tape, by its terms. It does not apply to a copy of data received by a person on paper. Yet, subsection 3(d) provides that a public agency shall make reasonable efforts to provide a copy of data on paper as well as on disk or tape.

Id. In my opinion, Counselor Davis' opinion failed to contemplate the language following "disk or tape" in subsection 3(e). The relevant portion of subsection 3(e) that lists what types of information may be subject to commercial use restrictions reads, "information on disk or tape ***under subsection (d)***…." I.C. § 5-14-3-3(e) (emphasis added). In my opinion, the highlighted language is important because it indicates the General Assembly's intention to include the remaining forms of information listed in subsection 3(d) that are not enumerated specifically in 3(e): "paper, . . . drum, or any other method of electronic retrieval…." I.C. § 5-14-3-3(d). Counselor Davis' reasoning

would lead to the conclusion that information received via disk or tape could be subject to a commercial use restriction but information received on a drum would not. I do not believe the General Assembly intended such a result. For the same reason, I also read subsection 3(e) to include electronic data that is produced on paper. As a result, it is my opinion that the Assessor did not violate the APRA by applying INDPLS. CODE § 285-311 to the information contained in the spreadsheet sent to First American via email. Moreover, it is my opinion that INDPLS. CODE § 285-311 would apply to paper copies of such data if the Assessor were to release such records at some point in the future.[1]

First American is correct that, as a general rule, agencies should produce paper copies of electronic data upon request. *See Opinion of the Public Access Counselor 07-FC-131* ("[I]t is my opinion that the Auditor must make reasonable efforts to provide to First American a copy of all disclosable data on paper."). While the APRA does not generally require agencies to produce records that do not exist in response to a public records request, section 3 of the APRA does require an agency to "make reasonable efforts" to provide copies of electronic data upon request. That section does not require that an agency make *entirely new* records, but because electronic data is not stored on paper, subsection 3(d)'s requirement that an agency make reasonable efforts to produce such data on paper obligates public agencies to produce existing records *in a particular form*. Here, however, the Assessor need not produce paper copies of the requested records because it has already provided the records electronically. "Under Indiana Code section 5-14-3-8(e), a public agency 'must provide at least one (1) copy of' a public record to a person, but there is no requirement that a public agency provide multiple copies to the same person." *Opinion of the Public Access Counselor 01-FC-07.*

CONCLUSION

For the foregoing reasons, it is my opinion that the Assessor did not violate the APRA.

Best regards,

Andrew J. Kossack
Public Access Counselor

Cc: Drew Carlson

[1] I acknowledge that this interpretation is in conflict with Counselor Davis' opinion in *Opinion of the Public Access Counselor 07-FC-131*. To the extent that a party disagrees with my conclusion, section 9 of the APRA provides for *de novo* judicial review, which might lead to a different result. I note that I believe my interpretation is consistent with Counselor Neal's in *Opinion of the Public Access Counselor 07-FC-163*, which was issued more recently than Counselor Davis' opinion and has not been superseded by the General Assembly in any of the three legislative sessions that have occurred since it was issued.