



STATE OF INDIANA

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August 16, 2011

Ms. Susan C. Engelbrecht
1647 S 200 W
Greenfield, Indiana 46140

Re: Formal Complaint 11-FC-175; Alleged Violation of the Access to Public Records Act by the Greenfield-Central Community School Corporation.

Dear Ms. Engelbrecht:

This advisory opinion is in response to your formal complaint alleging the Greenfield-Central Community School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The School's response is enclosed for your reference.

BACKGROUND

In your complaint, you alleged that on June 29, 2011 you requested in writing from the School the ". . .xyz coordinates found for the original topographical survey done for the construction of the new Greenfield Middle School." You further provided that you only needed the coordinates found along the east edge of Franklin Street.

The School responded to your request in writing on July 5, 2011. The School advised that in March of 2011 it provided you copies of the survey that was completed and it had no further records responsive to your request. The School provided that while it may be possible that Cripe Engineering ("Cripe") independently created or gathered the coordinate information in the process of surveying the property, the coordinate information has never been requested or provided to the School.

In response to your formal complaint, the School has provided that it has produced all records responsive to your request, the School has never requested or had a need for the coordinate information, and if Cripe did have the coordinate information and the School requested it, the School would be charged for the information.

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.” *See* I.C. § 5-14-3-1. The School is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* 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 (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the School responded to your request within the seven-day time period required by the APRA.

If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy...”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *Opinion of the Public Access Counselor 10-FC-56*.

In 2005 the Court of Appeals in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) (“*Knightstown*”), held that because a private entity created a settlement agreement for a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Id.* at 1134. The Court did not find that the language “created, received, retained, maintained or filed by or with a public agency” in I.C. §5-14-3-2 excepted from the definition records created for or on behalf of a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room in order to deny the public access. *Id.* at 1133. The Court of Appeals reasoned that “the Taxpayers of a community have the right to know how and why their money is spent. Therefore, mindful of the statute's purposes of openness, the court does not allow a public authority to thwart disclosure by having an attorney or an insurer's attorney prepare every writing that the public authority wishes to keep confidential.” *Id.* at 1134.

Initially I would observe that it is not apparent from the information before me whether Cripe has the coordinate information that has been requested. The School did not retain Cripe to create or provide the coordinates on its behalf; Cripe was retained to provide a survey of the property, which it has provided to the School and the School has provided to you. If Cripe did generate the coordinate information in the completion of the survey, Cripe acted independently of the School in doing so. This is further evidenced by the fact that the School has indicated that if a request was made of Cripe for the coordinate information and Cripe had access to it, the School would face a monetary charge from Cripe *for* the information, beyond that of a mere copying fee. (emphasis added). Under such circumstances, it is my opinion that the coordinate information that may or may not be in the possession of Cripe are not public records because they were not created or maintained by, for, or on behalf of the School.

CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Dan L. Strahl