

August 29, 2000

Mr. Martin L. Hensley
7205 Mohawk Lane
Indianapolis, Indiana 46260

Re: Advisory Opinion 00-FC-24 *Alleged Denial of Access to Public Records by the Rush County Board of Zoning Appeals.*

Dear Mr. Hensley:

This is in response to your formal complaint, which was received on August 10, 2000. You have alleged that the Rush County Board of Zoning Appeals, ("BZA") has violated the Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, on July 22, 2000, you made a request to the BZA and received no response. You made another request to the BZA dated August 8, 2000. Mr. William Todd, Executive Director of the Rush County Area Plan Commission, which includes the BZA, responded to your complaint and your August 8th request in a letter dated August 14, 2000. A copy of his response and the attachments are enclosed for your reference.

For the reasons set forth below, it is my opinion that you were informed by telephone that the information you requested in your July 22nd public records request did not exist. It was not, therefore, a denial under Indiana Code section 5-14-3-9. With respect to your August 8th request, the BZA did respond within the time period specified under the APRA.

BACKGROUND

According to information provided in your complaint, you sent¹ a public records request to the BZA dated July 22, 2000, asking for the list of the names and telephone numbers of those persons who had complained about your Carthage, Indiana radio tower. You stated that you received no response to your July 22, 2000 request. You then sent another request, dated August 8, 2000 for a copy of this list, as well as other information concerning your tower and possible complaints filed with the BZA. You filed your formal complaint with this Office on August 10, 2000.

After receiving your formal complaint, Mr. Todd responded on behalf of the BZA as their record keeper. Mr. Todd did not respond to your July 22nd request, which was received in his office on July 25th, because he had had a phone conversation with you the day before receiving your request. During that phone conversation, he had advised you that he did not have a public record that provided the information you requested. Mr. Todd indicated that he had advised both you and anyone who may have

called that the office did not accept oral complaints, and at that point, he had received no written complaints about your radio tower.

With respect to your August 8, 2000 request, which was received by the BZA on August 14th, Mr. Todd noted that he was still within the seven (7) day response time provided under the APRA when he provided his response to your formal complaint. In his response to your formal complaint, Mr. Todd responded to each of the items requested. A more detailed discussion of his response to your August 8th request will be provided in the following paragraphs.

ANALYSIS

The APRA states that " it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials." Ind. Code §5-14-3-1. In addition, the policy statement reminds public officials and public agencies that the burden falls upon them to justify the nondisclosure of a public record. Id. The BZA is a "public agency" and, therefore information collected and maintained are "public records" under the APRA. Ind. Code § 5-14-3-2. Any person has the right to inspect and copy the public records of a public agency unless they are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. Ind. Code §5-14-3-4.

Your July 22, 2000 Public Records Request

The APRA provides that a person is entitled to inspect and copy the public records of a public agency. Ind. Code §5-14-3-3(a). A denial of access to a written public records request that has been mailed or sent via facsimile occurs when a person has been denied access or seven (7) days after receipt of the request and the public agency does not respond. Ind. Code §5-14-3-9(b). This denial refers to the denial of the "right to inspect and copy a public record by a public agency." Ind. Code §5-14-3-9(d). If a person has made a request in writing, and the public agency is denying access to a public record, then the public agency must deny that request in writing. Ind. Code §5-14-3-9(c). If a public agency does not have a public record responsive to the request, that public agency is not required to create one to satisfy the request and is only obligated to notify the requestor that no such public record exists.

In the present case, Mr. Todd did not deny you access to an existing public record and therefore, a written denial was not necessary. He had informed you verbally on July 24th that no such public record exists; this was presumably after the date you mailed your request and prior to its receipt in the BZA. It appears that you did receive a response to the very request you had previously made in writing. Whether you believe that there should be such a record in existence is a different issue. Also, you alleged in your complaint that the BZA may be destroying public records, but absent evidence that the list you requested ever existed, this allegation is unfounded.

Mr. Todd probably should have responded again, even if it were repetitive, after receiving your written request. Whether by telephone or in writing, Mr. Todd could have reiterated his conversation with you on July 24, 2000 and dispensed with any confusion over whether a response had been provided

to your public records request.

Your August 8, 2000 Public Records Request

As noted by Mr. Todd in his response to your complaint, his time for responding to your August 8th request, which was received on August 10th, under Indiana Code section 5-14-3-9 had not yet expired. There could not have been a violation of the APRA with respect to your second request to the BZA at the time you filed your formal complaint.

Mr. Todd did, in his response to your formal complaint, provide detailed responses to the items you requested. In order to avoid the necessity of the filing of another complaint in this matter, I have addressed each of the items you requested and Mr. Todd's response to those requests under the APRA.

1. You requested "all documents mailed to any person which were represented to be minutes of any meeting or related to the zoning of my land in Carthage." Mr. Todd's reply to this request is that no one has been mailed copies of any minutes regarding the zoning of your land in Carthage. If you wish to obtain copies of any of the BZA minutes, those minutes are available to you for inspection and/or copying. This is an appropriate response under the APRA.
2. You requested "a list of all persons who have left their names and numbers with your office either opposing my tower or which you have previously indicated were names and numbers you had but did not feel comfortable releasing to me." Mr. Todd reiterated that there is no "list" of callers as you had previously requested and were informed don't exist. He did state that on August 8, 2000, he received a written complaint concerning your tower from Rebecca Renollet and another letter was received from the Richmonds on August 14, 2000. Copies of each of these writings were mailed to you on August 14th. Mr. Todd has responded appropriately to your request.
3. You requested "any directives by the Rush County BZA which allowed or required you to make a mass mailing or any mailing to homeowners near my tower asking these persons to write complaint letters." Mr. Todd responded that no directive document exists and there were no mailings from the BZA concerning your tower. This is an appropriate response under the APRA.
4. You requested "a list of any meetings held that would include discussions of my zoning for my land in Carthage (and) (m)inutes of these meetings." The only meeting that the BZA has had concerning your tower, according to Mr. Todd, was the one you requested on September 13, 1999 for your request for a special exception to allow for the construction of a radio tower on your property. Copies of the minutes of that meeting are available for your inspection and/or copying at the BZA. This is an appropriate response under the APRA.
5. You requested "a copy of any document including electronic documents that discuss or relate to my land in the Carthage area" and
6. "any letter sent or received by your office or any other public document that relates to my land in the Carthage area." In response to your fifth and sixth itemized requests, Mr. Todd responded that the only documents on file concerning your tower are in the file that concerns the special exception you requested in September, 1999. If you wish to obtain a copy of that entire file, it is open for your inspection and/or copying. This is also an appropriate response under the APRA.

7. Your final request was for "any documents previously denied which were requested." From the responses provided by Mr. Todd, it is my opinion that he has not denied you access to any documents requested in either your July 22nd or August 8th requests. If a public record does not exist that is responsive to any of your requests, it was not improper under the APRA for Mr. Todd to inform you of that fact.

CONCLUSION

It is my opinion that you were informed by telephone that the information you requested in your July 22nd public records request did not exist. There was no denial, therefore, under Indiana Code section 5-14-3-9. With respect to your August 8th request, the BZA did respond within the time period specified under the APRA by providing its response in conjunction with the response to your formal complaint.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. William Todd, Executive Director
Rush County Area Plan Commission/BZA

¹ Since your complaint does not state differently, I will assume for the purposes of this opinion that you mailed or faxed your letters to the BZA.
