

October 29, 2001

Ms. Gladys Rita Kopala
66559 Ivy Road
Lakeville, IN 46536

Re: *Advisory Opinion 01-FC-66*;
Alleged Denial of Access to Public Records by the St. Joseph County Surveyor's Office.

Dear Ms. Kopala:

This is in response to your formal complaint, which was received on October 3, 2001. You have alleged that the St. Joseph County Surveyor's Office ("Surveyor's Office") violated the Indiana Access to Public Records Act, ("APRA") Indiana Code chapter 5-14-3, by denying you access to rural and urban ditch funds report.¹ Mr. John R. McNamara, County Surveyor, responded in writing to your complaint in a letter faxed to this Office. A copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that the Surveyor's Office did deny you access to the rural and urban ditch funds report at the September 10, 2001 meeting of the St. Joseph County Drainage Board in violation of the APRA. This denial is actionable under Indiana Code section 5-14-3-9.

BACKGROUND

According to your complaint, on September 10, 2001, you made a verbal request to the Surveyor's Office during the St. Joseph County Drainage Board meeting. You asked for a copy of the rural and urban ditch funds report and Mr. McNamara advised you that he would not give or sell a copy of this report to you because it was in his computer. You then filed your formal complaint with this Office concerning this denial.

In response to your complaint, Mr. McNamara stated that he did in fact deny you access to the rural and urban ditch fund report since he did not print them out. Apparently Mr. McNamara had provided copies of the report to the Drainage Board members at the September 20th meeting, but no additional copies were provided for the public. Mr. McNamara believed that since he was not obligated by law to create this report, he would also not be required to print it out and provide you with a copy upon request. Mr. McNamara admitted that he now understands that he should not have denied you access to this public record and will, in the future, print it out and will provide it to you and the Drainage Board members.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code § 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

The Surveyor's Office is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Surveyor's Office during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a). If a public agency denies access to a public record, then that denial is actionable in the circuit or superior court in the county in which the denial occurred. Ind. Code §5-14-3-9.

A denial of access to public records occurs when the public agency affirmatively denies you access to the public records requested. As you noted in your complaint, you verbally requested a copy of the rural and urban ditch funds report at the September 20th meeting of the Drainage Board and Mr. McNamara denied your request at that time. The burden of proof for nondisclosure, as noted above, lies with the public agency. In this case, there is nothing to indicate that Mr. McNamara provided any statutory authority for the denial, only that he did not believe he was obligated to print a copy of the report for you because he is not obligated by law to produce the report.

A public record is defined as:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code §5-14-3-2. Since the burden for nondisclosure lies with the public agency, you should have been informed by the Surveyor's Office of a statutory basis for the nondisclosure. As is evident in the definition of a public record, just because information is stored on a computer, it is no less a public record than one that is stored on paper. The fact that he was not obligated to produce this report is not a basis for denial under the APRA either because once a public record is created, a public agency may not deny access to it unless there is statutory authority to do so. Further, Mr. McNamara shared this report with the Drainage Board members, but denied you a copy, again without a statutory basis for disclosing the public record to some people, but not to you. For these reasons, it is my opinion that the Surveyor's Office did deny you access to the rural and urban ditch fund report in violation of the APRA. Further, this denial is actionable in court as provided under Indiana Code section 5-14-3-9.

CONCLUSION

It is my opinion that the St. Joseph County Surveyor's Office did deny you access to public records in violation of the APRA and that this denial is actionable in court under Indiana Code section 5-14-3-9.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: The Honorable John R. McNamara

¹In your complaint, you made several allegations, some of which may be public access issues, but which predated your formal complaint by more than thirty days. Under Indiana Code section 5-14-5-7, we can only address in this formal opinion the alleged denial of September 10, 2001. Mr. McNamara has, however, addressed all of the concerns you raised in his response to your complaint.