

June 2, 2003

Bradley S. LeBoeuf
333 S. Main Street, Suite 509
Akron, OH 44223

Re: *Advisory Opinion 03-FC-36*: Alleged Improper Denial of Access to Public Records by the Indiana Professional Licensing Agency.

Dear Mr. LeBoeuf:

This is in response to your formal complaint, which was received on May 13, 2003. You have alleged that the Indiana Professional Licensing Agency and Indiana Real Estate Commission (hereinafter collectively referred to as "IPLA") have violated the Indiana Access to Public Records Act ("APRA,") Indiana Code chapter 5-14-3. Specifically, you allege that the IPLA denied you access in violation of the APRA in response to your April 11, 2003 request for public records related to a consumer complaint filed against Leonard Pryweller. Ms. Kimberly A. Garver, Deputy Director of IPLA, responded in writing to your complaint. A copy of her response is enclosed for your reference. For the reasons set forth below, it is my opinion that the IPLA did not deny you access to public records in violation of the APRA. Consumer complaint files are confidential under Indiana Code section 25-1-7-10 until the Attorney General files a notice with the licensing board to prosecute the licensee.

BACKGROUND

According to your complaint, on April 11, 2003 you sent a public records request to the IPLA requesting copies of the following records:

1. Any and all correspondence, notes, affidavits, journals, logs, faxes, photographs, minutes, comments, summaries, faxes, records or other reports concerning statements, interviews or telephone conversations, and inter-office and intra-office memoranda relating to the allegations of licensing violations of Leonard Pryweller of Leonard Pryweller Realty involving BDX, Inc. and Eugene A. LeBoeuf, since January 1, 2002 through the date of receipt of this request.
2. Any and all policy statements, directives, protocols, pamphlets, bulletins, instructions, and reports regarding how the Indiana Real Estate Commission handles consumer complaints against an Indiana licensee regarding an alleged licensing violation that have been in effect since January 1, 2002.

In a letter dated April 22, 2003, Ms. Garver responded to the first items you requested by advising you that there has been no disciplinary action taken against Mr. Pryweller in the time period you specified and no formal charges are pending against him. Ms. Garver stated that any document that the IPLA may have concerning the investigation of any consumer complaint filed against a licensee is confidential under Indiana Code section 25-1-7-10 and Indiana Code section 5-14-3-4(a)(1). Ms. Garver also advised you in her response that the IPLA has no documents that are responsive to the second category of public records you requested. You then filed your formal complaint with this Office.

In her response to your formal complaint, Ms. Garver stated that the IPLA did receive your public records request and responded to it by letter dated April 22, 2003. Ms. Garver acknowledged that you filed a consumer complaint with the IPLA. This complaint, however, led to no formal charges being filed or any disciplinary action against the licensee. As such, any documents that the IPLA may have concerning this consumer complaint are confidential under Indiana Code section 25-1-7-10 and cannot be disclosed to you.

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." Ind. Code § 5-14-3-1. The IPLA 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 this public agency 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 record is confidential, a public agency may not disclose that public record unless disclosure is required by state or federal statute or ordered by a court under the rules of discovery. Ind. Code §5-14-3-4(a).

While public records are generally open for public inspection or copying, there may be statutes that restrict access to such public records as contemplated under Indiana Code section 5-14-3-4. Under Indiana Code section 5-14-3-4(a)(1), the APRA states that a public agency may not disclose public records that are declared confidential under state statutes. The IPLA, in denying you access to documents contained in the consumer complaint file in question, cited Indiana Code section 25-1-7-10 as the statute that renders the public records in question confidential. Under Indiana Code section 25-1-7-10, the IPLA could release these public records only after the Attorney General had filed a notice with the appropriate licensing board, in this case the Indiana Real Estate Commission, that the licensee would be prosecuted as a result of the consumer complaint. Id. In this case, the IPLA has closed the file without providing any notice to the licensing board that formal disciplinary action would be taken. For this reason it is my opinion that the IPLA did not violate the APRA with respect to your April 11, 2003 request for access to a consumer complaint file when the Attorney General has not filed the requisite notice of prosecution under Indiana Code section 25-1-7-10. The IPLA cannot release information that

has been declared confidential by state statute unless disclosure is required under state or federal statute or ordered by a court under the rules of discovery.

CONCLUSION

It is my opinion that the Indiana Professional Licensing Agency and the Indiana Real Estate Commission did not violate the APRA by denying you access to records in a consumer complaint file. These records are confidential under Indiana Code section 25-1-7-10 and may only be released if and when the Attorney General files notice with the Indiana Real Estate Commission of his intent to prosecute the licensee.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Ms. Kimberly A. Garver, IPLA w/o enclosure