



STATE OF INDIANA

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June 6, 2008

Jerome Schneider
2709 South Dixon Road
Kokomo, Indiana 46902

Re: Formal Complaint 08-FC-141; Alleged Violation of the Access to Public Records Act by the City of Kokomo

Dear Mr. Schneider:

This advisory opinion is in response to your formal complaint alleging the City of Kokomo ("City") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you electronic access to records. I have enclosed a copy of the City's response to the complaint for your reference. It is my opinion the City must make reasonable efforts to provide the records in the format requested so long as the format is compatible with the City's data storage system.

BACKGROUND

You allege that on May 21 you submitted a request to the City for an electronic copy of the database of properties used to develop the City's 2008 annexation plans. You requested all fields of information contained in the database, including but not limited to Parcel ID number, deeded owner's name and address, property address, subdivision name, and assessed value of property. You requested that the information be separate to "east side" and "west side" files. You requested a copy of the database file in MAC or PC format and in Excel, tab delimited, comma delimited, or any other ASCII format currently in possession of the City.

You received a response to the request from the City by letter dated May 21 from Corporation Counsel Derek Sublette. Mr. Sublette indicated that pursuant to I.C. § 5-14-3-3(f) and I.C. § 5-14-3-3.6 the City would provide you the opportunity to inspect and make memoranda abstracts of the information. The City did not agree to provide you electronic access to the information. You filed the present complaint on May 28. You indicated in the accompanying documents that you intended to seek priority status, but you did not indicate so in the appropriate location on the formal complaint form prescribed by the counselor pursuant to I.C. § 5-14-5-11. You telephoned the office on June 2, and this office agreed that because you have requested the records for a proceeding

before another agency, priority status would be granted on June 2, pursuant to 62 IAC 1-1-3.

The City responded to the complaint by letter dated June 3 from Mr. Sublette. The City contends that as it relates to providing documents related to the proposed annexation, the City has tried to “remain fair and impartial in its provision of documents, balancing the needs of the annexation opposition with the privacy interests of the property owners who are either proponents or merely apathetic to the proceedings.” The City contends that allowing inspection rather than electronic access would temper the mass dissemination of personal addresses via electronic mail and the internet. As the City concedes, the Indiana Court of Appeals has provided that the simple fear of misuse is not justifiable grounds for nondisclosure. *See City of Elkhart v. Agenda: Open Government Inc.*, 683 N.E.2d 622 (Ind. Ct. App. 1997).

The City contends that I.C. § 5-14-3-3(f) provides statutory guidelines for release of information compiled in list form. This provision prohibits the release of certain lists for commercial use. The City contends the lists will ultimately be used to generate mailings and first person contact that will intrude on the privacy of those in the proposed annexation areas. The City cites a Howard County Circuit Court case where the court made no distinction between an electronic or hard copy of a list that had been requested.

The City contends that because you have indicated the requested information is available piecemeal in other locations and because you have failed to exercise those options for gathering the information, your complaint is political in nature rather than an imperative need of the annexation opposition.

Finally, the City indicates that despite its arguments the City will provide an electronic copy of the requested lists by June 6 at 12:00pm.

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

The following APRA provisions are pertinent to the present matter:

(d) Except as provided in subsection (e), 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. This subsection does not apply to an electronic map.

(e) 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. Use of information received under subsection (d) in connection with the preparation or publication of news, for nonprofit activities, or for academic research is not prohibited. A person who uses information in a manner contrary to a rule or ordinance adopted under this subsection may be prohibited by the state agency or political subdivision from obtaining a copy or any further data under subsection (d).

(f) Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses) it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law. The lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to any individual or entity for political purposes and may not be used by any individual or entity for political purposes. In addition, the lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to commercial entities for commercial purposes and may not be used by commercial entities for commercial purposes. The prohibition in this subsection against the disclosure of lists for political or commercial purposes applies to the following lists of names and addresses (including electronic mail account addresses):

(1) A list of employees of a public agency.

(2) A list of persons attending conferences or meetings at a state educational institution or of persons involved in programs or activities conducted or supervised by the state educational institution.

(3) A list of students who are enrolled in a public school corporation if the governing body of the public school corporation adopts a policy:

(A) with respect to disclosure related to a commercial purpose, prohibiting the disclosure of the list to commercial entities for commercial purposes;

(B) with respect to disclosure related to a commercial purpose, specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes; or

(C) with respect to disclosure related to a political purpose, prohibiting the disclosure of the list to individuals and entities for political purposes.

A policy adopted under subdivision (3)(A) or (3)(B) must be uniform and may not discriminate among similarly situated commercial entities. For purposes of this subsection, "political purposes" means influencing the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question or attempting to solicit a contribution to influence the election of a candidate for federal, state, legislative, local, or school board office or the outcome of a public question.

I.C. § 5-14-3-3

Here, you have requested an electronic copy of a record maintained by the City. While the City in its initial response to you made a reference to I.C. § 5-14-3-3.6, it is not my understanding this is a record to which the City has provide enhanced access (e.g. through its computer gateway). Rather, it is a record created and maintained by the City which is maintained in an electronic format. As such, it is the type of record contemplated by I.C. § 5-14-3-3(d). In other words, it is maintained in an electronic database. As such, the City must make reasonable efforts to provide a copy of the record in the medium requested if the medium requested is compatible with the City's data storage system. *See* § 5-14-3-3(d).

The City contends the Howard County Circuit Court case (*Nees v. McKillip*), of which the City has provided a copy, stands for the premise that an electronic copy is no different from an electronic copy. In my opinion, I.C. § 5-14-3-3(d) clearly requires an agency to make reasonable efforts to provide the record in the format requested, so long as the format is compatible with the agency's data storage system. You have provided a number options of formats in which you request the record, and the City has not argued that any of those formats is incompatible with the City's data storage system.

While 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 (*See* I.C. § 5-14-3-3(e)) , the City has not asserted such an ordinance. If the City has enacted such an ordinance, the City would bear the burden of proof regarding your intention to use the information for

commercial purposes. *See* I.C. § 5-14-3-1. While this issue of commercial purpose is raised by the City, it is my opinion the City has not, in its response to the complaint, sustained that burden. As such, it is my opinion the City cannot deny access to the information based on I.C. § 5-14-3-3(e) because it has not asserted the City has enacted such an ordinance and because the City has not demonstrated you intend to use the information for commercial purposes.

Regarding the City's reliance on I.C. § 5-14-3-3(f) to deny electronic access and instead allow only inspection of the record, I would note that I.C. § 5-14-3-3(f) applies not to all lists maintained by an agency but only to lists of names and addresses:

Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute.

I.C. § 5-14-3-3(f).

Further, the City makes reference to the prohibition in I.C. § 5-14-3-3(f) on the use of lists for commercial purposes, and I would note that prohibition extends only to the three types of lists in subsections (1) through (3). None of those is applicable here.

It is my understanding the record requested is more than merely a list of names and addresses. I understand the list to be a database containing a number of types of information, including names and addresses. Because the record is more than merely a list of names and addresses, it is my opinion that I.C. § 5-14-3-3(f) does not apply.

The City raises concerns regarding the privacy of individuals whose addresses are contained in the record. While I appreciate the City's concern, the APRA does not contain a privacy provision. Nor does the APRA afford a public agency the opportunity to balance the needs of a requester with the privacy interests of owners whose addresses are contained in a public record. Further, as the City points out, the Indiana Court of Appeals has held that simple fear of misuse is not grounds for nondisclosure. *City of Elkhart v. Agenda: Open Government Inc.*, 683 N.E.2d 622 (Ind. Ct. App. 1997) Instead, the APRA requires the disclosure of a public record unless an exception to disclosure is present. I.C. § 5-14-3-3. Based on the information provided by the City, I find no exception to disclosure applicable to this record.

Finally, regarding the City's contention that you could obtain the requested information from other sources and as such your request is politically motivated, the APRA requires an agency to provide access to public records regardless of whether the records may be obtained elsewhere. If the City does not maintain a record you seek, it would be appropriate for the City to indicate where you might go to obtain the record, and certainly the City would not be required to produce a record it does not maintain. But the APRA provides no reason for denial on the basis that a request is politically motivated or that the information is also available from other sources.

CONCLUSION

For the foregoing reasons, it is my opinion the City must make reasonable efforts to provide the records in the format requested so long as the format is compatible with the City's data storage system.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Derek Sublette, City of Kokomo Corporation Counsel