



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 14, 2008

Hans Markland
58 West 1000 North
Wheatfield, Indiana 46392

Re: Formal Complaint 08-FC-223; Alleged Violation of the Access to Public Records Act by the Jasper County Auditor and Jasper County Attorney

Dear Mr. Markland:

This is in response to your formal complaint alleging the Jasper County Auditor ("Auditor") and Jasper County Attorney ("Attorney") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to a copy of a settlement agreement. A copy of the Auditor's response to your complaint is enclosed for your reference. It is my opinion the Auditor and Attorney have not violated the APRA so long as they can bear the burden of proof to sustain the denial of access.

BACKGROUND

In your complaint you allege that you submitted a request for access to records to the Auditor on October 9, 2008. You requested a copy of a settlement agreement discussed at the September 2 meeting of the Jasper County Board of Commissioners. You allege the Auditor indicated she did not have the record but it was in the possession of the Attorney. You further allege you telephoned the Auditor the following day to inquire about the record, and the Auditor told you the record was not a public record until it was signed by the other party. You filed this complaint on October 17.

The Auditor responded to your complaint by letter dated October 31. The Auditor reiterated the facts as you presented them. The Auditor indicates she will provide you with a copy of the agreement as soon as she has a copy.

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 Auditor 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 Auditor 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).

A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. § 5-14-3-2(n).

Here, the Auditor has denied you access to the record on the basis that she is not in possession of the record and on the basis that it has not been fully executed. As to the first claim, that she does not have possession of the record, this is not necessarily an acceptable reason for denying access to a record. The Indiana Court of Appeals has held that records created for or on behalf of a public agency are public records, even if those records are not maintained in the public agency’s office. *See Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005).

Here, though, the issue is whether the record is yet a public record. A public record is a record that has been created, received, retained, maintained, or filed by or with a public agency. I.C. § 5-14-3-2(n). Here, if the record has not been fully executed, it may be nondisclosable at the discretion of the agency. The APRA does not provide an exception to disclosure for records merely because they are in draft format or are not yet executed, but the APRA does provide exceptions to disclosure that are often used to withhold from disclosure discussion or draft documents. For instance, the attorney work product exception (See I.C. § 5-14-3-4(b)(2)) or the deliberative materials exception (See I.C. § 5-14-3-4(b)(6)) are two exceptions which might be used to withhold such a record from disclosure during the deliberative stages.

Unfortunately I do not have before me enough information regarding the nature of the deliberations or the record itself to determine whether either of those exceptions applies here. If either the Auditor or Attorney is withholding the record from disclosure based on one or more exceptions, the agency bears the burden of proof to sustain the denial. I.C. § 5-14-3-1.

CONCLUSION

For the foregoing reasons, it is my opinion the Auditor and Attorney have not violated the APRA so long as they can bear the burden of proof to sustain the denial.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Donya Jordan, Jasper County Auditor
James Beaver, Jasper County Attorney