



# STATE OF INDIANA

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December 11, 2009

Mr. Paul Jefferson, Esq.  
11 South Meridian Street  
Indianapolis, IN 46204

*Re: Informal Inquiry 09-INF-31; State Board of Land Surveyors*

Dear Mr. Jefferson:

This is in response to your informal inquiry dated September 1, 2009. I apologize for the delayed response. I took office in September of this year and found a backlog of informal inquiries at that time. I am currently endeavoring to work through the backlog and appreciate your patience in waiting for this opinion.

Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry regarding the State Board of Registration for Land Surveyors ("Board"). My opinion is based on applicable provisions of the Indiana Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

## BACKGROUND

I summarize the relevant facts in your inquiry as follows: On August 5, 2009, you filed a complaint with this office on behalf of your client, Robert Isgrigg, alleging that the Board violated the APRA by failing to produce documents in response to a public records request. In that complaint, you alleged that you originally filed a public records request with the Board on March 19, 2009. The Board responded promptly to your request and promised to produce the records within six (6) weeks. As of August 5, 2009, however, the Board "wholly failed to meaningfully respond to a public records request served nearly five (5) months ago." You note that you also contacted the Board via letter on June 24, 2009, and at that time asked the Board to either produce the records or provide an estimate of the time required for production. The Board did not respond to that communication.

This office forwarded a copy of your complaint to the Board. Upon receipt, Board Director Angela Smith Jones promptly produced several records responsive to your request on August 6, 2009. Ms. Smith Jones apologized to you for the delay in producing the records; she explained that it took some time to locate the file, and once it

was located and scanned, there were discussions between the parties regarding a possible settlement.

After reviewing the produced records, you notified Ms. Smith Jones that you did not view the production as complete. In response, Ms. Smith Jones informed you and this office that the Board has no other responsive documents in its possession and the Board's August 6<sup>th</sup> production was a "complete and final response." Subsequently, you sent a letter to this office on dated September 1, 2009, in which you note that the "Board has produced documents relating to only one of four categories sought, and even that production appears incomplete."

## 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." I.C. § 5-14-3-1. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a). The Board is 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 Board's public records during regular business hours unless the records fall within one of the APRA's exceptions to disclosure. I.C. § 5-14-3-3(a).

The APRA does not prescribe any timeframes for a public agency's production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time based on all relevant facts and circumstances. Considerations include the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material. Agencies enjoy some deference pursuant to Section 7 of the APRA, which requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). The burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45*.

You made your initial records request on March 19, 2009. The Board responded to that request within seven (7) days as required by the APRA, but it did not produce any of the requested records until August 6, 2009. It is my opinion that the Board has not demonstrated that it produced the responsive records within a reasonable amount of time. See *Opinion of the Public Access Counselor 08-FC-162* (delay of five (5) months was unreasonable).

You also allege that the Board's August 6<sup>th</sup> production is incomplete. The Board maintains that it has produced all responsive records to you. Because the public access counselor does not sit as a finder of fact, I offer no opinion regarding the completeness or incompleteness of the Board's production. If the Board has failed to produce responsive records to you, the Board should either cite an exception to the APRA that permits withholding the records or produce them as soon as practicable. If this is the case and the Board persists in its denial of access following the issuance of an advisory opinion from this office, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e). If, however, the Board does not maintain the other records you requested, the Board has not violated the APRA by failing to produce them to you. Nothing in the APRA requires a public agency to develop records or information pursuant to a request; the APRA requires the public agency to provide access to records already created and maintained by the agency. *See Opinion of the Public Access Counselor 09-FC-135.*

### CONCLUSION

For the foregoing reasons, it is my opinion that the Board has failed to show that it produced your requested records within a reasonable amount of time. Moreover, to the extent the Board has failed to produce requested records and has no basis for withholding those records under the APRA, the Board has violated Section 3(b) of the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,



Andrew J. Kossack  
Public Access Counselor

cc: Angela Smith Jones, Esq.