

July 22, 2005

Sent Via Facsimile

Kerry R. Jones
P.O. Box 86
Berne, IN 46711

Re: Formal Complaint 05-FC-124; Alleged Violation of the Access to Public Records Act by the City of Berne Stormwater Utility Board

Dear Mr. Jones:

This is in response to your formal complaint alleging that the City of Berne Stormwater Utility Board ("Board") violated the Access to Public Records Act ("APRA") by failing to give you a copy of an electronic map. I find that the Board has failed to comply with the requirements of the APRA.

BACKGROUND

At a meeting of the Board on June 16, 2005, you requested an electronic copy of mapping information of the city. This oral request followed an earlier written request for the same information that you submitted on April 13, 2005. You were told by Mr. Ray Gill, Board Chairman, that you would need to present a second written request for the information and state why you wanted the information. Mr. Gill also told you that the Board would "need to assess a value to the file." You believe that the Board's assessing an excessive fee would effectively bar your receiving a copy of the data because the cost would be prohibitive. You filed your formal complaint with the public access counselor on June 22, 2005.

I sent a copy of your complaint to the Board. Attorney Mark Burry responded on behalf of the Board. A copy of his response is enclosed for your reference. Mr. Burry explains that the information you seek was compiled at considerable effort and expense to the City of Berne. He claims that Ind. Code 5-14-3-4(b)(19) exempts the infrastructure data from disclosure where its disclosure could pose a threat to the public safety by exposing a vulnerability to terrorist attack. He also claims that IC 5-14-3-4(b)(11) exempts computer programs, computer codes, computer

filing systems and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility. The information in the electronic map contains high resolution GIS mapping of the City with precise location of all infrastructure components, utilities and systems. The engineering process has been subject to review and discussion at public meetings, at which you have been in attendance. Although generally citizens do not have to state the purpose of a request for records, it is Mr. Burry's contention that this type of information should not be released without careful deliberation where the information contains sensitive infrastructure data.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). The APRA is to be liberally construed to carry out the policy of openness, and the burden for nondisclosure of a public record is on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. IC 5-14-3-1.

The issue presented in your complaint is whether the Board could deny you a copy of the Berne electronic map. "Electronic map" is defined as copyrighted data provided by a public agency from an electronic geographic information system. IC 5-14-3-2(d). It is clear that information from an electronic map is a public record, where it is electronically stored data maintained by a public agency and therefore meets the definition of "public record" at IC 5-14-3-2(m). I also note that the APRA sets out fee provisions for providing an electronic map to a purchaser. *See* IC 5-14-3-9(j).

If a public agency receives a request for records orally, it may deny the request orally. If the request is made in writing, or if an oral request that has been denied is renewed in writing, a public agency may deny the request if the denial is in writing and the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

Further, if an agency denies the disclosure of a record or a part of a record under section 4(b)(19), the agency or the counterterrorism and security council provided for in IC 10-19-8-1 (*see* SEA 56, 2005) shall provide a general description of the record being withheld and of how disclosure of the record would have a reasonable likelihood of threatening the public safety. IC 5-14-3-9(d).

Here, you had renewed orally your written request for the electronic map for the City of Berne. You were told that you should submit your request in writing with a statement of the purpose for the request. A person may not be denied a record because he or she has refused to state the purpose of the request, unless such condition is required by other applicable statute. IC 5-14-3-3(a). If the reason that you were asked to state the purpose of your request for the electronic map was to justify your right to obtain it under IC 5-14-3-4(b)(19), then the Board had a legal obligation to explain its justification for asking you to state the purpose of your request. Nothing in the Board's response indicated that you received this explanation. I advise public

agencies to cite the statute that requires that the purpose for the record be provided by the requester before denying a record for failure to state the purpose for the request. Also, it is not clear from the Board's response whether knowing the purpose for the request would inform the agency's judgment in exercising its discretion in releasing all or part of the GIS data.

Under section 4 of the APRA, a public agency may not disclose certain types of records in its discretion. The Board cited two exemptions in response to this complaint although it did not cite any specific exemption when it denied your request. The first exemption is IC 5-14-3-4(b)(11), which exempts computer programs, computer codes, computer filing systems and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility. The second is the exemption for a record or part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack. IC 5-14-3-4(b)(19).

Based on the Board's response to the complaint, the Board would not carry its burden in court to show that the electronic map falls within the exemptions above. With respect to the exemption at section 4(b)(11), the Board has not stated that the GIS data was *entrusted to it by a utility*, a condition for claiming this exemption. Merely stating that the electronic map includes data regarding utilities does not bring the record within section 4(b)(11).

With respect to section 4(b)(19) information, the Board has not provided the explanation required under IC 5-14-3-9(d), which states that an agency that denies a record under 4(b)(19) record must describe the record and provide an explanation of how disclosure of the record would have a reasonable likelihood of threatening the public safety. Also, the Board must take care to deny only that part of the record that meets an exemption and disclose the remainder. The law requires that a public agency separate material from a public record that is disclosable from nondisclosable information, and make the disclosable information available for inspection and copying. IC 5-14-3-6(a).

You also raise a concern regarding what fee may be assessed to you for the electronic map. IC 5-14-3-8(j) provides that a public agency may charge a fee, uniform to all purchasers, for providing an electronic map that is based upon a reasonable percentage of the agency's direct cost of maintaining, upgrading, and enhancing the electronic map and for the direct cost of supplying the electronic map in the form requested by the purchaser. The fee is subject to the approval of the fiscal body of the political subdivision if the public agency is a political subdivision.

CONCLUSION

For the foregoing reasons, I find that the City of Berne Stormwater Utility Board did not comply with the Access to Public Records Act when it denied you a copy of the electronic map.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mark S. Burry