

September 9, 2005

Ryan T. Nees  
5410 Duke Court  
Kokomo, IN 46902

*Re: Formal Complaint 05-FC-162; Alleged Violation of the Access to Public Records Act by the City of Kokomo*

Dear Mr. Nees:

This is in response to your formal complaint alleging that the City of Kokomo ("City") violated the Access to Public Records Act ("APRA") by denying you a copy of a list of names and electronic mail addresses. In my opinion, the City should give you a copy of the list.

#### BACKGROUND

You requested access to the City's electronic mailing list on July 26, 2005. On August 4, 2005 you received an e-mail from the City's attorney, Kenneth Ferries allowing you to inspect and make memoranda abstracts from the list, but denying you a paper or electronic copy, citing Ind. Code 5-14-3-3(f). You filed your formal complaint with my office on August 10, 2005. I sent a copy of your complaint to Mr. Ferries. He responded by letter, a copy of which is enclosed for your reference.

Mr. Ferries explained that the list that you requested was a list of subscribers to an electronically distributed electronic newsletter of the City. Subscribers can add or delete their names and e-mail addresses from the list from their own computers. The City also has the ability to maintain the list, making edits as needed. The City concedes that the list is a public record maintained by the City, albeit on a third party vendor's server. The City has taken the position that an e-mail address is the functional equivalent of an "address" as that term is used in the section 3(f) of the APRA. In a telephone conversation with me, Mr. Ferries confirmed that the list contains the corresponding name of the subscriber for virtually every e-mail address. The names and e-mail addresses are input into the computer by city personnel. Furthermore, the City is not required by law to publish or disseminate the list. As the City has told you, it will allow

you to inspect the list and make notes from it; however, it is not required to provide you with either an electronic or paper copy of the list.

## 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). Exceptions to access are to be narrowly construed, so as to effectuate the policy of the APRA. IC 5-14-3-1. Notwithstanding the other provisions of section 3 of the APRA, a public agency is not required to create or provide copies of lists of names and addresses, unless the public agency is required to publish such lists and disseminate them to the public under a statute. IC 5-14-3-3(f). However, if a public agency has created a list of names and addresses, it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law. IC 5-14-3-3(f). The APRA defines "inspect," in relevant part, to mean the right to manually transcribe and make notes, abstracts, or memoranda. In ordinary parlance, making memoranda abstracts is to copy by hand material in a record.

The City will allow you to view the list of names and e-mail addresses, but will not provide you with either an electronic copy or a paper copy of the list. A public agency must make reasonable efforts to provide a person all disclosable data stored in an electronic data storage system. IC 5-14-3-3(d). Under IC 5-14-3-3(f), a public agency must permit inspection of a list of names and addresses, unless disclosure is prohibited by law, but may refuse to provide a copy of the list. The controversy centers on whether the list of names with corresponding e-mail addresses maintained by the City is a "list of names and addresses" within the meaning of IC 5-14-3-3(f). The City urges an expansive construction of the term "addresses" to include e-mail addresses.

The right of a person to copy a record is a right generally conferred by the Access to Public Records Act; therefore, the discretion of the public agency to not provide a copy of a list of names and addresses is an exception to disclosure, albeit one not contained in section 4 of the APRA. It is the public policy of the APRA that it is to be construed liberally in favor of disclosure and, therefore, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-3-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . "[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

*Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. App., 1995) [Citations omitted], quoting *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App., 1982) [Citations omitted]. As a general rule, the words of a statute will be construed in their plain, ordinary and usual sense, and it is only where such construction will manifestly result in the defeat of the legislative intent that they will not be so construed. *Pennsylvania Company v. Mosher*, 94 N.E. 1033 (Ind. App., 1911).

In my opinion, the legislature did not contemplate e-mail addresses as a type of address, which, with corresponding names, a public agency could refuse to copy for a person, and therefore, did not intend for such a list to not be copied. The plain, ordinary and usual sense of “address” does not include e-mail addresses. To put it another way, the terms “e-mail address” and “address” are not interchangeable. Applying the rule that limitations on the rights under APRA are to be strictly construed, I reach the conclusion that the list you seek is a disclosable public record which you are entitled to copy, not limited by IC 5-14-3-3(f).

My research reveals that this question has never confronted the public access counselor, and therefore I was unable to find any guidance in our previous opinions. I encourage public agencies to consult my office prior to denying a record when close questions of statutory construction of the APRA are presented; nevertheless, I do not believe that the City’s refusal to provide you a copy was done with intent to violate the APRA.

#### CONCLUSION

For the foregoing reasons, I find that the City of Kokomo should provide you with a copy of the list of names and e-mail addresses.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Kenneth Ferries