

May 11, 2005

Mike Bernero
Chairman
Marshall County Tax Awareness Committee
805 Baker St. Lot 118
Plymouth, IN 46563

Re: *Formal Complaint 05-FC-66; Alleged Violation of the Access to Public Records Act by the Indiana Department of Local Government Finance, School Property Tax Control Board*

Dear Mr. Bernero:

This is in response to your formal complaint alleging that the Indiana Department of Local Government Finance, School Property Tax Control Board (“Department”) violated the Access to Public Records Act (“APRA”) by failing to respond to your written request for records within seven (7) days and failing to provide all of the information that you requested. I find that the Department did not violate the APRA when it did not provide information that it did not maintain. I find that the Department did not violate the APRA by failing to respond to your March 14, 2005 request within seven (7) days. The Department did fail to respond to your February 2, 2005 request within seven (7) days.

Additionally, you requested that your complaint receive priority status; however you failed to provide supporting information as to why your complaint should receive priority status under 62 IAC 1. As your request for priority status is unsupported, your complaint did not receive priority status.

BACKGROUND

On February 2, 2005 you mailed an information request to the Department. You requested information regarding the total number of remonstrances, involving School Corporations, filed by taxpayers and property owners and processed in Indiana for the last three (3) years, including 2002, 2003, and 2004. You requested that the names of School Corporations and locations including towns, cities and townships be included. Additionally, you

requested to know how many hearings had been heard and were on the agenda for the School Property Tax Control Board. You requested this information for the years of 2002, 2003 and 2004 and wanted to know what the total for the three (3) year period was.

On March 9, 2005 Brenda A. Dudley, Assistant Director of Operations and Data Analysis for the Department of Local Government Finance responded to your request. She apologized for the delay and provided a portion of the information requested. In response to your request as to how many remonstrances had been filed for the years of 2002, 2003, and 2004 she stated, "We do not keep track of the remonstrance process, this is handled by the individual county."

On March 14, 2005 you sent a second request to the Department stating that the County Auditors file information concerning the remonstrances with the Department. You requested to know how many remonstrances had been filed in the State of Indiana from all 92 counties, the name of petitioners and school corporations, as well as information on "the win and loss of said activity."

Ms. Dudley responded to this request on March 16, 2005. She responded, "[w]e do not keep track of the remonstrance process; the individual county handles this. A remonstrance that is successful for the unit is submitted with the Control Board petition, a remonstrance that is unsuccessful is generally not submitted to our office. Therefore, we do not keep a log or any other file of remonstrances. Consequently, we are unable to provide the requested information."

On April 4, 2005 you filed this complaint with the Office of the Public Access Counselor. The complaint was received on April 8, 2005 and assigned Formal Complaint # 05-FC-66.¹

The Department responded to this complaint by letter dated April 25, 2005; a copy of that letter is included for your reference. Mr. Bob Harris agreed that the agency failed to respond to your February 2, 2002 request within seven (7) days due to staff turnover. He stated that as soon as Ms. Dudley was appointed as a temporary Public Information Officer, she responded to your letters. Mr. Harris's response to the complaint of denial of access, in part, was to state that

¹ It must be noted that your complaint contained additional information that will not be evaluated in this opinion. First, is a letter dated March 4, 2005 and addressed to "Honorable Gov Mitch Daniels – ofc. and Comms. Melissa Henson D.L.G.F Sch. Propt. Tax Cont. Board." The letter states an opinion, rather than a request for records; therefore it is not germane to this discussion.

Additionally, you provided a letter dated March 18, 2005, addressed to the Department, in which you stated, "Dear Sirs and D.L.G.F,

In response to your letter dated March 16 – 2005, your Dept Stated that you are unable to provide the Requested Information.

Well, enclosed are Copies of the Information I requested back in approx Mid March 2002 of the same Nature as I have just Recently Requested. Specifically why provided then and Not Now."

Attached to this letter are two Certificates of County Auditor, from Marshall County. They appear to be in regards to: (1) a petition in favor of the construction of a new school and (2) a remonstrance against the construction of the same school. Your letter does not include a copy of the original 2002 information request from which these exhibits were produced. Specifically, it is not indicated whether the request was made to the Department or to the County, nor does it indicate the scope of the original request. Neither does it indicate whether these two documents were the entire response to the 2002 request, or whether they are representative of a larger body of documents received. Due to the lack of information concerning the letter and accompanying documents, their inclusion in your complaint will have no bearing upon this opinion.

the Department does not compile this information. He also indicated that the Department was trying to work with you on your request. My office contacted you by telephone on May 6, 2005 to inquire as to whether the matter had been resolved to your satisfaction. You stated that it had not.

ANALYSIS

Initially, I wish to note that as to the February 2, 2005 request for records, your complaint is untimely because complaints must be filed within 30 days of the denial of the record. Ind.Code 5-14-5-7. However, your renewed request for records on March 14, 2005 permits me to issue this advisory opinion with respect to that request. In the case of a denial of records occurring more than 30 days prior to the filing of your complaint, I may issue an informal inquiry response, which I incorporate into this advisory opinion.

Failure to Timely Respond

Any person may inspect and copy the public records of a public agency during the agency's regular hours of business, except as provided in section 4 of the APRA. IC 5-14-3-3(a). An agency is required to respond to a request for records within certain timeframes. If a request is mailed, sent by facsimile, or sent by electronic mail, the agency is required to respond within seven days of its receipt of the request. IC 5-14-3-9(b). A response may be an acknowledgment that the request for records was received, and a statement of how and when the public agency intends to comply. A failure to respond timely to a request for records is deemed a denial under the APRA. IC 5-14-3-9(a). On March 14, 2005 you filed your second request for records with the Department. The Department responded two days later by letter dated March 16, 2005. As to this request the agency responded timely and therefore, did not violate the APRA.

Your complaint was not timely filed as to the February 2, 2005 request for records; therefore, it must be addressed as an informal inquiry response. The Department concedes that it did not respond to your initial request for records within 7 days, thereby failing to comply with the APRA.

Denial of Access in Part

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." Ind. Code § 5-14-3-1. Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a). The burden for any nondisclosure generally lies with the public agency, not the person making the request under the APRA. Ind. Code §5-14-3-1.

Under the APRA, a public agency is required to respond to requests for public records that are maintained or filed by or with those agencies. A public agency is not required to compile records to respond to a request for information. If the public agency does not have a record or records that are responsive to a request for a record or for information, the agency may respond by stating that it does not maintain such a record.

In her March 16, 2005 letter to you Ms. Dudley explained that the Department does not track the remonstrance process; that it is handled by the individual county. She also explained that while a successful remonstrance is included in the petition sent to the Department, unsuccessful ones are not necessarily submitted. She explained that they do not keep a log or file of remonstrances. Therefore, while the information may be contained in individual files, the Department has no way of knowing which files might contain a remonstrance. The Department is not required to conduct research and compile the data that you are requesting in order to fulfill your request for a record. The Department's failure to provide you with data that is not otherwise contained in a record is not a violation of the Access to Public Records Act. The same analysis applies to the Department's March 9, 2003 response in which Ms. Dudley explained that the remonstrance process is tracked by the individual counties.

CONCLUSION

For the foregoing reasons, I find that the Department did not violate the Access to Public Records Act by declining to produce records it does not maintain. Additionally, for purposes of this formal complaint the Department did not violate the Access to Public Records Act, as it did timely respond to your request of March 14, 2005. As a matter of informal inquiry, however, the Department did fail to timely respond to your February 2, 2005 request.

Sincerely,

Karen Davis
Public Access Counselor

cc: Bob Harris