



# STATE OF INDIANA

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September 24, 2009

Ms. Judith Lewis  
c/o Mr. Michael Gillenwater  
411 Watt Street  
Jeffersonville, IN 47130

*Re: Formal Complaint 09-FC-192; Alleged Violation of the Access to Public Records Act by the Muddy Fork of Silver Creek Watershed Conservancy District*

Dear Mr. Gillenwater:

This advisory opinion is in response to your formal complaint alleging the Muddy Fork of Silver Creek Watershed Conservancy District ("District") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying your client, Judith Lewis, access to public records. For the following reasons, my opinion is that the District did not violate the APRA because it never denied Ms. Lewis' request for access.

## BACKGROUND

In your complaint on behalf of Ms. Lewis, you allege that the District violated the APRA by (1) failing to maintain its records at its office per I.C. § 14-33-5-19 and, instead, storing them in a private attorney's office in a city outside the District's boundaries; (2) maintaining records in the homes of the members of the Board of Directors, where they are inaccessible to your client; (3) failing to "adopt a resolution setting regular meetings, as required by law, making it difficult or impossible for [your client] to know when the Board will meet, so requests for information can be made"; and (4) providing your client with only "a few minimal records, of the District's choosing."

The District's response to your complaint is enclosed for your reference. The District, through its attorney, John W. Mead, states that the District is primarily a flood control district that only operates to supervise and maintain four (4) dams and flood retarding structures that it has constructed. The District has no employees. Its office is located at the Borden Museum in Borden, Indiana pursuant to an order of the Clark Circuit Court. The office is open to the public whenever the District has a meeting and is conducting its business.

Mr. Mead further responds that the District initially kept its public records at the museum. However, some years ago the District was asked by the Township Trustee, who is in charge of the museum, to move its records because of a concern with their protection and security. In response to that request, the District moved its records to the office of its attorney, Mr. Mead, where they are presently stored. According to Mr. Mead, his office is open during normal business hours and the District's records are available to any member of the public upon request.

On the morning of July 22, 2009, Mr. Mead received a facsimile from you requesting public records on behalf of Ms. Lewis. Mr. Mead responded in writing to your facsimile that same day. In his response, Mr. Mead wrote that all of the District's minutes would be available to Ms. Lewis that night at the District's 7:30 p.m. meeting. The District's remaining documents would not be available at the meeting because they were contained within approximately twenty (20) banker's boxes with other documents and the District had no employees who could search the boxes for the appropriate records. Mr. Mead noted that Ms. Lewis could visit his law office at any time during the following seven (7) days during regular business hours (8:00 a.m. to 5:00 p.m.) and review any records other than those excluded from disclosure by statute.

According to Mr. Mead, Ms. Lewis attended the District's meeting on July 22nd. The District made all of its minutes -- which consisted of one banker's box -- available to her at that meeting. According to Mr. Mead, Ms. Lewis spent less than 15 minutes looking through the minutes and then asked "to see the plans for what would be done on her land." The District responded that no plans had been drawn or prepared. At that time, Ms. Lewis asked to see all of the District's records. The District advised her that those records were kept at Mr. Mead's office in Salem, Indiana and would be made available to her "at any time during business hours the next day or any other day she chose." Ms. Lewis responded that she could not travel to Salem. The District then informed her that all of its records would be made available to her at the Borden Museum during the District's next meeting on September 9, 2009. On July 23, 2009, Mr. Mead wrote you and Ms. Lewis a letter to that effect. According to Mr. Mead, "all District records, consisting of eighteen banker's boxes and two mounted maps, were delivered to the Borden Museum" for the meeting on September 9th, but neither you nor Ms. Lewis attended the meeting.

## 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. The District does not contest that it 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 public records of the District 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 burden of proof 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. I.C. § 5-14-3-1.

The Public Access Counselor's authority to issue advisory opinions is limited to "interpret[ing] the public access laws...." I.C. §5-14-4-10(6). "Public access laws" refers to (1) the APRA; (2) the Open Door Law, I.C. §5-14-1.5; or (3) any other state statute or rule governing *access* to public meetings or public records. I.C. §5-14-4-3 (emphasis added). Consequently, the foregoing analysis is limited to those allegations in the complaint relevant to the District's alleged denial of Ms. Lewis' request for access to its public records.

Nothing in the APRA indicates that an agency's failure to provide a requester with "instant access" to requested records constitutes a denial of access. "It is the responsibility of the public agency to *respond* to requests for access to public records within a specified time period. The APRA does not set any time periods for *producing* public records, merely for responding to the request." *Opinion of the Public Access Counselor 02-FC-09* (O'Connor; advising that an agency's failure to produce requested documents within five days was not a denial under the APRA) (emphasis added).

The District's actions in response to Ms. Lewis' request do not indicate a denial of access. Although Mr. Mead was entitled to take up to seven (7) days to respond to Ms. Lewis' written request for access to public records, I.C. §5-14-3-9(b), he sent Ms. Lewis a written response the same day that she submitted her request stating that some documents would be available to her that evening and the remainder would be available during the next seven (7) days during his law office's regular business hours. When Ms. Lewis responded that she could not drive to Mr. Mead's office, Mr. Mead told Ms. Lewis and her attorney that he would bring all of the District's public records to its next public meeting. However, neither Ms. Lewis nor her attorney attended the meeting. Moreover, although the District has no copy machine and is, therefore, not obligated<sup>1</sup> to provide Ms. Lewis with photocopies of its records, Mr. Mead offered to make Ms. Lewis photocopies of all requested documents using his law firm's equipment. It is unclear whether or not Ms. Lewis proposed any alternative arrangement for accessing the records that the District denied. Considering Mr. Mead's repeated efforts to make the records available to Ms. Lewis, it is my opinion that the District did not deny her access to public records within the meaning of the APRA.

Ms. Lewis also alleges that the District is in violation of the APRA because it does not keep its records at its office in the Borden Museum. Whether or not that constitutes a violation of the District's obligation to "[k]eep all records and minutes available for inspection by any interested person of the district during the hours that the district office is open for business" under I.C. §14-33-5-19(b)(3) is beyond the scope of the Public Access Counselor's advisory authority. However, I agree with Counselor

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<sup>1</sup> If a public agency does not have reasonable access to a machine capable of reproducing the record, the person is only entitled to inspect and manually transcribe the record. I.C. §5-14-3-8(e).

O'Connor's reasoning insofar as I do not believe the District has violated the APRA by storing its documents in the office of its attorney:

There is nothing within the Act that requires public records to be stored in a public building, but the Act does apply to public records stored in private buildings.

\* \* \*

It is the duty of the public official to provide access to public records, and it is the duty of every public official to ensure against the loss, alteration or destruction of public records under Indiana Code 5-14-3-7. If town officials are required to store public records at their homes or other private buildings, the officials must provide opportunities for access, in other words, set up regular business times for inspection and copying, and protect those records from destruction or damage.

*Opinion of the Public Access Counselor 94-FC-4.* The District moved its records from the Borden Museum to Mr. Mead's office in response to a request from the Township Trustee, who was concerned about the records' protection and security. The APRA requires public agencies to "protect public records from loss, alteration, mutilation, or destruction" and "take precautions that protect the contents of public records from unauthorized enhanced access, unauthorized access by an electronic device, or alteration." I.C. §5-14-3-7(a), (b). Of course, these mandates do not relieve public agencies of their obligation to comply with the public's right to access. *See* I.C. §5-14-3-7(c). Here, however, the District has demonstrated that it made reasonable efforts to produce its public records to Ms. Lewis for inspection and copying. Ms. Lewis' apparent failure to take advantage of multiple opportunities to inspect the records does not put the District in violation of the APRA.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the District did not violate the APRA.

Best regards,



Andrew J. Kossack  
Public Access Counselor

Cc: John W. Mead, Mead, Mead & Clark, P.C.