



STATE OF INDIANA

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August 2, 2011

Mr. Harry Elburg
7940 West 256
Madison, Indiana 47250

Re: Formal Complaint 11-FC-171; Alleged Violation of the Access to Public Records Act by the Jefferson County Board of Zoning Appeals

Dear Mr. Elburg:

This advisory opinion is in response to your formal complaint alleging the Jefferson County Board of Zoning Appeals ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* The Board's response is enclosed for your reference.

BACKGROUND

In your complaint you allege that you submitted a written request to the Board on June 20, 2011, requesting ". . . information on the INDOT variance on building permit Oct 6, 2010, Item 8." You state that the Board responded by alleging that that you were harassing the Board's secretary with your requests and threatened to arrest you as a result of your conduct.

R. Patrick Magrath ("Magrath") responded to you on behalf of the Board. He acknowledged that you had made two requests to the Board, on June 13, 2011 and June 20, 2011, requesting information on INDOT variances and/or clearances. Magrath responded to your June 13, 2011 request in writing on June 15, 2011, and advised you that the Board was not "in charge of INDOT clearances." He further provided that since your inquiry for records closely related to the ongoing lawsuit you have filed against the Board, he had instructed the members and employees of the Board not to personally discuss the lawsuit with you.

On June 27, 2011, Magrath responded to your June 20, 2011 request and provided that the Board does not keep records on the "INDOT variances" and the Board had produced all information in the public record that was pertinent to your request. Magrath stated that while you are entitled to the same access to public records as any other person, you have no right to abuse the right of public access by being threatening and harassing.

He stated that when you appeared at the office of the Board after making your written request, you persisted in making numerous inquires about INDOT, the pending litigation between the parties, brandished a tape recorder at the secretary, and threatened to have the secretary fired.

In response to your formal complaint, Magrath responded and provided that he was uncertain as to whether your formal complaint concerned a violation of the Open Door Law or the APRA. In response to your June 13, 2011 and June 20, 2011 requests, Magrath provided that the Board had produced all records in its possession regarding “INDOT variances” and that you had no right to abuse the right of Public Access by threatening and harassing members of the Board or its employees. Magrath further provided that after filing your Formal Complaint, you made additional requests of the Board on July 19, 2011 for tape recordings of prior Board meetings, which the Board submits have already been provided to you.

ANALYSIS

At the outset, I will note that I.C. § 5-14-5-7 provides that a person must file a formal complaint with the public access counselor no later than thirty days after the denial. In your complaint and the Board’s response, both parties make multiple references throughout the documents that were submitted to a July 6, 2010 Board meeting, the Board’s August 3, 2010 written findings of fact supporting a grant of the conditional use and petition for variance from developmental standards, a September 10, 2010 revision to August 3, 2010 findings, a August 3, 2010 public records request filed by Mr. Elburg, and the continuing litigation between the parties. I will only address the June 13, 2011, June 20, 2011, and the July 19, 2011 APRA requests, as they are the only issues that have been timely presented.

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 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 are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Board responded to your requests within the seven-day period that APRA prescribed for responding to written requests.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Op. of the Public Access Counselor 01-FC-61*. APRA does not require public agencies to create records to satisfy a request. *Op. of the Public Access Counselor 10-FC-56*; see also *Op. of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Since the Board has produced all records responsive to your requests for information regarding INDOT variances and/or clearances, they did not violate the APRA in regards to your June 13, 2011 and June 20, 2011 requests.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. See *Opinion of the Public Access Counselor 11-FC-80*. The parties’ description of your interaction with the Board’s secretary varies greatly. You stated that the Board informed you that you were harassing the secretary by asking her for the information and you were going to be arrested. The Board provided that you threatened the secretary’s job, continually pointed a tape recorder at her, and refused to leave the office. Under either scenario, there is no requirement under APRA that a request or a response be made orally. If either party is of the belief that the other is unable to cordially correspond to a request made pursuant to the APRA, I would encourage the party to conduct all future matters in writing to avoid any uncivilized incidents.

In regards to your July 19, 2011 request, you acknowledged in your request to the Board that the tapes recordings of the July 6, 2010 and August 3, 2010 hearings had previously been provided to you by the Board. I.C. § 5-14-3-8(e) requires an agency to provide only one copy of a record. See *Opinion of the Public Access Counselor 08-FC-145*. The Board has indicated that although not required, they intend to provide you with an additional copy of the recordings. As such the Board did not violate the APRA in regards to your July 19, 2011 request.

CONCLUSION

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

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: R. Patrick Magrath

