



# STATE OF INDIANA

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October 12, 2012

Mike Hoff  
1535 Madison Avenue  
Dyer, Indiana 46311

*Re: Formal Complaint 12-FC-272; Alleged Violation of the Access to Public Records Act by the Lake County Surveyor's Office*

Dear Mr. Hoff:

This advisory opinion is in response to your formal complaint alleging Lake County Surveyor's Office ("Surveyor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John S. Dull, Attorney, responded on behalf of the Surveyor. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that on September 6, 2012, you submitted a written request for records to the Surveyor. Within forty-eight (48) hours of receiving your request, Gregory Sanchez contacted you and inquired whether you "really wanted the information that was requested." You informed Mr. Sanchez that you did in fact still desire copies of the records that were requested. As of September 18, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you further allege that you have yet to receive any records that are responsive to your request.

In response to your formal complaint, Mr. Dull advised that on September 6, 2012, Joe Jargella submitted a written request for records to the Surveyor's Office signed by Mike Hoff. The request sought copies of certain records related to the Kaiser Ditch Project and the Brown Levee Ditch Phase III. On September 10, 2012, Mr. Sanchez contacted Mr. Hoff to ensure that he had submitted a request for records. At that time, Mr. Hoff acknowledged his request. Mr. Sanchez informed Mr. Hoff that he would assign the task of gathering and copying the documents and Mr. Hoff would be informed when the response was complete. Eight days later, Mr. Hoff filed a formal complaint with the Public Access Counselor's Office. At the completion of the Surveyor's search for records, no records that were responsive to your request were maintained by the Surveyor. On September 21, 2012, the Surveyor did in fact receive records that were responsive to your request and promptly provided you with copies.

## 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.” *See* I.C. § 5-14-3-1. The Surveyor is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Surveyor’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* 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. *See* 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. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c).

Generally, if a public agency has no records responsive to a public records request, the agency generally 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.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion 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....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. At the time of your request the Surveyor provided that it did not maintain any records that were responsive. After completing its response, the Surveyor did receive records that would have been responsive to your request, at which time the Surveyor promptly provided you with copies. As such, it is my opinion that the Surveyor did not violate the APRA by failing to produce records that it did not maintain at the time of your request.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable

timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*. As applicable here, it is my opinion that the Surveyor complied with the section 3 of the APRA by providing all records that were responsive to your request within fifteen days of its receipt.

#### CONCLUSION

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

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: John S. Dull