

STATE OF INDIANA
COUNTY OF HOWARD

IN THE HOWARD CIRCUIT COURT
CAUSE NO. 34C01-0510-PL-00984

RYAN T. NEES,
Plaintiff,

Vs.

MATT MCKILLIP, in his official
capacity as MAYOR, CITY OF
KOKOMO, INDIANA,
Defendant.

ENTERED
FEB 20 2006
HOWARD CIRCUIT COURT

ORDER

Plaintiff Ryan T. Nees having filed a Complaint to Compel Compliance With Indiana Access to Public Records Act on the 26th day of October, 2005, and the Defendant Matt McKillip having filed an Answer and Affirmative and Other Defenses on the 18th day of November, 2005, and the Plaintiff having filed a Motion for Summary Judgment and Memorandum in Support on the 2nd of December 2005, and a Memorandum in Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment on the 9th day of January, 2006, and the Defendant having filed a Cross-Motion for Summary Judgment, Designation of Evidence and Authorities in Support, and Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment on the 3rd day of January, 2006, and a Sur-Reply to Plaintiff's Motion for Summary Judgment and Reply in Support of Defendant's Cross-Motion for Summary Judgment on the 17th day of January, 2006, and the Plaintiff having appeared in

person and by counsel William R. Groth, and the Defendant having appeared by counsel Adam Arceneaux and Brian E. Bailey at a hearing held on the 20th day of January, 2006, and the court having considered the Complaint, Answer, Motion for Summary Judgment, Cross-Motion for Summary Judgment, Supporting Materials, Memoranda, Briefs, and Replies filed, the arguments submitted, the record, and applicable law, herein enters its Findings and Order as follows:

1. At all times relevant to this action, Plaintiff Ryan T. Nees has been a resident of the City of Kokomo, Indiana.
2. At all times relevant to this action, Defendant Matt McKillip has been the elected executive officer of the City of Kokomo, Indiana, and has been named as Defendant herein in his official capacity as the Mayor of Kokomo.
3. Beginning in February 2005 and periodically thereafter, the City of Kokomo published and distributed an electronic magazine or "e-zine" called "The City of Kokomo E-Zine". The City distributes the e-zine through a third party vendor called Egov who sends the e-zine directly to a recipient's e-mail address.
4. Persons who receive the e-zine can add or delete their names and e-mail addresses from the subscription list. The City has the ability to maintain the list, making edits as needed. As of January 2006, the e-zine was distributed to approximately 1,400 recipients. The City administration maintains a list of the e-zine recipients' names and email addresses.

5. On July 26, 2005, Ryan Nees made a formal request to the Mayor's office for a copy of the individual email addresses that were on the City's e-zine subscriber list as of that date. The request was made in writing, in person, and done in accordance with the requirements of I.C. 5-1-4-3-3(a) of the Indiana Access to Public Records Act ("APRA").
6. On August 4, 2005, Nees received a letter from the City's corporation counsel denying, in part, his request. The letter acknowledged that Nees was entitled to inspect the list but stated that he was not entitled to a copy of the subscriber list per I.C. 5-1-4-3-3(f) of the APRA.
7. On August 10, 2005, Nees filed a complaint with the Indiana Public Access Counselor, Karen Davis, requesting a formal advisory opinion, in accordance with I.C. 5-14-4-10(6). The City was notified of Nees' complaint, and the City's corporation counsel submitted a response to the complaint on August 24, 2005.
8. On September 9, 2005, Indiana Public Access Counselor Karen Davis issued a formal advisory opinion concluding that the subscriber list was a "disclosable public record", which the City must allow Nees to not only inspect but also to be provided a copy of the e-zine subscriber list of names and e-mail addresses.
9. Subsequently, the City continued to refuse to provide Nees with a copy of the list.

10. On October 26, 2005, Nees initiated this action by the filing of a Complaint to Compel Compliance with [the] Indiana Access to Public Records Act, pursuant to I.C. 5-14-3-9(e). On November 18, 2005, the Defendant filed an Answer asserting that the Plaintiff was not entitled to relief.
11. At a case management conference with counsel for the parties, it was determined that an evidentiary hearing was not needed and that the issues presented by the complaint would be submitted to the court by way of a motion and cross-motion for summary judgment pursuant to Indiana Trial Rule 56. The Plaintiff filed a Motion for Summary Judgment with supporting materials, and subsequently, the Defendant filed a Cross-Motion for Summary Judgment with supporting materials. The court heard legal argument on January 20, 2006.
12. A grant of summary judgment requires that the designated materials show that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial R. 56 ©; Wright v. Carter, 622 N.e.2d 170,171 (Ind. 1993). The moving party carries the burden of establishing that (a) there is no issue as to any material fact, and (b) he is entitled to judgment as a matter of law. City of Muncie v. United Nat. Ins. Co., 564 N.E.2d 979 (Ind. Ct. App. 1991).
13. The material facts of this case as recited above are undisputed. The sole issue in this case requires a determination of law, to-wit: whether the list of email addresses maintained by the City to distribute the e-zine publication

is a list exempt from copying under the provisions of the Indiana Access to Public Records Act.

14. Plaintiff Nees requested a copy of the City's list of email addresses of persons subscribing to the City ezine pursuant to I.C. section 5-14-3-3(a), which provides that "any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter."
15. In response to Nees' request, the City acknowledged that Nees was entitled to inspect the list, but asserted that he was not entitled to a copy of the subscriber list, citing I.C. section 5-14-3-3(f). The pertinent part of that section provides as follows:

"(f) Notwithstanding the other provisions of this section, 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. 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."

16. Here, the City has created a list of the email addresses of its ezine subscribers. Access to the list is not prohibited by law, and as agreed by the City, it must permit Nees to inspect and make his own notes from the list. The City denies Nees a copy of the list, arguing that the email subscriber list is a list of "names and addresses" protected from copying under I.C. section 5-14-3-3(f).

17. The City is statutorily required to bear the burden of proof for the non-disclosure of requested information. I. C. section 5-14-3-1. When a person who has been denied the right to inspect or copy a public record by a public agency files an action in court to compel the public agency to permit the person to inspect and copy the public record, the court shall determine the matter de novo, with the burden of proof on the public agency to sustain the denial. I.C. section 5-14-3-9(f).
- 18 The City's argument is that the "names and addresses" exemption from copying in I.C. section 5-14-3-3(f) should be interpreted as encompassing email addresses, such as contained on the subscribers' list for the City's ezine. In determining whether the City has met its burden of proof for non-disclosure, the court must interpret the statute in accordance with legislative intent.
19. The intent of the Indiana legislature in enacting the APRA is expressed in Section 1, which states that "it is the public policy of the State that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." I.C. section 5-14-3-1. The section goes on to state that "[T]his chapter shall be liberally construed to implement this policy, and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record." *Id.*

20. Relying on this statutory language of clear legislative intent, the Indiana Appellate Courts have held that a court must give a narrow construction to the exceptions for non-disclosure set forth in the APRA. Journal Gazette v. Board of Trustees of Purdue University, 698 N.E.2d 826,828 (Ind.Ct.App. 1998); Robinson v. Indiana University, 659 N.E.2d 153,156 (Ind.Ct.App. 1995). Where a statutory term is required to be construed narrowly, such strict construction involves a “close, conservative adherence to the literal and textual interpretation”, and accorded its “common meaning unless a different purpose is clearly manifested by the statute itself.” KLLM, Inc. v. Legg, 826 N.E.2d 136,140 (Ind.Ct.App. 2005).
21. A conservative literal and textual interpretation of the word “address” is a reference to a person’s physical address, a place, such as a home, business, or post office box where mail or other communications can reach that person. There is no provision of the APRA that would clearly manifest as interpretation of “address” different from its common meaning of a physical location where an individual resides or works or receives mail.
22. The term “email address” has a distinct and clear meaning. The Indiana Code contains a specific reference and definition of the term “electronic mail address” which is found at I.C. section 24-5-22-3, added in 2003 by the legislature in its “anti-spam” legislation. “Electronic mail address” is defined as “a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.”

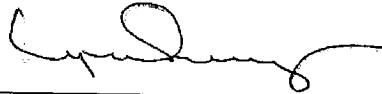
23. The fact that the Indiana legislature has explicitly mentioned and defined electronic mail (commonly known as email) addresses in another statutory provision shows that the Indiana Legislature was aware of the use of email for commercial purposes. The "address" exemption in I.C. 5-14-3-3(f) was first codified in its current form in at least 1991, prior to the widespread use and availability of electronic mail for personal and commercial uses. The Legislature has amended the APRA numerous times since 1991, last during the 2003 legislative session. Had the Indiana Legislature intended to exempt a list of email addresses under I.C. section 5-14-3-3(f), it could and would have done so.
24. The City argues that allowing Nees a copy of the ezine subscriber list will, rather than promoting the APRA's stated legislative goal of open government, instead serve to chill the ability of elected officials such as McKillip to provide information to constituents through the use of modern technology. McKillip argues that citizens may not subscribe to the ezine if, for example, they know their email address will be made available to members of the public upon request. However, the issue here is not whether the list is a public document that must be disclosed, but rather the manner of this disclosure.
25. McKillip has stated that a reason for the City's refusal to provide a copy of the email addresses of the ezine subscribers is the concern that Nees might somehow misuse the list. As to this issue, the Indiana Appellate Court has held that a public agency may not withhold otherwise disclosable information

- because of a fear that the information might be mis-used. City of Elkhart v. Agenda: Open Government, Inc., 683 N.E.2d 622,627 (Ind.Ct.App. 1997).
26. The City's arguments here are of a policy rather than a legal character, and are more appropriately addressed to the Indiana Legislature rather than to this court. The courts cannot fill gaps in a statutory scheme designed by the legislature. State Bd. of Tax Comm'rs v. Mixmill Mfg., 702 N.E.2d 701,705 (Ind. 1998), *citing* Grody v. State, 278 N.E.2d 280,285 (Ind. 1972) It is not the court's province to "expand or contract the meaning of the statute by reading into it language which will, in the opinion of the court, correct any supposed omissions or defects therein." Sales v. State, 714 N.E.2d 1121, 1128 (Ind.Ct.App. 1999), *citing* Grody, id..
27. Based upon the reasons expressed above, this court comes to the same conclusion as the Indiana Public Assess Counselor. 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. As the limitations on the rights under the Access to Public Records Act are to be strictly construed, the list sought by the Plaintiff Nees from the Defendant as Mayor of the City of Kokomo is a disclosable public record to which the Plaintiff is entitled to copy.
28. Based upon the foregoing, the court finds that there is no genuine issue of material fact and Plaintiff Nees is entitled to judgment as a matter of law compelling the Defendant McKillip to provide him with an electronic or hard

copy of the ezine email list generated and maintained by the City of Kokomo. The court grants the Plaintiff's Motion for Summary Judgment, and denies the Defendant's Cross-Motion for Summary Judgment.

29. The Plaintiff Nees filed this action after obtaining a favorable opinion from the Public Access Counselor and the Defendant's subsequent refusal to abide by the Counselor's advisory opinion. I.C. section 5-14-3-9(i) provides that should the plaintiff prevail in this action, the court is mandated to award to the plaintiff reasonable attorney's fees, court costs, and other reasonable expenses of litigation.
30. The Plaintiff shall submit affidavit(s) in support of his claim for attorney fees, court costs and expenses of litigation within fifteen (15) days of this order. The Defendant shall submit any affidavit in opposition of the Plaintiffs' claim within ten (10) days thereafter. An evidentiary hearing on the issue of reasonable fees and costs will be held upon the request of either party.

SO ENTERED ON THE FINDINGS THIS 20TH DAY OF FEBRUARY, 2006.



Lynn Murray, Judge
Howard Circuit Court

Distribution:
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