

November 14, 2003

Ms. Virginia Perry
6467 E. Hadley road
Mooreville, IN 46158

Re: Advisory Opinion 03-FC-105; *Alleged Violation of the Access to Public Records Act by the Madison Township Board*

Dear Ms. Perry:

This is in response to your formal complaint, which was received in this Office on October 16, 2003. In it, you alleged that the Madison Township Board (the "Board") violated the Indiana Access to Public Records Act (the "APRA"). Specifically, you allege that you sent your request by electronic mail ("e-mail") requesting information on October 14, 2003, at 1:01 p.m. to Trustee Rodger Birchfield (the "Trustee"), and that you had received no response by 4:00 p.m. on October 15, 2003. Mr. Stephen R. Buschmann, counsel for Madison Township, responded to your complaint on behalf of the Trustee. A copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that neither the Trustee nor the Board violated the APRA.

BACKGROUND

You allege that on October 14, 2003, at 1:01 p.m., you sent an e-mail to the Trustee requesting information. You further allege that as of 4:00 p.m. on October 15, 2003, you had received no response. Your e-mail states:

The information I received on October 12, 2003, from Dave Jones is discrepant with the figures shown on the Budget for 2003. . . . Please check with Mr. Jones and verify the amounts being paid to these positions as they should be what was budgeted for 2003. Please respond as required by IC 5-14-4-3; 24 business hours.

In his response, the Trustee alleges that your e-mail was not a request for access to public records, but rather a request for information. The Trustee's position is that your e-mail "does not fall within the purview of IC 5-14-3." In addition, the Trustee questions

application of the twenty-four (24) hour response period to requests made by e-mail. The Trustee alleges that your e-mail was addressed to the Trustee's home account, and that the Trustee's Office does not have e-mail capacity. The Trustee states that he is not certain when he received your e-mail, but alleges that it was some time after he arrived home from work on Tuesday, October 14, 2003. The Trustee further alleges that "a request for information that is received after normal office hours is considered 'received,' for the purposes of the [APRA], at the beginning of the next business day." It is the Trustee's position, then, that even assuming that the twenty-four (24) hour response period applies to your e-mail request, that period did not begin to run until regular office hours began the next morning, October 15, 2003.

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." Ind. Code § 5-14-3-1. Furthermore, "[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 and not on the person seeking to inspect and copy the record." *Id.* The Trustee's Office is a public agency for the purposes of the APRA. IC 5-14-3-2. Accordingly, "[a]ny person may inspect and copy the public records of [the Trustee] during the regular business hours" of the Trustee's Office, unless the records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. IC 5-14-3-3(a).

According to the documents you provided, on October 14, 2003, you requested that the Trustee "check with Mr. Jones and verify the amounts being paid to certain positions as they should be what is budgeted for 2003." It is my opinion that this e-mail did not constitute a public records request. Rather than asking for the opportunity to inspect or copy records you requested that the Trustee "check with Mr. Jones and verify the amount being paid to . . . [certain] positions as they should be what was budgeted for 2003." Because you did not request access to a public record, it is my opinion that the APRA does not apply to your request. Therefore, the Trustee was not required to respond within any time frame required under Indiana Code section 5-14-3-9.

Even if the Trustee was required to respond to your request, it is my opinion that the Trustee did not violate the APRA because at the time you filed your complaint the time period for response had not expired. The APRA requires response either within twenty-four (24) hours or seven (7) days depending on how the request was made. If a person making the request is physically present in the office, makes the request by phone, or requests enhanced access to a document, then the public agency must respond within twenty-four (24) hours of receiving the request. If, however, a person makes a request by mail or facsimile the public agency must respond within seven (7) days of receiving the request. It is my opinion that twenty-four (24) hour response period does not apply to e-mail requests. The spirit, if not the express language of the statute contemplates a direct and contemporaneous communication between the requestor and the agency

representative before the twenty-four (24) hour rule is triggered. While e-mail has expedited communications to the great benefit of those with access to that medium, it is not the sort of direct and contemporaneous communication achieved by physical presence or an oral request made by telephone conversation with an agency representative. The instant request illustrates the problem. As here, an entity that may be the custodian of public records may not have e-mail access, thus resulting in a request being made to an addressee outside the entity. Then too, as here, e-mails may be sent and received outside normal business hours. Other considerations suggest that the twenty-four (24) hour response requirement should not apply to e-mail requests. Electronic filters may delay delivery of an e-mail for hours and even days, or (as with some filters and firewalls) preclude e-mail from being delivered at all. Moreover, a person who has access to e-mail may not be in the office within twenty-four (24) hours of the e-mail request. Other circumstances may preclude review and response to the e-mail within a twenty-four (24) hour period. Disruptions to e-mail service or computer systems are not uncommon, and more recently disruptions and data corruption caused by computer viruses have impacted e-mail address books, as well as the form and content of incoming and outgoing messages. The evolution of e-mail as a business communication tool and the nature of that medium provide practical limitations regarding the receipt of the e-mail and the communication of the substantive request being made in that medium. In my opinion, those limitations preclude application of the twenty-four (24) hour response rule.¹

A request sent by e-mail is akin to a request by mail or facsimile because each lacks the direct and contemporaneous interaction contemplated by Indiana Code section 5-14-3-9(a). It is my opinion that a public agency has seven (7) days to respond from receipt of the request. That time period had not expired at the time you filed your complaint, therefore the Trustee did not violate the APRA by failing to timely respond.

CONCLUSION

It is my opinion that the Access to Public Records Act does not apply to a request asking one public employee to verify information with another public employee. It is also my opinion that, even assuming your request fell within the purview of the statute, the seven (7) day response period would apply and that time period had not yet expired. Therefore, it is my opinion that the Trustee did not violate the Access to Public Records Act by failing to respond within the statutorily required time period for response.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Stephen R. Buschmann, Attorney for Madison Township

¹ To the extent that this opinion is contrary to *Advisory Opinion 02-FC-44; Alleged Denial of Access to Public Records by the Indiana Department of Transportation*, this opinion controls.