

October 27, 2004

Mr. Timothy R. Kuiper  
Austgen, Decker & Phillips, P.C.  
130 North Main Street  
Crown Point, IN 46307

*Re: Formal Complaint 04-FC-179; Alleged Violation of the Access to Public Records Act by the Town of Merrillville*

Dear Mr. Kuiper:

This is in response to your formal complaint alleging that the Town of Merrillville ("Town") violated the Access to Public Records Act ("APRA") by failing to respond to your request for public records. For the following reasons, I find that the Town of Merrillville violated the Access to Public Records Act.

#### BACKGROUND

You allege that on September 15, 2004, you submitted, in person, a handwritten request for public records to the Town of Merrillville. Specifically, you requested the following:

1. A copy of the August 23, 2004 Plan Commission Meeting minutes (after Plan Commission approval);
2. A copy of the audio tape(s) from the August 23, 2004 Plan Commission Meeting;
3. A copy of the resident written statement read into the record and tendered to the Plan Commission on August 23, 2004;
4. A copy of the Merrillville Staff report for the above-referenced petitions; and
5. A copy of the current Oaths of Office for all Town Council members.

By September 27, 2004, you still had not received a response from the Town. You filed a formal complaint, which was received by this office on September 27, 2004.

I forwarded a copy of your complaint to the Town of Merrillville. The Town provided no written response to this office.

During a telephone conversation with this office, you verified that on September 28<sup>th</sup>, the Town sent you a written response along with all of the records you requested, with the exception of the Oath of Office for the Town Council members. In the written response provided to you by the Town, you were advised that the Clerk-Treasurer does not maintain the current Oaths of Office, but that you could obtain a copy of those documents at the County Election Board Office in the Lake County Government Center.

## ANALYSIS

Any person may inspect and copy the public records of a public agency, unless those records are confidential or otherwise nondisclosable. Ind. Code §5-14-3-3(a). For requests that are delivered by hand, a denial is deemed to have occurred if: (1) the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record when a request has been made; or (2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made; whichever occurs first. IC 5-14-3-9(a). If twenty-four (24) hours elapse and a requestor does not receive any response, a denial is deemed to have occurred. Furthermore, a public agency that receives a written request for public records is required to respond to that request in writing. IC 5-14-3-9(c)(1).

The Town responded to your request in writing, however, that written response was sent to you on September 28<sup>th</sup>, more than the twenty-four (24) hours allowed under the APRA. Therefore, it is my opinion that the Town of Merrillville violated the Access to Public Records Act by not responding to your request in writing within twenty-four hours of its receipt of that request.

When the Town forwarded the requested records to you, it advised you that it was unable to send you the current Oaths of Office for the Town Council members, because it does not maintain those records. Failure of an agency to produce records that it is required to maintain may be a violation of the APRA. However, it is not clear whether the Clerk-Treasurer is required to maintain the Oaths of Office of current Town Council members. Pursuant to the 1998 version of IC 5-4-1-4, the copy of the oath of town officers was to be deposited with the town's clerk-treasurer. However, the current version of that statute, effective in 2000, states that copies of such oaths are to be deposited in the circuit court clerk's office. Therefore, depending on when the Oaths were filed, they may be located in the Clerk-Treasurer's Office or with the circuit court clerk. I also note that IC 36-5-6-6 states that the Clerk-Treasurer is required to maintain custody of the town seal and the records of the legislative body, which is the town council pursuant to IC 36-5-2-2. However, "records of the legislative body" is not defined, and I am not convinced that this provision requires the Clerk-Treasurer to maintain oaths of the current Town Council members. Notwithstanding the issue of where the oaths of office are filed, the Town fulfilled the requirements of the APRA by advising you that it did not have the record you sought. If you still seek the oaths of the current Town Council members, I

advise you to contact the court clerk.

I note that your complaint also states that the Town does not have a form for records requests. While such a form may be helpful, and while it is within an agency's discretion to require that requests for records be submitted on a particular form, the APRA does not require an agency to utilize a form. Therefore, the fact that the Town of Merrillville does not prescribe a form for record requests is not a violation of the Access to Public Records Act.

#### CONCLUSION

For the foregoing reasons, I find that the Town of Merrillville violated the Access to Public Records Act by failing to timely respond to your written records request.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Mr. John Petalas and Ms. Mabel Gemeinhart