

December 22, 2004

Mr. Thomas L. Whitley
5012 E. Orchard Road
Mooresville, IN 46158

Re: Formal Complaint 04-FC-220; Alleged Violation of the Access to Public Records Act by the Madison Township Trustee

Dear Mr. Whitley:

This is in response to your formal complaint alleging that the Madison Township Trustee ("Trustee") violated the Access to Public Records Act ("APRA") by denying you certain township records. I find that the Madison Township Trustee did not violate the Access to Public Records Act.

BACKGROUND

You allege that on October 28, 2004, you sent an e-mail to Madison Township Trustee Roger Birchfield requesting certain documents of the township. In particular, you requested various documents concerning payroll information regarding a Heather Colburn, who had been employed by the Trustee, and a list of the month and times that the township responded to requests for poor relief, as well as a list of all checks for poor relief that are written in the future.

You stated that you needed the information to prepare for a November 9th meeting of the Madison Township Board, on which you serve. You claim that the first time you received any response to your request was at the November 9 meeting. At that meeting, the Trustee informed you that he had received your e-mailed request and had been attempting to respond to you via e-mail, but the e-mail had been repeatedly returned to him. You allege that you have been denied records because you have not received them as of the date of your correspondence with this office, November 20, 2004.

After receiving your complaint on November 24, I sent a copy to the Trustee. He responded by his counsel, Stephen R. Buschmann. I enclose the response for your reference. Mr. Buschmann states that your October 28 request for records was not subject to the Access to

Public Records Act because you are an employee of the township, and he characterizes your request as an interagency request for records that should not require a formal response. He compares your request with that of a co-worker in a public agency seeking a record from another employee of the same agency, where the request for information is within the scope of the requester's employment. He argues that the APRA should not apply to require a formal response.

Mr. Buschmann also states that the Trustee had responded to your October 28 message on November 4. He also stated that on November 8, Mr. Birchfield discovered that the e-mail to you had been rejected for delivery due to a "permanent fatal error in the address." Mr. Birchfield indicated to you at the November 9 meeting that he had not been able to e-mail his response, but that the information you seek would be provided to you. In addition to this information regarding the agency's response, Mr. Buschmann responds in more detail to your numbered requests. He indicates that the payroll information will be provided when it is produced by the company maintaining those records for the township, Accupay. Mr. Buschmann indicated that no documents exist that are responsive to the request for a list showing each month and the times that the township has been called upon for poor relief, as well as a list of all checks that will be written for poor relief funds in the future.

ANALYSIS

Any person may inspect and copy the public records of a public agency during the agency's regular business hours, unless a record is exempt from disclosure under Ind.Code 5-14-3-4. IC 5-14-3-3(a). Your complaint appears to raise an issue regarding both the responsiveness of the Trustee to your request as well as the tardiness in actually producing the documents. In addition, Mr. Buschmann has raised an issue regarding whether APRA applies to your request, which he characterizes as an "interagency" request for records.

I first write with respect to the issue of the applicability of APRA to a request for records by a township board member to the same township's trustee. You are a member of the Madison Township Board, an elected official and member of the township legislative body under IC 36-6-6. You requested records from the Madison Township Trustee, an elected official under IC 36-6-4 and the executive of the township. Under IC 36-6-4-3, the Trustee is required to keep township records open for inspection.

Unlike the scenario suggested by Mr. Buschmann where a coworker of a public agency seeking a document from another coworker might demand a formal written response in an unintended application of APRA, you are not an employee of the township nor is the Trustee. You are each an elected official. Although you have sought records of the agency that you are both officials of, a township, you are not the custodian of the records. Mr. Buschmann has not stated that the records are in your custody or control. Rather, you have sought records from the Trustee because he is statutorily required to keep them open for inspection, and is able to exercise dominion over them. Further, even if you were authorized as a member of the Township Board to access township records yourself, Mr. Birchfield was still compelled under APRA to issue a written response to you indicating such. *See Opinion of the Public Access Counselor 04-FC-88, 89 (consolidated).*

Although your request is subject to APRA, I do not find that the efforts of the Trustee to respond to your e-mailed request to be in violation of APRA. According to Mr. Buschmann, Mr. Birchfield did not discover that his response to you had failed until November 8, the eve of the scheduled meeting. Under the facts as presented, the attempt of the Trustee on November 4 to respond to your request using the same mode of transmission as your request does not indicate that the Trustee failed to timely respond, although it is regrettable that you did not receive the response. The attempted response of November 4 was timely under APRA, where it was sent within seven (7) days of receipt of your request and was in writing. IC 5-14-3-9(b) and (c).

There are no explicit time requirements in APRA for an agency to produce documents. Rather, I determine whether the response time was reasonable under the circumstances. Here, you have requested information spanning about 10 months for one particular employee, Heather Colburn. The records are in the custody of a contractor, Accupay. Although Mr. Buschmann's response should have indicated when he expected Accupay to produce the payroll records, I am not convinced that the time for production is unreasonable as of the date of your complaint.

With respect to your request for a list of months and times that the township has been requested to provide poor relief, Mr. Buschmann has indicated that the township has no responsive records. An agency is not required to produce a record that does not exist, or to create one to satisfy a request for information. You may have demanded information that you are statutorily entitled to under IC 36-6, but I express no opinion on that issue because it is not an issue addressed by APRA. Also, your request for records that are not yet created, with an expectation that your request will be honored upon creation of the record in the future, is not guaranteed under APRA.

CONCLUSION

For the foregoing reasons, I find that the Madison Township Trustee did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Stephen R. Buschmann