

March 29, 2004

Mr. Jack E. Lemley  
501 Lincolnway  
LaPorte, Indiana 46350

*Re: Formal Complaint 04-FC-31; Alleged Denial of Access to Public Records by the  
Center Township Trustee*

Dear Mr. Lemley:

This is in response to your formal complaint alleging that the Center Township Trustee, LaPorte County, Indiana (Trustee) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), by failing to properly acknowledge and respond to your record requests, and by further failing to produce documents responsive to your record requests within a reasonable time from the date she acknowledged receipt of the request. A copy of the Trustee's response to your complaint is enclosed for your reference. In my opinion, the Trustee's initial acknowledgment and responses to your request were lacking under the APRA; however, I decline to find on the record before me that her further failure to produce responsive documents in the time since you made the request violates her obligations to produce responsive records within a reasonable time.

#### BACKGROUND

On February 9, 2004, you submitted fourteen (14) written requests for records to the Trustee, and delivered those written requests to her office in person. The Trustee responded in writing on the same day. Her response acknowledged receipt of your requests and indicated her intention to comply with production of the documents. The response did not cover production of the documents, and did not state when production would occur or when you would otherwise be contacted regarding the status of compliance with your request. Rather, the response merely noted that you would be "notified when the documentation is fully prepared."

On February 10, 2004, you replied to the Trustee's acknowledgment with two letters. It appears that you sent these letters to the Trustee by facsimile.<sup>1</sup> In both, you acknowledged receipt of her response, noted that her response did not state a time for production, and suggested to her that the absence of that information was in violation of her response obligations under the APRA. In one letter you acknowledged that some of the requests would take longer to fulfill

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<sup>1</sup> The Trustee avers that her office is not open on Tuesdays. February 10, 2004, was a Tuesday.

than others, and requested that she treat them separately and provide documents as they became available rather than holding production until all are fulfilled. In the other you indicated your intent to personally appear at her office on the following day and pick up any documents that are ready to be produced at that time.<sup>2</sup>

On February 11, 2004, you appeared at the Trustee's office at which time you were provided with documents responsive to one of your 14 requests. According to your complaint, at that time you were advised to return in two weeks for further production. According to the Trustee, you were told at that time that other responsive documents were stored off-site and would need to be retrieved and compiled for production. The Trustee denies that you were told to return to her office in two weeks.

On February 25, 2004, you returned to the Trustee's office and were told that no further documents were yet available for production. This complaint immediately followed.

On March 3, 2004, the Trustee submitted a response to your complaint. The response indicated that in addition to the partial production that occurred on February 11, 2004, additional documents were produced to you on March 3, 2004, responding to some but not all of your remaining 13 requests for records.<sup>3</sup> In further response to your complaint, the Trustee asserted that her office is closed for part of the week, that responsive documents are stored off-site and need to be retrieved and compiled, and that some of the responsive documents are nine years old. The Trustee further answered that at the time of your requests her office and staff was subject to "an extremely heavy case load for poor relief request[s]." The Trustee cited these reasons for the time it is taking to respond to all of your requests. With regard to her initial response, and with regard to her subsequent responses failing to identify a date certain for production, the Trustee opines that notice to you that you will be notified when further documents are available is in compliance with the APRA.

## ANALYSIS

A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request does not mean that the public agency must expressly decline to produce or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. In the latter instance, although the APRA does not expressly provide for the content of an agency's response, this office has consistently interpreted the agency's response obligation to require the agency to identify a date certain for either

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<sup>2</sup> See Note 1. Because the Trustee's office was not open on Tuesday, February 10, 2004, the office would not have received your facsimile and thus would not have known of your intent to appear for any production on the following day until they opened for business on that same day.

<sup>3</sup> In an email to this office on March 4, 2004, you acknowledged this receipt of some but not all of the documents responsive to your remaining requests. Your email suggested that some of the documents received were not actually responsive to any of your requests.

production or for an additional response regarding the status of the request. In this manner, a public agency retains the burden of production imposed upon it by Indiana Code 5-14-3-3. Otherwise, a public agency can defer production indefinitely and thereby effectively shift its burden to the requesting party to keep the request active.

In this matter, there is no question that the Trustee responded in a timely manner. Your requests were written and hand-delivered, and thus required a written response within 24 hours of receipt. IC 5-14-3-9(a). The Trustee responded in writing on the same day she received the requests. The response indicated the Trustee's intention to fully comply with the requests. However, the response was nonetheless lacking in its failure to provide you with a date certain for production or for a further response. In that manner, it is my opinion that the Trustee's initial response was not in compliance with the APRA. In the same regard, the Trustee's further responses covering partial productions, while evidencing her good faith in complying with your requests, were deficient only in that they failed to identify a date certain for subsequent productions or subsequent responses regarding the ongoing status of your requests.

While I find that the Trustee's responses were lacking for what they did not say, I decline to find that her partial production and failure to fully comply with all 14 of your requests within the slightly more than two weeks of receiving those requests was unreasonable and in violation of the APRA. As noted above, production of the records need only occur within a reasonable time of the date the public agency receives the request. There are practical reasons for such a rule. A public agency may be able to produce public records immediately in some cases, but more time may be required for production based on the nature and circumstances surrounding the public agency or regarding the request. These include such factors as whether the public agency is a full time agency or has a limited or part-time staff, or whether special circumstances within the agency or at the time of the request are already depleting the limited resources of the agency. Additional factors include whether the responsive records are current or whether they are stored in a central repository or on or off-site. Another factor influencing this issue is whether any of the responsive records include nondisclosable information that the public agency must separate from disclosable information or have reviewed by counsel to avoid disclosure of material that is required to be kept confidential by state or federal law. Interpreting Indiana Code 5-14-3-9 to require public agencies to produce records within a specific period of time would have the effect, in some cases, of requiring public agencies to stop activity on all other matters in order to provide the records requested. While providing information is an essential function of public agencies, the APRA also specifically provides that public agencies shall regulate any material interference with the regular functions or duties of their offices. IC 5-14-3-1; IC 5-14-3-7(a).

In this matter you made 14 separate requests for public records. You acknowledge that some of these requests may involve documents that contain multiple pages. You further acknowledge that some of these requests may take longer than others to prepare. The Trustee's responses to your requests and her response to your complaint support and inform those acknowledgments. Indeed, the Trustee avers that her office is not open full time and that at the time your multiple requests arrived her office was responding to a heavier than usual burden of requests for poor relief (which I understand to be within her statutory duties as a Township Trustee). The Trustee further avers that all of the responsive records are not stored within her

office, but rather some are stored off-site and are nine years old. At the time you submitted your complaint, only slightly more than two weeks had passed from the date that the Trustee received your request. Within that time, the Trustee had almost immediately produced documents responsive to one of your 14 requests, and thereafter produced documents responsive to others. I simply cannot find on these facts and subject to the Trustee's averments that her failure to produce all of the documents responsive to all of your requests was an unreasonable delay and thus a violation of the APRA.

That said, I note that the Trustee's averments and your allegations create disputed issues of fact. That is to say, a contrary result might be compelled if evidence on the factors addressed above is developed and resolved establishing that the Trustee was able to produce all of the responsive documents within the time period preceding your complaint. A court of competent jurisdiction is in the best position to receive evidence challenging the reasonableness of the delays alleged, and to order the appropriate relief. You are entitled to bring any such action pursuant to Indiana Code 5-14-3-9, and should you prevail in any such action this opinion stands as support for your entitlement to attorney fees for the prosecution of that action. IC 5-14-3-9(h); *see Gary/Chicago Airport Board of Authority v. Maclin*, 772 N.E.2d 463, 471 (Ind. Ct. App. 2002).

#### CONCLUSION

For the reasons set forth above, I find that the Trustee's initial acknowledgment and responses to your request were lacking under the APRA for failing to state a date certain for production or further response regarding the status of your requests. However, I decline to find on the record before me that her further failure to produce responsive documents in the time since you made the request violates her obligations to produce responsive records within a reasonable time.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Ms. Debra Arnold