

January 23, 2006

Charles W. Ponsler
7302 Griffith Road
Indianapolis, IN 46227

Re: Formal Complaint 05-FC-266; Alleged Violation of the Access to Public Records Act by the Perry Township Trustee

Dear Mr. Ponsler:

This is in response to your formal complaint alleging that the Perry Township (Marion County) Trustee (“Trustee”) violated the Access to Public Records Act (“APRA”) by failing to disclose a report of findings regarding the assessment of the Perry Township Fire Department. I find that the Trustee did not deny you a record that does not exist.

BACKGROUND

In September 2003, you requested of the Trustee copies of “all documents, advertisements, instruments or any other archival paper or monograph that contains information relating to services provided by Keith Smith” (a consultant) relative to his assessment of the Perry Township Fire Department. The Trustee responded rather promptly to send you 11 pages, which included a copy of the contract between the Township and Keith Smith, a purchase order, and several invoices submitted by Mr. Smith. You stated in your formal complaint, filed on December 27, 2005, that you read an article about a case involving the Knightstown newspaper and the Town of Knightstown that you believed applied to any report that was generated by Mr. Smith to the Trustee in connection with fire management consultant services performed in 2002.

Your renewed request for records was sent to the Trustee on December 19, 2005. In your December 19 letter, you state your understanding that the Township did not receive any written report from Mr. Smith as to his findings and recommendations. However, you believe that such a report must exist, and the Township should disclose it to you.

In response to your latest records request, Mr. David Miller, Township attorney, advised you that the Knightstown case is not applicable, because Mr. Miller did not generate any report of findings and recommendations, nor was he obligated to issue any report to the Township under his contract. Hence, the records disclosed to you in 2003 were all the records that were responsive to your request. Mr. Miller sent me a similar justification following his receipt of a copy of your complaint. I have enclosed Mr. Miller's response for your reference.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). "Public record" means any writing, paper, report, study, or other material that is created, received, retained, maintained, or filed by or with a public agency, regardless of form or characteristics. *See* IC 5-14-3-2(m). A request for a record must identify the record requested with reasonable particularity. IC 5-14-3-3(a)(1). Because the APRA is concerned with disclosure of a public agency's records, it is axiomatic that if the public agency does not maintain a public record, the APRA does not require the agency to create one to fulfill a person's request for information.

Your interest in gaining information about the Perry Township consultant's work product was piqued when you read an item in the newspaper about a recent court decision. The Indiana Court of Appeals decided a case where the central issue was the definition of "public record." *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). Observing that the legislature crafted a broad definition of "public record," the court held that a settlement agreement drafted by the Town attorney on behalf of the Town was a public record, even though the settlement agreement was not in the Town's possession, but was retained by the Town's attorney. *Id.*

Following your December 2005 request for a written report of Mr. Smith's findings and recommendations, you received a letter from Mr. Miller reminding you that you were told in 2003 that no report exists: "in the case of your request, no such document exists nor were they created."

I have reviewed the documents that were disclosed to you in 2003, including the contract for consultant services. It does not appear that any report was required as a deliverable under the contract. The Trustee's attorney has averred that Mr. Miller did not create a report for the Township. Hence, if no report of findings or recommendations was created, the Trustee did not deny you a record. This situation is distinguished from the facts in *Knightstown Banner*, where the settlement agreement existed, but was not physically in the custody of any town employee or town official. The Trustee did not deny you a record, where your 2005 record request was for a report of findings or recommendations.

After reviewing the 2003 documents, I can make one suggestion. You may consider reviewing in detail the invoices for services that were disclosed to you in 2003. There are several entries that suggest other records that were not particularized in your 2003 or 2005 requests. For example, in the invoice dated May 31, 2002, the entry for May 2, 2002 shows:

“develop & research professional standards.” Several other examples of documents are suggested in these entries that, if not created by Mr. Smith, were reviewed and redrafted by him, perhaps in concert with others within the fire department. I would caution that these entries do not guarantee that records exist, but further inquiry may be worthwhile. If the Trustee maintains responsive records, the Trustee must either make them available for inspection and copying, or state the exemption that allows the Trustee to withhold the record. IC 5-14-3-9(c).

CONCLUSION

For the foregoing reasons, the Perry Township Trustee did not violate the Access to Public Records Act in not disclosing a document that does not exist.

Sincerely,

Karen Davis
Public Access Counselor

cc: David A. Miller