

September 11, 2006

*Sent Via Facsimile*

Hans Markland  
58 W. 1000 N.  
Wheatfield, IN 46392

*Re: Formal Complaint 06-FC-137; Alleged Violation of the Access to Public Records Act by the Town of Wheatfield*

Dear Mr. Markland:

This is in response to your formal complaint alleging that the Town of Wheatfield (“Town”) violated the Access to Public Records Act by refusing to give you records regarding the Wheatfield Town Volunteer Fire Department (hereinafter, “Department”).

#### BACKGROUND

You allege that you presented a public records request in person to the Town on August 2, 2006. Addressed to Town Council President Donald Gear, your written request was for an annual roster of certified firefighters for 2005 and 2006, as well as the Department’s run report for 2005 and 2006 to date. You state that Cindy Davis, the Clerk Treasurer, told you that she did not have the information you requested. You suggested that she give your request to Mr. Gear. You reminded her that the contract between the Town and the Department mandates that the Department submit the information to the Town.

In conversations with Mr. Gear prior to your formal request, you were told that information you wanted regarding use of tax monies paid to the Department and the monies they collected for fire run calls was not public, because the tax monies are placed in the Department, a nonprofit corporation. As of the date of your complaint, Mr. Gear had not responded to your request for this public information.

I sent a copy of your complaint to Mr. Gear. He responded by letter, a copy of which is enclosed for your reference. Mr. Gear stated that the Department is not an entity of the Town, and is an autonomous entity that the Town contracts to provide fire protection for the Town. The Department also contracts with surrounding townships. Mr. Gear denied having any run reports or rosters of certified firefighters. In answer to other requests that apparently you have made for financial records concerning the Department and the quarterly report, Mr. Gear stated that while the fire protection contract provides for quarterly reports to the Town, the contract does not require that the report be written. Moreover, the roster of firefighters “has not been a great issue” as the town is very small and virtually all of the firemen are well-known to the Town. Mr. Gear suggested that you take up the matter of the records with either your township trustee or the fire department itself.

## 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 Access to Public Records Act. Ind. Code 5-14-3-3(a). A public record is any material that is “created, received, retained, maintained, or filed by or with a public agency.” See IC 5-14-3-2(m). The Town is a public agency under IC 5-14-3-2(1)(2)(A). A public agency is not required to create or retrieve a document, not otherwise a public record of the public agency, to satisfy a person’s request for information.

When a public agency receives a request for a record, the public agency is required to respond within 24 hours for requests delivered in person, or the request is deemed denied. IC 5-14-3-9(a). A response could be just an acknowledgment that the public agency received the request, and some indication of how and when the agency intends to comply. The public agency is required to deny a written request in a writing that states the exemption or exemptions that authorize the public agency to withhold the record, and the title or position of the person responsible for the denial of the record. IC 5-14-3-9(c). If the record requested is not “created, received, retained, maintained, or filed by or with” the public agency, the public agency should so indicate within a reasonable period of time after receiving the request.

You provided me with a copy of the Agreement between the Town and the Department. In relevant part, the Agreement recites that the Department covenants and agrees to furnish firefighting service. It specifies that during the term of the Agreement, “quarterly reports shall be given to the Town,” and the Department would “furnish the Town, as required by law, an annual roster of certified firefighters, as certified by the Indiana Fire Marshal’s Office, who have been elected or appointed to membership in the Department. This roster will be updated and sent whenever changes occur.” The agreement also recites that it is entered into pursuant to IC 36-8-12-3.

At issue in your complaint are two discrete types of records, the annual roster of certified firefighters for two years, and run reports of the Department for two years. The Town denies that either type of record is maintained by the Town, but rather, may be in the possession of another public agency such as the township trustee, or in the possession of the Department, a non-profit corporation.

If the records you seek are not public records of the Town, the Town is not obliged to secure those for you from the township trustee or from the Department. However, the question of whether the records are public records of the Town is not answered merely by the Town's denying possession of the records. Rather, the Access to Public Records Act has been construed to effectuate its purpose of openness in a recent case in the Indiana Court of Appeals. In *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d. 1127, (Ind. Ct. App. 2005), transfer denied, 2006 Ind. LEXIS 668 (Ind. July 24, 2006), the appellate court held that an agreement created by the attorney of the town's insurance company, memorializing the terms and conditions of a settlement of a civil rights lawsuit brought against the town, is a public record under the APRA, irrespective of whether the town ever viewed or possessed the document. Part of the rationale for the appellate court's decision was the statutory requirement that the town legislative body allow a claim if the claim is filed in the manner prescribed by statute, and the claim documentation was required to be maintained by the town under the statute.

At least with respect to the roster of certified firefighters, the Agreement between the Town and the Department recites that the Department will furnish the Town an annual roster of certified firefighters and update and send it to the Town whenever changes occur. The agreement states that this is consistent with the requirements of law, although it is not clear what law makes this a requirement. In any case, it is my opinion that this provision of the Town's agreement with the Department makes the roster a public record of the Town, even if the Town has not enforced compliance of this provision because the Town is aware of the members' identities. As in the case of *Knightstown Banner*, to conclude that a roster created by the Department is not a public record of the Town would thwart the public's right to know of public business where the contracting entity is allowed to prepare the document and keep it out of the Town's files. The roster is a public record as well if a law provides for the maintenance of the roster, as the agreement recites. As a public record of the Town, it was incumbent on the Town to retrieve the record from the Department rather than insist that you secure the record from the Department.<sup>1</sup>

The run reports for 2005 and 2006 are not specifically addressed in the Agreement, and it is not clear if the quarterly reports given to the Town, if maintained in writing by the Department, include this information or not. The Town implies that no written quarterly reports exist, even in the Department's possession. If no written quarterly reports exist, the Town is under no obligation to create them. If written quarterly reports are maintained by the Department, the Town should consider whether the run reports are a public record of the Town under the guidance issued here. If the run reports are not a public record of the Town, the Town's telling you that it does not maintain the run reports would be consistent with its obligation to respond to that part of your records request.

---

<sup>1</sup> Under IC 36-8-12-18, personnel files of members of a volunteer fire department are confidential for purposes of IC 5-14-3 (the APRA), except for certain information that must be disclosed. I have opined that a volunteer fire department established by agreement under IC 36-8-12 is a public agency in its own right, and this provision implicitly validates that opinion. Nevertheless, a public agency may not deny a public record merely because another public agency maintains it; hence, the Town could not deny you the roster merely because it was created by the Department or maintained by the township trustee's office.

## CONCLUSION

For the foregoing reasons, I find that the denial of your request for the roster of certified firefighters was in violation of the Access to Public Records Act. If written quarterly reports exist, they should be disclosed if they meet the definition of a public record of the Town.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Don Gear