

October 6, 2006

Sent Via Facsimile

Daniel E. Hoagland
1114 Lake Drive Clear Lake
Fremont, IN 46737

Re: Formal Complaint 06-FC-157; Alleged Violation of the Access to Public Records Act by the Town of Clear Lake

Dear Mr. Hoagland:

This is in response to your formal complaint alleging that the Town of Clear Lake (“Town”) violated the Access to Public Records Act by refusing to give you access to the Town’s minutes.

BACKGROUND

You filed your formal complaint against the Town on September 8, 2006. You alleged that you were denied access in April 2006 to Town minutes when you presented your request in person to the Town Clerk. You state that the Clerk Virginia Nye would not allow you immediate access even though the records were stored in a binder that was located on the shelf behind the Clerk’s desk. Clerk Nye told you that you would not be allowed access unless you completed a records request form. When you completed the form, Clerk Nye still denied you access, without citing any exemption. In an April 10 letter, Clerk Nye acknowledged your request and provided the Plan Commission minutes, but did not provide the minutes of the board of zoning appeals. Instead, Ms. Nye indicated in her letter that she would send you the minutes of the board of zoning appeals.

On August 21, you visited the Town to remind Clerk Nye that she had not sent you the board of zoning appeals minutes. Again, although the binder containing the minutes was located just behind the Clerk, Clerk Nye refused your request. You claim that although you were in the

office at 3:47 p.m., Clerk Nye left the office earlier than the posted closing time of 4:00 p.m. and you have yet to receive copies of the minutes of the board of zoning appeals.

I sent a copy of your complaint to the Town. Attorney W. Erik Weber provided a response, a copy of which is attached for your reference. He made two points. First, on both occasions referenced in your complaint, you appeared and demanded to review documents with less than thirty minutes of time remaining in the work day. The Town will not permit review of official Town records without the presence of a town official. The time and manner that you presented yourself made it impossible to comply with your requests.

In addition, you are a plaintiff in several lawsuits against the Town, including the Clear Lake Board of Zoning Appeals. Although the Town had arranged to provide records at the request of your attorney, the attorney cancelled the time set aside by the Town for disclosure. It is the Town's position that if you are represented by legal counsel and your request for documents involves the various lawsuits, your attorney should make the request for documents. The Town has no way of knowing for what purpose you make your requests or who is authorized to cancel and reinstate the requests. Therefore, it is necessary for the Town to determine whether the requests are related to one of the lawsuits you have filed or for some other reason.

ANALYSIS

As threshold matters, I address two things: 1) the timeliness of your complaint regarding the April request for records, and 2) your request for priority status, which would require the Office of the Public Access Counselor to issue an advisory opinion in this matter within seven (7) days after the complaint is filed.

A person that chooses to file a formal complaint with the counselor must file the complaint not later than thirty (30) days after the denial. IC 5-14-5-7. Your complaint regarding the April request is untimely; however, I will issue an informal inquiry response as part of this advisory opinion. *See* IC 5-14-4-10(5).

You requested priority status for your complaint; however, you have alleged none of the circumstances for which priority status may be granted. *See* IC 5-14-5-10; Ind. Admin. Code tit. 62, r. 1-1-3. Therefore, I have issued this advisory opinion within 30 days of the time it was filed.

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). If a public agency receives a request for a record in person, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If a request is made orally, either in person or by telephone, a public agency may deny the request orally. IC 5-14-3-9(c). However, if a request initially is made in writing, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if the denial is in writing and states the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

The law contemplates that a response of the agency is an acknowledgement that the agency has received the request, and some indication of how or when the agency intends to comply. Because the APRA contains no specific timeframe for when the documents must be produced, the Public Access Counselor has stated that records should be produced within a reasonable period of time. What is reasonable will vary with the specific circumstances. In addition, the public agency may regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 5-14-3-7(a).

According to the documentation that you provided, the Clerk timely responded to your request for records, because she responded by the next business day, Monday, April 10 to your Friday, April 7 request. In addition, the Clerk timely provided copies of the Plan Commission minutes, which she enclosed as part of her response. However, the Clerk did not timely provide copies of the minutes of the board of zoning appeals, if she did not make them available at all, prompting you to revisit the Town's offices in August to renew your request.

Hence, the Town is correct that it did not have to provide you immediate access when you visited the Town offices just prior to closing. However, the Town's failure to provide the minutes of the board of zoning appeals as of the date you filed your complaint in early September was not reasonable under the Access to Public Records Act.

In addition, the Town may not delay or deny disclosable public records merely because the records are relevant to your litigation against the Town. This is because no exemption exists for records that a person is requesting that would be covered in a discovery request. The Access to Public Records Act is an independent means to obtaining records from a defendant public agency.

CONCLUSION

For the foregoing reasons, I find that the Town of Clear Lake has not provided minutes of the board of zoning appeals within a reasonable period of time. I urge the Town to provide you with copies of the minutes as soon as possible. It is also my opinion that the Town may not delay or deny the disclosure of records relating to your lawsuit against the Town when it receives a request for records from you.

Sincerely,

Karen Davis
Public Access Counselor

cc: W. Erik Weber