



STATE OF INDIANA

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April 21, 2011

Mr. Joseph L. Weingarten
14066 Deer Stone Lane
Fortville, IN 46040

*Re: Formal Complaint 11-FC-77; Alleged Violation of the Access to
Public Records Act by Fall Creek Township*

Dear Mr. Weingarten:

This advisory opinion is in response to your formal complaint alleging Fall Creek Township (the "Township") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-1.5-1 *et seq.*, by denying you access to public records. The Township's response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on March 17, 2011, the Township denied your request for records regarding the maintenance of cemeteries in the Township in 2011. The Township responded that it has no records responsive to your request. However, you note that the Township "failed to respond to the questions" contained in your request. You submitted your records request after receiving a notice dated February 14, 2011, from the Township rejecting your bid for cemetery maintenance. That notice stated that the Township "is taking a different direction as to the maintenance of its cemeteries in 2011 to comply with direction from the Indiana Legislature to work more efficiently and save money." You seek records regarding the "direction" from the legislature and the analysis on cemetery maintenance bidding.

The Township's attorney, Jeanette C. Kassebaum, responded to your complaint on behalf of the Township. She maintains the Township's position that it has no records responsive to your request.

ANALYSIS

The public policy of the APRA states, "[p]roviding persons with information is an essential function of a representative government and an integral part of the routine duties

of public officials and employees, whose duty it is to provide the information.” I.C. § 5-14-3-1. The Township is a public agency subject to the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the Township’s public records during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

With regard to the Township’s statement that it does not maintain the records you requested, previous public access counselors have repeatedly opined that if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). The APRA does not obligate an agency to create new records in response to a request.

It is unclear what the Township considered when it drafted the February 14th letter to you. Public agencies that receive information orally or in some other non-written form are unable to permit inspection and copying of that information because it does not exist in reproducible form. Here, the Township insists that it has no records responsive to your request. If that is the case, the Township did not violate the APRA by denying it.

CONCLUSION

For the foregoing reasons, it is my opinion that the Township did not violate the APRA if it has no records responsive to your request.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Jeanette C. Kassebaum