



STATE OF INDIANA

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January 30, 2006

Ian Steele
221 Pokagon Trail
Michiana Shores, IN 46360

Re: Formal Complaint 05-FC-269; Alleged Violation of the Access to Public Records Act by the Town of Michiana Shores

Dear Mr. Steele:

This is in response to your formal complaint alleging that the Town of Michiana Shores ("Town") violated the Access to Public Records Act ("APRA").

BACKGROUND

On December 30, 2005 you filed a formal complaint with the Office of the Public Access Counselor alleging that the Town had violated the APRA on numerous occasions between June 2005 and December 2005 by failing to provide you with records that you requested. In order to be timely filed, a complaint must be filed with this office not later than 30 days after the denial. IC 5-14-5-7(a). Your complaint is timely with respect to those requests forwarded to the Town in December. Pursuant to IC 5-14-4-10(6) I may issue an informal inquiry response regarding any portion of your complaint that is untimely; the informal inquiry response is consolidated into this formal opinion.

Over the course of several months you made numerous requests for records to the Michiana Shores Clerk-Treasurer ("Clerk-Treasurer"). Each request contained a list of records that you sought. The records can generally be described as records relating to several construction projects including building permits, ordinances, correspondence, and approved minutes for meetings of various governing bodies. Specific record requests will be addressed as necessary below.

You allege that most of the requested documents have not been produced. You state that an oral request on December 20, 2005 did not result in a mutually convenient time to read requested documents within 24 hours. You state that a consistent pattern of not producing records has been displayed by the Clerk-Treasurer, the Planning Commission, Building Commissioner, Park Board and Town Council of Michiana Shores.

Clerk-Treasurer Steve Millick responded to your complaint on behalf of the Town by letter dated January 13, 2006. A copy of that letter is enclosed for your reference. Mr. Millick explained that the Office of the Clerk-Treasurer is a part-time office, staffed only by him, the elected Clerk-Treasurer. He asserted that you make numerous requests for copies of public records. He stated that copying the records and making them available “a couple at a time” is the best that he can do given the limited time and resources of his office and the requirements of his other statutory duties.

Mr. Millick indicated that he has provided a timely response, within seven (7) days, of each request. He asserted that the Town is not required to create records that do not exist. Mr. Millick provided an extensive response to each of the items that you have requested; his response can be summarized as either: 1) the record has been provided, 2) the Town does not have the record, or 3) he intends to provide you with the record.

Additionally, you filed a formal complaint on August 10, 2005. Your complaint was untimely filed because it addressed public records requests made between December 14, 2004 and April 25, 2005; therefore, it was converted to an informal inquiry request. I am incorporating the response into this formal opinion. You complained that the Clerk-Treasurer denied you access to public records by indicating that the records were not maintained in the Office of the Clerk-Treasurer.

Mr. Millick responded to your informal inquiry by letter dated September 20, 2005. A copy of that letter is enclosed for your reference. Mr. Millick indicated that the records are kept on file in the building department office. He stated that after he receives your requests “a physical check is made for records in the building department office.” Mr. Millick provided a copy of the Town’s building ordinance, which requires that approved building permit applications including the application, the duplicate sets of the plat, plans and specifications shall be forwarded to the Town Clerk. Further, a record of all applications for Building Permits along with one set of the plat, plans and specifications and of the disposition of such applications shall be kept by the Building Commissioner for a period of at least six months after occupation of such building or structure, after which the drawings and plans may be returned, upon demand, to the persons by whom they have been deposited. *See* Michiana Shores Municipal Code 2-2-10-12.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” IC 5-14-3-1. Furthermore, “[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.” IC 5-14-3-1.

Response Time

If a public agency receives a request for records via U.S. mail, facsimile, or e-mail, it has seven (7) days in which to respond. IC 5-14-3-9(b). For requests that are delivered in person, the agency must respond within twenty-four (24) hours. IC 5-14-3-9(a). A request for records

may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in writing, the agency must deny the request in writing. IC 5-14-3-9(c). A response may be an acknowledgment that the request for records was received, and a statement of how and when the public agency intends to comply. If the public agency fails to respond within seven (7) days of its receipt of the request, the request is deemed denied.

Although you did not complain that the Town has not provided you with a response within seven days of receipt of each of your requests, the Town asserted that it has responded within this time frame. You complain that a time was not arranged for you to review records within 24 hours of making an oral request. The Town is not required to provide you with the opportunity to inspect the records within 24 hours of receiving your request. It is required to respond within 24 hours, which it did. While the Clerk-Treasurer must take into consideration how long it will take him to gather the requested materials, he should, within a short period of time after receiving the request, contact you to arrange a mutually agreeable time to review the records.

Reasonable Production Time

The APRA does not specify a time for production or inspection of responsive records, but this office has stated that records must be produced within a reasonable time of the request. Often, this office is asked to make a determination as to the reasonableness of the time for production by a public agency. What is a “reasonable” time period under one circumstance may not be reasonable under other conditions. Production need not materially interfere with the regular discharge of the functions and duties of the public agency. IC 5-14-3-7(a). The determination of what is a reasonable time for production, therefore, depends upon the public records requested and circumstances surrounding the request.

The Clerk-Treasurer is a part-time elected official. The Clerk-Treasurer’s Office is staffed by one person, part-time. In addition to his other statutory duties, the Clerk-Treasurer has the statutory duty to comply with the APRA. From the information that you have provided, it appears that you frequently make requests for public records, often before the Clerk-Treasurer has had an opportunity to fulfill the previous request. In addition, your requests usually seek several records at once. While many of the records you seek should be readily available, such as meeting minutes, some of the records are located in the offices of other agencies of the Town. For those records maintained in other agencies, the Clerk-Treasurer must request the records be sent to him from the agency that maintains them. I note, however, that the Town has not provided an explanation as to why it should take nearly four months for the various agencies of the Town to provide the records to the Clerk-Treasurer for production.

Given the volume of your public records requests and the part-time nature of the Clerk-Treasurer’s Office it is not unreasonable to expect that responding to your requests would take some time. However, to wait for six months for records to be produced is not reasonable under these circumstances. I encourage the Clerk-Treasurer to first work on providing those records for which you have waited the longest. Additionally, in order to more timely produce the records you seek, the Clerk-Treasurer may wish to make the records available for you to inspect and copy during the regular business hours of the agency. If the Clerk-Treasurer has copy equipment available on site, he may allow you to make the copies on the agency’s equipment in order to more quickly provide the records you seek. It is also my advice that the Clerk-Treasurer provide

you with a time frame for when you can expect to receive the records rather than leaving the production time open-ended.

Request for Records not Maintained by the Agency

The APRA does not require a public agency to create a record, or conduct research to compile any record, in order to satisfy a request for documentation of particular facts. If no record already exists that would be responsive to a particular request, the Town is under no obligation to create a record to satisfy your request for records.

I note that in each of your public records requests you asked that the Town, for those records it does not maintain, provide a written explanation as to why a record does not exist. The Town is not required by the APRA to explain why it has not created a record; it should, however, notify you if a record is not maintained by the Town.

In response to a prior complaint filed by you I have advised the Town to give an itemized list of the documents being disclosed, and if there are no records responsive to a given request, to so state. I will add that when the Town makes a partial production of records it should advise you as to the status of the remaining records. Nevertheless, if the Town does not have documents responsive to your request, it did not violate APRA when it did not give you those documents.

Additionally, you requested a copy of a transcript for the Board of Zoning Appeals hearing held on December 8, 2005. The hearing was recorded by a stenographer hired by a private citizen. Mr. Millick's response to your request was that the Town does not have a transcript on file for that meeting. If the Town maintains a copy of the transcript it must allow you to inspect and copy the transcript. If the Town does not maintain a copy of the transcript, or no transcript was prepared, the Town may refer you to the reporting service to obtain a transcript. The Town is not required to obtain a copy of the transcript for you if it does not maintain it. Note that the Town must maintain memoranda for meetings of governing bodies of public agencies; the required memoranda may provide you with the information you seek concerning the contents of this meeting. IC 5-14-1.5-4(b).

The Town is not Obligated to Provide More than One Copy of a Record

A public agency must provide at least one (1) copy of the public records to the person. IC 5-14-3-8(e). In response to your complaint, the Town has noted that it has already provided you with some of the requested records. The Town is under no obligation to provide you with additional copies of records that it has already provided to you.

Destruction of Records

You allege that the Planning Commission discussed destroying records that you had requested. The Town has the duty to protect public records from loss, alteration, mutilation, or destruction. IC 5-14-3-7(a). Notwithstanding IC 5-14-3-7, public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention schedules under Indiana Code 5-15; or public records not subject to Indiana Code 5-15 may be destroyed in the ordinary course of business.

August 10, 2005 Informal Inquiry Response

According to Michiana Shores Municipal Code 1-1-5-2 all requests to inspect or copy public records shall be made either in person or in writing to the Town Clerk. You complied with the ordinance by making your requests directly to the Clerk-Treasurer. The Clerk-Treasurer provided you with some of the records you requested. However, for portions of your requests, he responded by indicating, “the Clerk-Treasurer’s office does not have the following items on file. . .” followed by a list of the records that were not being provided for that reason. You allege that the records are maintained by the building department and should be made available. In his response Mr. Millick stated that he checked with the building department prior to responding to your request, although he does not specifically indicate whether the building department maintains the records. If the Town maintains the records and the Clerk-Treasurer failed to provide them, then the Town violated the APRA. However, if the Town does not maintain the records, the Clerk-Treasurer should state that the Town, rather than just the Clerk-Treasurer, does not maintain the records.

CONCLUSION

For the foregoing reasons, I find that the Town of Michiana Shores has unreasonably delayed production of records responsive to your public records request. Additionally, if the Town of Michiana Shores maintained records in the building department but denied you access because they were not maintained by the Clerk-Treasurer, the Town violated the Access to Public Records Act. However, if the Town of Michiana Shores does not maintain records responsive to your requests it did not violate the Access to Public Records Act by failing to provide you with records it does not maintain. Finally, if you believe that the Town of Michiana Shores actually maintains records that it has indicated it does not maintain or has an affirmative duty to maintain, your recourse is to file a lawsuit in accordance with IC 5-14-3-9(e).

Sincerely,

Karen Davis
Public Access Counselor

cc: Steve Millick