

May 20, 2005

Philippa C. Tolliver
6620 Hemlock
Gary, IN 46403

Re: Formal Complaint 05-FC-79; Alleged Violation of the Access to Public Records Act by the Calumet Township Trustee's Office

Dear Ms. Tolliver:

This is in response to your formal complaint alleging that the Calumet Township Trustee's Office ("Trustee") violated the Access to Public Records Act ("APRA") by failing to provide you with documents which you have requested and by failing to provide them in a timely manner. I find that the Trustee did not violate APRA.

BACKGROUND

You filed a complaint with this office dated April 11, 2005, and postmarked April 18, 2005, alleging that the Trustee had denied you access to public records. The complaint was received on April 20, 2005 and assigned Formal Complaint # 05-FC-79.

Your complaint states:

In my capacity as an elected member of the Calumet Township, I submitted a written request on February 7, 2005, regarding fiscal information 2004 encumbrances (695, 447,57). The trustee has not responded as of April 13, 2005. Please be advised that the initial request was made at an official board meeting held February 15, 2005, or February 8, 2005. (it was verbal) Violation IC 5-14-3-(illegible). Also, there was another request (education expenses) Purdue University and Indiana University expenses on 3/8/05, her response was that she received my request, however to date the request has not been complied with. See letter dated 3/14/05.

Trustee Mary Elgin responded to your complaint by letter dated May 12, 2005. A copy of that response is included for your reference. Ms. Elgin also provided copies of the documents that she had provided to you, correspondence and minutes of the Township Board meeting to support her explanation. Ms. Elgin asserts that the requested information has been previously provided to you.

ANALYSIS

General Provisions

Timeliness of Filing of Formal Complaint

Initially, I wish to note that as to the February 8, 2005 (dated February 7) and March 8, 2005 requests for records, your complaint is untimely because complaints must be filed within 30 days of the denial of the record. IC 5-14-5-7. A denial would have occurred either by the agency's failure to respond within the time frames specified in IC 5-14-3-9, or if the agency had made a denial of disclosure. However, your request is being reviewed to determine if the agency provided the records within a reasonable time frame. In the case of allegations of a denial of records or failure to respond within the statutory time frames occurring more than 30 days prior to the filing of your complaint, I may issue an informal inquiry response, which I incorporate into this advisory opinion.

The Access to Public Records Act Does Not Require Agencies to Create Documents.

Additionally, I also note that APRA covers only requests for documents. I believe that it would be instructive for both the agency and the requestor to note that under APRA an agency is not required to create a document to respond to a request, but to merely provide documents already within the agency's possession. Whether the agency should provide you, as a member of the Board, with additional information, including the creation of documents to satisfy your questions, is not an issue under APRA.

The Request Must Be Stated with Reasonable Particularity

When a public records request is made, the requestor must make his or her request with reasonable particularity. Ind. Code § 5-14-3-3(a)(1). There is no Indiana case law defining "reasonable particularity," so were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary, dictionary meanings of the word used. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. Ct. App. 1992). "Particularity" is defined as "the state of being particular rather than general." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981), 956. Rules of statutory interpretation also require that one construe the phrase "reasonable particularity" in light of the entire APRA. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. App. 1991).

Since the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, then the agency should contact the requestor for more information if it is necessary to respond to the request. See generally, Ind. Code § 5-14-3-1.

It is apparent from reading your records request, from the Trustee's repeated requests for clarification¹ and the Trustee's inability to provide you with a response that satisfies you that your request is not reasonably particular. The APRA regulates the production of documents that are maintained by public agencies. It does not require agencies to answer general questions. Much of your request is written in the format of general questions. While an agency should provide documents in its possession that would contain the answer to these questions, it is not required to create a responsive document. The Trustee has tried to provide you with documents that she believes will answer your questions. However, you have repeatedly found these documents to be inadequate. It appears that you believe the Trustee is in the possession of some other document that will answer your questions. If that is the case, your request needs to be stated with the required particularity to clearly communicate to the Trustee which records you are seeking.

A Requestor May Not Reject the Documents Provided and Then Complain That the Agency Has Not Complied With the APRA.

It is clear that you have not been satisfied with the responses that you have received from the Trustee. Ms. Elgin has stated that she provided you with documents responsive to your requests; however, you state that your requests have not been answered. Ms. Elgin also provided minutes from the February 8, 2005 board meeting in which the record reflects that she has provided you with documents. She additionally provided this office with copies of the documents, which she tried to provide to you. Included in the documents she provided is a copy of the 2004 encumbrances which bears a notation by you rejecting the document as not being what you want. If an agency tries to provide a response to a requestor and the person rejects the document, that person can not subsequently complain that the agency did not respond to the request.

Regarding that specific document, the 2004 encumbrances, Ms. Elgin has also stated that the document provided to you is the only document that is responsive to your request. If she has no other document containing the information, she is not required to provide you with anything else under APRA. Ms. Elgin has not made the same claim regarding your other requests. Since you do not feel that the documents provided are adequate, I would encourage Ms. Elgin to provide any additional documents she may have that would also be responsive to your requests. If she does not have any other documents that would answer your questions she should inform you of such.

¹ The minutes of the February 8, 2005 board meeting reflect the Trustee's request for clarification of your February request. The Trustee also indicated in a telephone discussion with my Office on May 18, 2005 that the reason for delay in responding to your March request was due to conversations with you in order to clarify what information you needed.

Timeliness of Response

The public policy of the APRA states that “(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.” IC 5-14-3-1.

Timeliness of Initial Response

As a matter of informal inquiry, I will address whether the Trustee fulfilled her duty to respond under IC 5-14-3-9. Since the Trustee’s duty under this section of APRA must be completed within either twenty-four (24) hours or seven (7) days, your complaint on this count must have been filed within 30 days of that time frame. Your complaint was not timely as to this issue for either of your requests; therefore, it will be addressed as an informal inquiry incorporated into this Formal Opinion.

It is the responsibility of the public agency to respond to requests for public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. While this response has not been defined under the APRA, what is contemplated is a communication to the requestor. For example, a public agency may respond that the request has been received, whether there are any records that will be produced, that the records requested are confidential or otherwise nondisclosable, or that the public agency needs more time to compile the records requested. A response may also provide the records requested, or notify the requestor that the public records requested are available for his or her inspection.

February 8, 2005 Request

A public agency is required to make a response to a written request that has been hand-delivered within twenty-four (24) hours after it is received; the failure to do so constitutes a denial under the APRA. Ind. Code § 5-14-3-9(b).

It is somewhat unclear from your complaint and accompanying documents as to the exact date of the first, verbal request.² However, there appears to be agreement that you delivered your request to Trustee Elgin at the Township Board meeting. Ms. Elgin states that the written request, dated February 7, 2005, was delivered to her in person at the February 8, 2005 Township Board meeting. The minutes of the February 8, 2005 Township Board meeting verify that the meeting was held on the 8th, and that the request was discussed that evening. Ms. Elgin states that she tried to respond to you immediately by providing the requested information. The minutes of the board meeting state:

² Your complaint stated that the request was delivered at the board meeting on February 15, 2005 or February 18, 2005. You also provided a letter dated February 7, 2005, which Ms. Elgin stated was delivered to her at the board meeting on the 8th. In addition, your letter to this office on March 19, 2005 states that the request was delivered on February 5, 2005.

For complaints concerning the timeliness of the response the complainant should be clear as to the date upon which the request was made. But for the minutes provided by the Trustee, it would have been impossible to determine when the statutory response time would have begun.

Cody-Tolliver recognized Trustee Elgin. Trustee Elgin stated she would like the record to show that she was not clear on the information Cody-Tolliver requested. . . .

Trustee Elgin stated that she is responding to Cody-Tolliver request tonight, February 08, 2005, by giving Cody-Tolliver all the information she requested in her written response within the 24 hours.

Cody-Tolliver stated for the record that she had been refused the information she requested. Trustee Elgin at this time stated that this is absolutely incorrect. The information was given to Cody-Tolliver tonight, February 08, 2005.

From these minutes it appears that Ms. Elgin did in fact give you some response within 24 hours by trying to clarify your request. There is a dispute in the minutes as to whether she did provide the records. However, given your prior refusal to accept records, it is difficult to discern whether your statement that you had been refused the information requested means that nothing was provided to you, or that you did not find the information provided adequate. She also provided a written response to the questions of your request on February 9, 2005. In that response she made reference to information contained in documents provided to you on an earlier occasion.

Under IC 5-14-3-8(e), a public agency "must provide at least one (1) copy of" a public record to a person, but there is no requirement that a public agency provide multiple copies to the same person. Since you have already been provided copies of the documents to which you are entitled by the Trustee, she could reference documents provided to you at an earlier time in her response. As noted above, under IC 5-14-3-8(e), the Trustee is not obligated to provide multiple copies of a public record to you so long as one (1) copy has been provided. Accordingly, it is my opinion that since you have already obtained from the Trustee copies of the public records that satisfy your public records requests, her decision not to provide additional copies to you was not a denial under the APRA.

I find that Ms. Elgin's verbal response to you at the board meeting, upon receipt of your request, and subsequent letter were sufficient to show compliance with the APRA requirement to respond within 24 hours.

March 8, 2005 Request

Under the APRA, "if a person requests by mail or by facsimile a copy or copies of a public record, a denial of disclosure does not occur until seven (7) days have elapsed from the date the public agency receives the request." Ind. Code §5-14-3-9(b). It is the responsibility of the public agency to respond to requests for public records within this time period. The APRA does not set any time periods for producing public records, merely for responding to the request.

Your second request for documents was dated March 8, 2005. The Trustee replied to this letter on March 14, 2005, stating that your request had been received in the Trustee's office on March 11, 2005. She also stated that the items would be provided within the time stipulated under APRA. It is unclear whether the Trustee was under the mistaken assumption that APRA

required her to provide the documents within seven (7) days, or whether she intended to provide them within a reasonable time as required by APRA. For that reason, it is unclear as to when the Trustee intended to provide the documents.

It is clear that the Trustee responded to this request well within seven (7) days of receiving it as required by APRA. I find that the Trustee complied with APRA, when she responded to the March 8, 2005 request within three (3) days of receiving it. I would advise the Trustee, however, for future responses to provide a more definite time frame within which the records will be provided.

Reasonable Time for Production

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 business 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.

For your February 8, 2005 request, the Trustee provided the responsive documents either that day, or prior to that date, as referenced in the Township Board meeting minutes and her letter of February 9, 2005.

In your request dated March 8, 2005 you renewed your request for the 2004 encumbrances and made an additional request for copies of the "Disbursement Report, Checks, Correspondence, and Invoices as they relate to payments to Indiana University and Purdue University." The Trustee responded on March 14, 2005 that she would provide the requested documents. These documents were provided to you on May 11, 2005.³ It appears that it took nearly two (2) months for the Trustee to provide you with these documents. My office spoke with the Trustee by phone on May 18, 2005. She stated that she had the documents prepared, but had been waiting to hear back from you. She stated that between the date of the request and the date the documents were provided that she had talked with you a couple of times to verify what information you already had and what information was still needed. She could not recall upon which date you were told that the documents were available for pick up, but states that she believes that at least one of the conversations occurred at a board meeting on April 8, 2005. She stated that she had prepared the documents and sat them aside while waiting for you to call her back.

Ordinarily, I would say that two months would be an unreasonable time for production, particularly in light of the Trustee's admission that she had the documents prepared and set aside for you. However, it appears that the delay in providing the documents was at least in part attributable to your failure to confirm with the Trustee which documents were required. In light

³ You refused to accept the 2004 encumbrances. As previously discussed, a requestor may not refuse a document and then complain that it was not received.

of the ongoing communication between yourself and the Trustee to verify the contents of the response to your request, I cannot say that the Trustee took an unreasonable amount of time in providing those documents to you.

CONCLUSION

For the foregoing reasons, I find that the Trustee provided a timely response to both your February 8, 2005 and March 8, 2005 requests. I also find that the Trustee did not unreasonably delay in providing you the documents in response to your March request.

Sincerely,

Karen Davis
Public Access Counselor

cc: Trustee Mary Elgin