

September 20, 2004

Mr. Bruce C. Scalambrino
313 Pokagon Trail
Michiana Shores, IN 46360

Re: Formal Complaint 04-FC-148; Alleged Violation of the Access to Public Records Act by the Town of Michiana Shores

Dear Mr. Scalambrino:

This is in response to your formal complaint alleging that the Town of Michiana Shores (“Town”) violated the Access to Public Records Act (“APRA”) by failing to produce documents that you allege are maintained by the Town and which are responsive to your request. I find that the Town violated the APRA by failing to adequately respond to your written request for documents.

BACKGROUND

According to your complaint, you attended a meeting of the Michiana Shores Town Council on July 10, 2004, and during the meeting you made an oral request for certain documents. In response, the Council President Joan Lewis asked that you submit your request to the Town’s Clerk Treasurer Steven Millick. On July 15, 2004, you wrote to both Clerk Treasurer Millick and Ms. Lewis. In your letter, you requested the following documents, numbered as follows:

1. All conflict of interest waivers submitted by the Town’s Building Inspector;
2. Any approvals or denials of those conflict of interest waivers;
3. All minutes of any meeting of the Building Committee in which those waivers were discussed;
4. Minutes of any Town Council meeting where the waivers were discussed;
5. Copies of all filings of those waivers with the State Board of Accounts and/or the county Clerk of Court;
6. Copies of all lot clearing permits issued by the Town in the last year and any applications;

7. Copies of all public notices of Building Committee meetings since January 1, 2004;
8. Minutes of all Building Committee meetings since January 1, 2004;
9. Copies of all building permits issued after January 1, 2004 wherein the Town Building Inspector is a contractor, consultant or otherwise retained to render services to the person who requested the building permit;
10. For the period from and after January 1, 2004, copies of all building inspection notes made by the Town Building Inspector for all building projects in which he served as a contractor, consultant or was otherwise retained to render services to the person who requested and obtained a building permit from the Town;
11. All building permits issued to Richard Pliske from and after January 1, 2004; and
12. All building permits issued to any other member of the Town Council from and after January 1, 2004.

Around July 25, 2004, Mr. Millick telephoned you and indicated that the documents would be made available. On August 5, 2004, Mr. Millick telephoned you again and said that the documents would be available on August 7, 2004. You specifically requested that Mr. Millick state whether any of the requested documents did not exist. On August 7, certain documents were produced to you. The Town did not issue anything in writing with respect to missing documents, which you allege would include items 3, 4, 5, 8, 9, 10, 11, and 12 for which no documents were included in the August 7 packet. You filed your complaint with the Office of Public Access Counselor, which we received on August 20, 2004.

Following receipt of your complaint, we sent a copy and all documentation to the Town Council President and the Clerk Treasurer. We received a response, enclosed for your review, from Christopher Willoughby, counsel to the Town.

In his response, Mr. Willoughby stated that the Town received your July 15 written request on July 16. He acknowledged that the Clerk Treasurer called you to indicate that the documents responsive to your requests would be forthcoming, and would be available on August 6th or 7th. They were provided to you on August 7th. In addition, additional documents responsive to your July 15 request were sent to you on August 21, 2004. Mr. Willoughby stated that all responsive documents have now been provided to you. He did not specifically dispute your allegations that certain documents were missing from the August production of documents.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). A town is a public agency, and is therefore subject to the APRA. IC 5-14-3-2. You complain that the Town must maintain certain of the documents that you requested, such as “copies of building permits issued where the Town Building Inspector is a contractor, consultant or otherwise retained to render services to the person who requested the building permit.” In support of your allegation, you enclose a photograph of a home where you claim that a building permit in the window is visible from the street indicating it was issued during the relevant timeframe, and that the Building Inspector had been seen working at the construction site. You

also state that other documents requested should have been provided to you, or the Town should have indicated affirmatively that the documents did not exist.

An agency is not under any obligation to produce or create a record it does not have. However, if a member of the public requests such a record, the agency is obligated to indicate that the information does not exist. I note that even in the Town's response provided to this office by its counsel, Mr. Willoughby does not state that some of the requested documents do not exist. Rather, Mr. Willoughby states that "all documents/records believed to be responsive to Mr. Scalabrino's request have been provided at this time." This response leaves you (and me) to wonder whether the Town believes in good faith that all twelve requests were satisfied by its production in August, or to the contrary, that some requests were satisfied and the remainder are simply not maintained by the Town.

If the Town maintains any documents that are responsive to the remaining requests, that information should have been produced in response to your request, or the Town should have issued a written response claiming an exception under section 4 of APRA. The failure to provide this missing information without citing to any exception to disclosure under the APRA, or to indicate that the information does not exist, was a denial under the APRA. If the Town did not have all of the information requested, it should have specifically informed you of this in writing. IC 5-14-3-9(b).

CONCLUSION

For the foregoing reasons, I find that the Town's failure to respond in writing to your written request for documents, specifically stating which of your enumerated requests was not being produced by the Town and the basis for the denial, was a violation of the Access to Public Records Act. The Town continues to violate APRA to the extent it fails to state in writing what documents it is denying and the basis for the denial, including whether any of the documents you requested did not exist.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Christopher L. Willoughby