

November 19, 2004

*Sent Via Facsimile*

Mr. Ian M. Steele  
221 Pokagon Trail  
Michiana Shores, IN 46360

*Re: Formal Complaint 04-FC-200; Alleged Violation of the Access to Public Records Act and Open Door Law 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") and the Open Door Law ("ODL").

#### BACKGROUND

You have presented your complaint in two parts. In one, you sought copies of ordinances introduced at a special meeting of the Town Council the first week of January, 2004. In the second, you sought bidding procedures and construction details of a proposed Park Pavilion as well as documentation that you believed would demonstrate two violations of the Open Door Law. The Town received your two requests for these documents on August 26. The Town responded by letter on August 28, 2004. The Town stated that it was gathering the documents and would inform you when the copies would be available by September 21, 2004. You received documents responsive to your requests on September 23, but you believe that some of the records you requested are not being made available.

You filed your complaint with this office on October 20, 2004. I sent a copy of your complaint to Steven Millick, the Town Clerk-Treasurer. He responded on behalf of the Town, and a copy of the Town's response is enclosed for your reference.

## ANALYSIS

### *Ordinances and Resolutions submitted to the Town during 2004*

You requested copies of all ordinances and resolutions submitted for consideration to the Town Council during the period of January 1, 2004 to August 23, 2004. You noted that “this should include the name of the person submitting the ordinance or resolution, and the date of submission.” You then had three conditional requests:

- If the proposed ordinance or resolution was adopted, include the copy of the minutes documenting the voting of each Town Council Member as “yea” or “nay” and the date of adoption or rejection, and the number of readings for each ordinance as recorded in the minutes.
- If the proposed ordinance or resolution was tabled, indicate as such with the date of consideration as well as any documented subsequent action during the above time period as recorded in the Town Council Minutes.
- If the ordinance or resolution is still under consideration as of August 23, 2004, provide the number of readings having taken place as recorded in the Town Council minutes.

You stated in your complaint that you did not receive all the ordinances that were introduced at the special meeting the first week of January. The Town states that there were no ordinances introduced or distributed to the public, and that fact is demonstrated in the minutes. To the extent that the Town has no documents that are responsive to your request, it is not a violation of APRA to not produce them. This matter appears to be a factual dispute that would require resolution by a court of competent jurisdiction under IC 5-14-3-9(e).

You also complain that with respect to the three “conditional” requests, you did not receive the information concerning 1) the number of readings for the ordinances introduced in the first week of January, 2) documentation showing that some of the ordinances were tabled and what action was subsequently taken on those ordinances, and 3) the number of readings for any ordinance or resolution that is still under consideration as of August 23, 2004. The Town replies that there is no statute requiring that the minutes document the number of times that an ordinance has been read; at the meeting held in the first week of January, no ordinances were introduced, only distributed to Council members; and the ordinance that was tabled on January 13, 2004, had no other action taken on it.

Generally, your requests are actually for information that you believe is documented in the Council minutes or should appear in some form on the ordinance or resolution itself. The Town is not obligated under the Access to Public Records Act to gather information from the minutes and supply the needed information to a person requesting that information. Since the Council’s business is conducted openly and is recorded in the minutes or memoranda, your

request for information about the progress of the Council's legislation may be fulfilled by the Town by simply making all the minutes available to you for inspection and copying. APRA does not require that the Town create a document that contains the information you seek. I decline to find that the Town violated APRA in the manner in which they made the records available to you.

### *Proposed Park Pavilion*

Regarding your second complaint, you are alleging that the response to your document request regarding the proposed Park Pavilion indicated that the Town violated the Open Door Law, and also that the Town did not provide all the documents that you requested.

You asked for seven categories of documents, in addition to the general request for copies of all notices of meetings of both the Park Board and the Building Committee of the Town for the period January 1, 2004 to August 23, 2004.

It was out of the information gained from your general request that you claim a violation of the Open Door Law. You allege that the Building Committee did not provide sufficient notice for its Tuesday, March 23 meeting, where the notice was "published" on Saturday, March 20<sup>th</sup>. The Town admits that the notice was published in the local paper early Saturday morning. The Town's reply does not fully explain whether the notice requirement was met, but your allegation that the Town did not "publish" notice of its March 23 meeting in sufficient time does not allege a violation of the Open Door Law, either. The Open Door Law requires that notice of a meeting be **posted and delivered to news media who request it** 48 hours prior to the meeting, excluding Saturdays, Sundays, and legal holidays. IC 5-14-1.5-5(a) and (b). You do not say that notice was not timely posted at the Building Committee's meeting place or principal office. Moreover, the Town says that all meeting notices are posted outside the meeting place, but doesn't say this notice was posted 48 hours in advance excluding the weekend days. In any case, I cannot say that the Town violated the Open Door Law with respect to the March 23 meeting. However, using the above guidelines, if it did not post the notice timely, and if it did not deliver the notice to the newspaper timely, it violated the Open Door Law. Time of publication of the notice in the newspaper (and note that publication of a meeting notice in the newspaper is not required by the Open Door Law) is not relevant, only the time of delivery to the newspaper.

The second Open Door Law violation you allege involves the Park Board's meeting notice for its May meeting. You state that the Park Board's meeting notice stated the meeting was May 8, but was actually held May 5, according to the minutes. The Town states that the meeting was held on May 8<sup>th</sup>, and the minutes reflect the incorrect date. Taking the Town's reply as fact, I find no violation of the Open Door Law.

Next, you state that you did not receive minutes from three Building Committee meetings. The Town counters that no minutes of past Building Committee meetings were given to the current Committee. In addition, the Town states that you have been furnished monthly reports from the Building Commissioner which includes the actions of the Building Committee. It appears from the Town's reply that the Building Committee does not keep memoranda and "no voting has been required" to act on building permit applications. Again, this response rather

misses the mark. Again, I offer more guidance: if the Building Committee was appointed by the Town Council or its presiding officer, or by some other governing body as that term is defined in the Open Door Law, and the appointment includes a delegation to the Building Committee to take official action on public business, then the Building Committee is subject to all the requirements of the Open Door Law, including keeping memoranda of its meetings and disclosing those memoranda upon request. IC 5-14-1.5-2(b)(3). Official action includes making decisions and recommendations, as well as receiving information. The fact that no vote is taken is not dispositive of this question.

Next, you complain that no names of persons who submitted bids on the Park Pavilion building project had been supplied by the Town. You believe that proposals were submitted because the Clerk Treasurer announced that bids had been received at the July Town Council meeting. The Town explains that the July 13 minutes do not contain the quote you give. Instead, bids were opened at that meeting for a water main expansion project. However, the Town does not state affirmatively that no such record exists (although it does say this in the next part of its reply). If it has a record identifying the bidders of the project, it must disclose the record to you. Also, I advise agencies to give an itemized list of the documents being disclosed, and if there are no records responsive to a given request, to so state. 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.

You also stated that you requested copies of correspondence between the Town and the people or organizations submitting bids for the Park Pavilion project, but none was produced. In this part of its reply, the Town confirms that no bids were solicited or received for the proposed pavilion. Therefore, the Town has not violated APRA by not giving you documents it does not have; however, I reiterate that if no documents existed that met one of your requests, a better practice is to state that fact.

The next issue concerns the lack of the architect's name on the proposed design of the pavilion as well as the proposed location. The Town states that the material you reference is a feasibility study, and several designs were provided free, and no location was determined because the material was only for feasibility. In other words, no information has been redacted from the documents you received. Correspondingly, I cannot find a violation of APRA here.

You likewise allege that a quotation did not contain the name of the submitting organization. The Town counters that the "quotation" was the estimate for the feasibility study. Apparently the Town is stating that the estimate was not a proposal from a particular entity. Again, I cannot find that the Town altered or omitted information from the documents you received.

Next, you state that the failure of the Town to give you conflict of interest disclosures in connection with the project is indicative of an effort to conceal a true conflict with a member of the Council. The Town responds that since only a feasibility study had been procured and no bids had been solicited, no conflict of interest could have arisen that would have necessitated a filing. Likewise, your request for governmental permits was met with no documents from the Town. Yet, the Town states that because of the results of the feasibility study, no progress

toward a location was ever pursued, and hence no need for permits arose. I decline to find a violation of APRA where no records exist that are responsive to your requests.

Finally, you obliquely allege that the Town did not timely produce the documents you requested because in its response, it stated that it intended to supply you with the documents prior to September 21, but you did not receive the documents until September 23, after paying the copying fee two days before receiving the copies. The Town alleges that it actually made the records available prior to that by notifying you by telephone as early as September 20. The Town neither delayed production of the records to you nor violated APRA by seeking payment prior to your receiving the records. An agency may require payment prior to producing documents. IC 5-14-3-8(e).

#### CONCLUSION

For the foregoing reasons, I decline to find that the Town of Michiana Shores violated the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Steven J. Millick