

June 7, 2004

Mr. Roger Owen
2330 West 600 South – 57
Columbia City, Indiana 46725

*Re: Formal Complaint 04-FC-76; Alleged Denial of Access to Public Records
by the Noble Township Trustee*

Dear Mr. Owen:

This is in response to your formal complaint alleging that the Noble Township Trustee (Trustee) violated the Access to Public Records Act (APRA) (Ind. Code §5-14-3), when the Trustee failed to produce a record responsive to your record request within a reasonable time of receipt of that request. The Trustee's written response to your complaint is enclosed for your review.¹ In addition to the written response, the Trustee called this office on June 7, 2004, and advised the undersigned that the record you allege to have been denied was never requested and, in any event, does not exist. For the reasons set forth below, I find that the Trustee did not deny you access to records in violation of the APRA.

BACKGROUND

Your complaint alleges that you are a member of the Noble Township Advisory Board, and that the Board requested a copy of the Trustee's annual report for 2003. You do not provide any written copy of your request, and it is my understanding that your request was made orally. You further allege that the Trustee advised you that the report was "not complete" and could not be produced. You state that the Trustee denied your requests for the report on March 19, 2004, March 31, 2004, and April 17, 2004. This complaint followed.

In response, the Trustee denies that you made a request for access to the annual report for 2003. In any event, the Trustee asserts that the annual report for 2003 did not

¹ The response is unsigned because it was transmitted as an attachment to an electronic mail from the Trustee's remote location where he is serving on duty with the Air National Guard.

exist at any point in time relevant to this matter, and does not even now exist in any form. The Trustee states that you did make oral requests to see the Township's "books," and particularly the accounting books that would be used by the Trustee to create the annual report for 2003. The Trustee denies that he refused you access to those records. With regard to the dates you allege to have been denied access, the Trustee notes that he missed a meeting of the Board because he overslept (March 19, 2004), and that he requested that you make an appointment to come review the books after you showed up unannounced at his home late on a subsequent evening (March 31, 2004). The Trustee avers that he provided you with access to the books on April 17, 2004, by appointment.

ANALYSIS

The APRA applies only to the public records of public agencies. IC 5-14-3-3; *see* 5-14-3-2 (defining public record). The APRA does not require that a public agency create a record that responds to a public records request.

Your complaint alleges that you requested access to the Trustee's annual report for 2003, and that you were denied access to that record. The Trustee denies that you made a request for access to that record, and further asserts that the record does not in any event yet exist in any form. In this regard, your complaint and the Trustee's response create a disputed question of fact (whether you did or did not make a request for the annual report) that cannot be resolved in this forum and in an advisory opinion. Regardless, it appears undisputed that the record you allege to have been denied in violation of the APRA did not exist at the time of your request and does not exist even now. It may well be that the Trustee has an obligation under the statutes creating his office (*see* IC 36-6-4) to perform certain duties including to prepare an annual report setting forth the Township expenses; however, this office does not stand in judgment of the Trustee's performance of his Title 36 duties, and is without authority to opine on any alleged violations of those duties. If the report you allege to have been denied access to does not exist as a public record of the Trustee, it cannot be said that the Trustee denied you access to a public record of a public agency in violation of the APRA. I offer no opinion on whether the Trustee violated any other laws regarding the conduct of his office.

To the extent that your complaint can be read to allege that you were denied access to other Township records, I decline to find a violation based on the information presented. First, I do not find the Trustee's failure to produce records on March 19, 2004, and March 31, 2004, to be in violation of the APRA. Whatever else might be said for the Trustee's failure to attend a meeting of the Board, there is certainly no evidence presented here to suggest that it was designed to avoid production of any records requested by the Board. Moreover, the Trustee, like any public agency, is not required to produce records on demand. Rather, assuming a timely response is made to acknowledge the request, a public agency has a reasonable time to produce records and may make an appointment for purposes of doing so. The Trustee avers that he required an appointment for production, and that he in fact produced the records requested on April 17, 2004, by

appointment. Again, it is undisputed that he did not produce an “annual report for 2003” at that time, but as set forth above, his failure to do so is not a denial actionable under the APRA where no such record was in existence at that time. Your complaint does not assert that you were denied any other record at the time of the April 17, 2004, production, but to the extent that it can be read to do so, the Trustee’s response creates a disputed issue of fact for resolution in any civil action you might bring against the Trustee under Indiana Code 5-14-3-9.

CONCLUSION

For the reasons set forth above, I find that the Trustee did not deny you access to the public records of a public agency in violation of the APRA.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Aron Rex