

April 16, 2004

Mr. David Paul Allen
5231 Hohman Avenue, Suite 703
Hammond, Indiana 46320

*Re: Formal Complaint 04-FC-45; Alleged Denial of Access to Public Records
by the Calumet Township Trustee*

Dear Mr. Allen:

This is in response to your formal complaint alleging that the Calumet Township Trustee (Trustee) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq.*), when she failed to timely respond to your request for records. A copy of the Trustee's response to your complaint is enclosed for your reference. For the reasons set forth below, I find that the Trustee did fail to respond to your request in a timely manner in violation of the APRA. That said, I note that the Trustee did make a partial production with that response. I find that the partial production was made within a reasonable time of receiving the request, and that production of the remaining document has not been unreasonably delayed.

BACKGROUND

On March 2, 2004, you sent a written request for records to the Trustee by certified mail. The request sought the minutes of a January 20, 2004, meeting of the Township Advisory Board, along with a copy of a specific resolution of that board. Your letter anticipated that the minutes responsive to your request would be that version of the minutes that had been approved by the board. The return receipt for the request indicates that the Trustee received the request on March 3, 2004.

On March 15, 2004, the Trustee responded to your request. The response covered production of the resolution, but did not include production of the minutes. The stated reason for the omission was that the minutes had not yet been approved and thus could not be released at that time.

On March 16, 2004, you prepared and signed the formal complaint in this matter. Your complaint alleges that the Trustee failed to respond to your request. For purposes of this opinion, I assume that at the time you prepared and submitted this complaint, you had not yet received the Trustee's letter dated one day earlier.

Regarding your complaint, the Trustee admits that she did not respond in a timely manner, but asserts that she did not deny your request. The Trustee provides a copy of her March 15, 2004, response covering the partial production and explaining that the meeting minutes had not yet been approved. The Trustee promises further production once the minutes are approved.

ANALYSIS

A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request does not mean that the public agency must expressly decline to produce or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production. When a public record request is made in writing and delivered to the public agency by mail or facsimile, the public agency is required to respond to that request within seven (7) days of *receipt* of the request. IC 5-14-3-9(b). If that period of time elapses without a response, the request is presumed denied. IC 5-14-3-9(b). Absent evidence to the contrary, and consistent with the practice in other contexts, this office calculates and assumes receipt within three (3) days of the date of mailing. *Cf.* Ind. Trial Rule 6(E); Ind. Appellate Rule 25(C).

Here, the certified mail return receipt establishes that the Trustee received the written request on March 3, 2004. By operation of law, a written response was required to be submitted within seven days, or by March 10, 2004. The Trustee admits that she made no response until March 15, 2004. While her reasons and the partial production demonstrate good faith, I must nonetheless find the response to be late and therefore in violation of the APRA for that reason. *See* IC 5-14-3-9(b).

That said, while the initial response was tardy, I do not find the production of records untimely under these facts. As noted above, a timely response to a record request does not mean that the public agency must produce the responsive records within that time. Rather, production or inspection of the records must only occur within a reasonable time of the request. There are practical reasons for such a rule. A public agency may be able to produce public records immediately in some cases, but more time may be required for production when records are not in a central repository, are archived off-site, include information that may require counsel or other review for confidentiality, or include disclosable and nondisclosable information that the public agency must separate for purposes of producing what is disclosable. The effect of interpreting Indiana Code 5-14-

3-9 to require public agencies to produce records within a specific period of time would have the effect, in some cases, of requiring public agencies to stop activity on all other matters in order to provide the records requested. While providing information is an essential function of public agencies, the APRA also specifically provides that public agencies shall regulate any material interference with the regular functions or duties of their offices. IC 5-14-3-1; IC 5-14-3-7(a).

Here, the Trustee produced a document responsive to part of your request on March 15, 2004, only 12 days after having received the request. The Trustee alleges that the delay in her response and production was because she was hoping to produce both documents together and anticipated that the other document would be available sooner. It was only when she realized that the other document would not be available when expected that she prepared the March 15, 2004, letter and produced what she had at the time. Even without these averments I would not be inclined to find that 12 days is an unreasonable period of time to produce documents responsive to a record request. This is especially true when the APRA requires only an acknowledgment of the request on the seventh day post receipt.

For the same reasons, I decline to find that the Trustee has failed to produce the requested meeting minutes within a reasonable time. However, on this point I write further to clarify the rights and obligations of the parties with respect to the minutes. The Trustee's response to your request indicates that draft minutes have been created but not approved. Your request seeks minutes approved by the board. Accordingly, the Trustee's failure to tender to you a copy of the draft minutes cannot be said to violate the APRA. However, the Trustee's letter to you suggests that you would not be entitled to the draft minutes even if you asked. This is simply not the case. The draft minutes of a governing body are a public record of the public agency and are thus subject to disclosure upon request. There is no exemption available to withhold production of a public record because it is in "draft." Accordingly, if your request sought the unapproved or draft minutes, the Trustee would be obligated to provide them, and because they are apparently immediately available, the Trustee could not reasonably be heard to delay production.

CONCLUSION

For the reasons set forth above, I find that the Trustee did fail to respond to your request in a timely manner in violation of the APRA. I further find that the Trustee did not otherwise violate the APRA by failing to produce the responsive documents within that response time or within a reasonable time.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Stafford Garbutt, Executive Aide