

March 27, 2006

Sent Via Facsimile

David W. Murray
620 N. East Street
Indianapolis, IN 46202

Re: Formal Complaint 06-FC-41; Alleged Violation of the Access to Public Records Act by the Noblesville Schools

Dear Mr. Murray:

This is in response to your formal complaint alleging that the Noblesville Schools (“School”) violated the Access to Public Records Act by refusing to disclose certain records. I find that the School did not violate the Access to Public Records Act when it denied you a record of the certified payroll of its contractor.

BACKGROUND

You sent to the School a letter dated January 11, 2006 requesting a copy of the schedule of the wages to be paid to laborers, workmen, or mechanics filed by Mitchell Masonry, Inc., a contractor performing public work for the School. You cited to the Indiana Code for the provision requiring that a wage schedule be filed with the state or municipal corporation awarding a bid for construction work.

You followed up with a January 19 letter in which you explained that the School had erroneously provided information that you possessed already, the common wage settings. You clarified your request by stating that you were requesting “the certified payroll records for this particular job.”

You claim in your formal complaint that you requested the certified payroll on January 11 and January 19, and had not received a response to either request.

I sent a copy of your complaint to the School. Attorney Jack G. Hittle, counsel for Noblesville Schools, responded by letter, a copy of which is enclosed for your reference. Mr. Hittle stated that the Schedule of Wages provided for in Indiana Code 5-16-7-2 has been provided to “Mitchell Masonry” [*read*, the International Union, for which you are Organizer]. He also explained that for the construction project at issue, the School does not receive the payroll records for the contractor; hence, no record of the payroll is maintained by the School. The School has complied fully with the request, contends the School.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a). If a public agency receives a request for a record in person, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If the public agency receives a request for a record via U.S. Mail or facsimile, the public agency is required to respond within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b). If a request initially is made in writing, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny a written request for a record if the denial states the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c). A public agency is not required to compile or create a record to satisfy a person’s request for information. Rather, the APRA requires that a public agency make available records created, received, retained, maintained, or filed by or with a public agency. IC 5-14-3-2(m); IC 5-14-3-3(a).

Under IC 5-16-7-1, any firm, individual, partnership, limited liability company, or corporation that is awarded a contract by the state, a political subdivision, or a municipal corporation for the construction of a public work, and any subcontractor of the construction, is required to pay on the project a scale of wages that may not be less than the common construction wage in the county. IC 5-16-7-1(a). The municipal corporation or state shall require any contractor or subcontractor performing such public work to file a schedule of wages to be paid to the laborers, workmen, or mechanics. IC 5-16-7-2. Such schedule shall be filed before any work is performed on the contract. *Id.* The scale shall not be less than the common wage determined under IC 5-16-7-1. *Id.*

Although you allege in your complaint that you requested a copy of the certified payroll in your original request, your first letter plainly requests the Schedule of Wages filed by Mitchell Masonry contemplated by IC 5-16-7, the provision to which you meant to cite.¹ This document differs from a certified payroll in that the Schedule of Wages shows wages anticipated to be paid, not actually paid. You also state in your complaint that you received no response to the January 11 request. However, this assertion is belied in your January 19 letter, which appears to acknowledge receipt of a document in response to the January 11 request. You then clarified your request for the “certified payroll record for that particular job,” although in the next paragraph, you reiterate your request for the schedule of wages. Upon telephoning you to seek clarification, I learned that you want the certified payroll, i.e., the wages that have actually been paid to the workers by Mitchell Masonry, Inc., not the Schedule of Wages, which you already have obtained.

¹ You actually cited to IC 5-15-7.

If the School did not respond to your January 19 request for the certified payroll, it violated the Access to Public Records Act. The School was required to respond to your January 19 request within seven days of receipt. From its complaint response, the School does not assert that it responded to the January 19 request. Rather, the School asserts that it does not maintain payroll records of its contractors, and more particularly, does not maintain the certified payroll of Mitchell Masonry. Hence, the School cannot produce a record that it does not maintain.

Where the School does not maintain a record of the certified payroll of Mitchell Masonry, it was not a denial of the record to not allow you to inspect and copy it.

CONCLUSION

The Noblesville Schools violated the Access to Public Records Act in failing to respond to your January 19 request in a timely manner, but otherwise did not deny you a record that it does not maintain.

Sincerely,

Karen Davis
Public Access Counselor

cc: Jack G. Hittle