

May 19, 2006

Mr. Alec K. Kalla
8733 W. Summit Circle Drive
French Lick, IN 47432

Re: Formal Complaint 06-FC-72; Alleged Violation of the Access to Public Records Act by the Town of French Lick

Dear Mr. Kalla:

This is in response to your formal complaint alleging that the Town of French Lick ("Town") violated the Access to Public Records Act ("APRA") by denying you records that you had requested. I find that the Town did not deny you records in violation of the Access to Public Records Act.

BACKGROUND

You filed your formal complaint with the Office of the Public Access Counselor on April 19, 2006. You alleged that certain records that you had requested from the Town were being withheld, in violation of the APRA. That part of your complaint describing the records and how the Town denied you the records is not entirely clear. You contend, I believe, that you requested and were denied the following documents:

- Plans, specifications, cost estimates, and drawings specified in the Notice of Public Hearing published in the Springs Valley Herald newspaper for two leases.
- Certain handwritten notes made by Mr. Harner, the Town Clerk Treasurer, during a meeting of the Redevelopment Commission.
- Information about bonding to finance the projects referenced in the notice published in the Springs Valley Herald newspaper.
- Plans related to the new sewer plant.

You enclosed four separate written requests that you filed with the Town, each dated April 6, 2006. Those requests recited the following:

- Text and drawings of Exhibits A, C & D of lease between French Lick Redevelopment Commission and the French Lick Redevelopment Authority, and minutes of April 2006 meetings of the above named organizations;
- Text and Exhibits/Attachments of the 2nd lease noticed in the April 5, 2006 Springs Valley Herald, the lease not available to me at this time;
- Back of last page of proposed lease between Redevelopment Commission & Authority, i.e., handwritten notes observed by me today detailing tax abatement among other items;

- All info and details of bonding to finance projects involved in notice in Springs Valley Herald of April 5, 2006.

You contend that the handwritten notes, having been made during a public meeting by Mr. Harner, a public official, are public documents. You believe that the Town is denying you bond information because the information you have been able to gather is sparse. You also claim that while your written requests for documents regarding the leases did not specify that you wanted the plans, specifications, and cost estimates, you clarified orally your request to a member of the office staff the day after you submitted your written requests.

I sent a copy of your formal complaint to the Town. I received in response a letter from Mr. David Umpleby, Attorney to the Town. He denied that the Town denied you any record; the Town either does not maintain records that you seek because they have not been developed yet, or the Town has records that you are welcome to inspect and copy but that you had not specifically requested. Mr. Umpleby points to the language in your written requests in answer to your contention that you wanted the plans, specifications, and cost estimates for the two leases referenced in the newspaper notices. The lease exhibits that the Town provided to you contained only brief descriptions of the plans, but did not include drawings or specifications. If you had asked for the documents, the Town would have provided them to you.

The same applies to the request for the sewer plans, according to the Town. In fact, during a subsequent meeting of the Redevelopment Commission, you declined to inspect the sewer plans when they were specifically offered to you.

As for the request for bond financing information, Mr. Umpleby states that you have not identified any particular document, so the Town is unable to respond to your complaint in this respect. In fact, at the time of your request the details and structure of the bond transaction was still being negotiated and there were no documents to provide. You were told this when you submitted your request.

With respect to Mr. Harner's handwritten notices concerning tax abatements, the notes were Mr. Harner's personal notes, were not filed with the Town or maintained by the Town, and hence are not public records. Moreover, the notes on tax abatement had nothing to do with the lease transaction; they were merely notes Mr. Harner took during a previous public meeting when a potential developer had requested tax abatement for a project. They were intended and have been used only for Mr. Harner's reference.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). A request for inspection and copying must 1) identify with reasonable particularity the record being requested; and 2) be, at the discretion of the agency, in writing on or in a form provided by the agency. IC 5-14-3-3(a).

A requestor is obligated to state his or her request for access to public records "with reasonable particularity" so that the public agency understands what public records are being requested. While the phrase "reasonable particularity" appears to be clear, were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary meaning. "Particularity" is defined as "the state of being particular rather than general" . . . Statutory interpretation also requires that one construe the phrase "reasonable particularity" in light of the entire Public Records Act. Since the APRA favors disclosure and the burden of proof for nondisclosure is on the public agency, the agency should contact the requestor for more information if it is necessary to respond to a request. *Opinion of the PAC, 99-FC-21, (Jan, 19, 2000) page 3-4 [Citations omitted.]*

In the instance of your April 6 requests for records, you stated with reasonable specificity that you wanted the lease and exhibits of the two leases referenced in the newspaper notices. Hence, when faced with a reasonably specific request, the Town dutifully complied. The exhibits did not contain the specific plans, specifications, cost estimates and drawings that you perhaps expected would be included in the exhibits. It was incumbent on you to clarify in writing that you wanted all the material that was referenced in the newspaper notices, or in the alternative, state in writing that you wanted the plans, specifications, cost estimates and drawings.

Although you state that you related this additional clarification orally to a staff person, you did not put this request in writing, on the form that the Town provides for this purpose, although your original requests were submitted in writing. This documentation would protect you and the Town inasmuch as no confusion concerning what records you needed could occur. Although you contend that the Town is hiding these documents, this seems to me a bold assertion, given that the newspaper notices stated that the proposed lease, plans, specifications, and cost estimates for the projects "are open to public inspection at the Town Hall, French Lick, Indiana." I recommend that you submit a request for these specific items if you have not already done so.

With respect to the bond financing documents, the Town contends that at the time that you requested the information, no financing documents were in place; the deal had not yet ripened into documentary evidence of the deal (I paraphrase here). The Town was not required to create records to satisfy your request, and I also agree that your request in this regard was not reasonably particular. Where a request is not stated with reasonable particularity, the Town should have sought clarification from you. Whether the Town did so is not clear, but the Town

avers that you were told that no documentation exists. I recommend that you make periodic requests for this documentation so that if and when the Town possesses documents describing the bond financing, the Town will be required to disclose the records or state why they are exempt.

Finally, Mr. Umpleby stated that the handwritten notes of Mr. Harner that you witnessed were not filed or maintained by the Town. A “public record” is any material that is created, received, retained, maintained, or filed by or with a public agency. *See* IC 5-14-3-2(m). Mere creation of handwritten notes during a public meeting by a public official of the Town, without more, does not demonstrate that a record is a “public record.” Only “public records” are required to be available for inspection and copying. If the handwritten notes created by Mr. Harner were not filed with or maintained by his Town office, they are not a public record.

Full consideration of this issue would require development of a factual record, following the filing of a lawsuit. For your consideration, a person who has been denied the right to inspect or copy a public record by a public agency may file an action in the circuit or superior court of the county in which the denial occurred to compel the public agency to permit the person to inspect and copy the public record. IC 5-14-3-9(e). In such an action, the court shall award reasonable attorney fees, court costs, and other reasonable expenses of litigation to the prevailing party if the plaintiff substantially prevails, and if the plaintiff filed the action after seeking and receiving an informal inquiry response or advisory opinion. IC 5-14-3-9(i).

CONCLUSION

For the foregoing reasons, it is my opinion that the Town did not deny public records under the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: David Umpleby