

August 30, 2000

Mr. Gary Emberton
c/o Mr. John Emry, Attorney
62 W. Jefferson Street
Franklin, IN 46131-2311

Re: Advisory Opinion 00-FC-25 *Denial of Access to Public Records by the Town of Trafalgar.*

Dear Mr. Emberton:

This is in response to your formal complaint, which was received on August 10, 2000. You have alleged that the Town of Trafalgar ("Town") has violated the Indiana Access to Public Records Act ("APRA,") Indiana Code chapter 5-14-3, by failing to respond to a public records request and by charging excessive copying fees. Ms. Sonya Krejci, Clerk-Treasurer, responded in writing to your complaint in a letter faxed to this Office today.¹ A copy of her response is enclosed for your reference.

It is my opinion that the Town did not fail to respond within a timely manner under the APRA to your request on July 21, 2000. Since there is no duty to produce any disclosable public record in that same twenty-four (24) hour period, the Town was only obligated to communicate to you the status of your request, which it did. Furthermore, although the Town is allowed to charge a fee for copying documents, the actual cost of the photocopying as defined by Indiana Code section 5-14-3-8(d) is the appropriate fee for the documents requested and the current per-page copying fee may be excessive.

BACKGROUND

According to your complaint, on July 21, 2000, an oral public records request was made to the Town requesting copies of the following:²

1. Any sewer permits issued for commercial projects since January of 1997.
2. Building permits issued for commercial projects in the last two years.
3. Any paperwork related to the "Green Farm" development.
4. Minutes of town board meetings to bring him up to date since his last request for minutes about one year ago.³

According to your complaint, on July 29, 2000 you checked back with the Town and were told that they needed more time and did not have the requested documents, but that the documents would be ready by noon on August 1, 2000. When you returned to pick the documents on August 1, 2000 you were only

given the town board minutes for March 16 through July 17, 2000. No explanation was given as to why the other documents were not provided. As for the nineteen (19) pages that you did receive you were charged \$.50 per page for a total of \$9.50.

In her response, Ms. Krejci stated that she informed you that she would be unable to get all the documents together at once, but that she would be able to get portions of the documents to you over a period of time. According to Ms. Krejci, she provided the minutes from March of 2000 because she understood those to be the requested minutes. She further stated that when you picked up the minutes on July 26, 2000, you requested that the commercial sewer permits be copied next, and that you were not sure that you needed the other documents but you would call if they were needed. On July 31, you came back to the office to pick up the second set of requested documents, but Ms. Krejci was out of the office and Cindi Martin, Utility Clerk, was unaware that the documents were ready for your pickup. Finally, she stated that you have not called or been to the office since that time, but the copies of all the commercial sewer permits since 1997 were mailed to your attorney John Emry on August 15, 2000.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code § 5-14-3-1. The Town is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Town during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a)

Responding to Your Public Records Request

It is the responsibility of the public agency to respond to requests for public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. While this response has not been defined under the APRA, what is contemplated is a communication to the requestor. For example, a public agency may respond that the request has been received, whether there are any records that will be produced, that the records requested are confidential or otherwise nondisclosable, or that the public agency needs more time to compile the records requested. A response may also provide the records requested, or notify the requestor that the public records requested are available for his or her inspection.

A public agency is required to make a response to an oral request within twenty-four (24) hours after it is received; the failure to do so constitutes a denial under the APRA. Ind. Code § 5-14-3-9(a). Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code § 5-14-3-9(d).

A response to a public records request that is made orally, even a denial, may be made orally

under the APRA. Ind. Code §5-14-3-9(c). There is no provision within the APRA that requires a public agency to produce public records at the time requested or within any particular time period, although many public agencies do so on a routine basis.

According to your own admission, on July 21, 2000 you were promised the requested documents. Since there is no provision that requires a public agency to produce public records at the time the request is made, Ms. Krejci was correct in agreeing to provide the documents and then providing them to you as soon as they were able to be reproduced. Therefore, it is my opinion that the Town did not fail to respond in a timely manner to your oral request of July 21, 2000.

Copying Fees

For a public agency that is not a state agency, the fiscal body of the public agency, or the governing body, if there is no fiscal body, shall establish a fee schedule for copying documents. Ind. Code § 5-14-3-8(d). The fee may not exceed the actual cost of copying the document. Ind. Code § 5-14-3-8(d). "Actual cost" means the cost of paper and the per-page cost for use of copying or facsimile equipment and does not include labor costs and overhead costs.

While the APRA does not set a specific amount or range of acceptable amounts for the per-page copying fee, it is not likely that the cost of a piece of paper plus the per-page cost of the use of a copying machine will approach \$0.50 per page. For this reason, the \$0.50 per page that you paid appears to exceed the standards for "actual cost" under Indiana code § 5-14-3-8(d). The burden is on the fiscal body for the Town to address this matter and Ms. Krejci has indicated in her response to your complaint that she will inform the Town Council of this problem.

CONCLUSION

It is my opinion that the Town of Trafalgar did not fail to respond within the time period required under Indiana Code § 5-14-3-9(a) with respect to your public records request of July 21, 2000. Furthermore, it is my opinion that the \$0.50 per page copy fee you paid appears to exceed the statutory standard for "actual cost," which is defined at Indiana Code § 5-14-3-8(d). It is the responsibility of the Trafalgar Town Council to take appropriate action to set the copying fee as prescribed by the Access to Public Records Act.

Sincerely,

Anne Mullin O'Connor

Enclosure cc: Ms. Sonya Krejci, Clerk-Treasurer
Town of Trafalgar

¹ Apparently, Ms. Krejci had faxed this document on a prior occasion, but it was not received by the Office.

² In her response, Ms. Krejci also listed as a requested document "[a]ny and all IDEM and Town correspondence or anything else that even mentions anything from IDEM, since the beginning of time." She did not list building permits issued in the last two years.

³ Ms. Krejci, in her response, lists "[m]inutes of all Town Council and Planning Commission minutes since March 2000 to the present."
