

January 17, 2001

Mr. Thomas S. Frailey  
Indiana, Illinois, Iowa Foundation for Fair Contracting  
600 South Weber Road, Suite 10  
Romeoville, IL 60446

Re: *Advisory Opinion 01-FC-01*; ;Alleged Violation of the Access to Public Records Act by the Town of Bourbon.

Dear Mr. Frailey:

This is in response to your formal complaint, which was received on January 4, 2001. You have alleged that the Town of Bourbon ("Town") violated the Indiana Access to Public Records Act ("APRA") Indiana Code chapter 5-14-3. Specifically, you claim that the Town is obligated to collect certified payrolls from contractors under Indiana Code chapter 5-16-7 and make that payroll information available to you under the APRA. Mr. Ronald D. Gifford, attorney for the Town, responded in writing to your complaint. A copy of his response is enclosed.

If certified payroll records are received or maintained by the Town, it is my opinion that these payroll records would be disclosable public records. There is no requirement under Indiana Code chapter 5-16-7 for the Town to collect certified payroll information, therefore, the failure to collect and provide copies of this information in response to your request is not a violation of the APRA.

### BACKGROUND

According to your complaint, on December 14, 2000 you made a verbal request, following up on your November 1, 2000 written request to the Town for copies of certified payroll information. Specifically, you requested copies of the weekly, certified payroll information submitted to the Town from the contractor who performs the work on the west side sewer project.<sup>1</sup> On December 14, 2000 you claim to have had a telephone conversation with Mr. Gifford who agreed to provide the schedule of wages required under Indiana Code section 5-16-7-2 and the certified payroll information. In a letter dated December 15, 2000, however, Mr. Gifford informed you that it was his opinion that there is no requirement under Indiana law that a certified payroll information be filed with the Town. Consequently, Mr. Gifford stated that that he would advise the Town Council that they should not require the submission of such information by the contractor. You claim that the position of the Town on this issue conflicts with the policy of the Indiana Open Door Law that people are to be fully informed about the affairs of government.<sup>2</sup> You then filed your formal complaint with this Office.

In his response to your formal complaint, Mr. Gifford stated that the sewer project in question

does not involve federal funds, but rather Build Indiana funds so he is not aware of any federal laws imposing a requirement to collect certified payroll information from the sewer contractor. He confirmed that Indiana Code chapter 5-16-7 does apply to the project and that the wage schedule was set in accordance with this statute. The sewer contractor will provide the schedule of wages to the Town as required under Indiana Code section 5-16-7-2 before performing any work on the project, but it is his opinion that there is no requirement that the contractor provide certified payroll information to the Town. While Indiana Code section 5-16-7-3 does make it a Class B misdemeanor to fail to comply with a wage schedule adopted under Indiana Code chapter 5-16-7, Mr. Gifford points out that there is no affirmative duty to ask the contractor to submit certified payroll information to the Town. Mr. Gifford also denied your claim that he made a verbal agreement by telephone to provide the payroll information to you. Mr. Gifford did agree that this information would be subject to the APRA if in fact the Town were to collect it. He further contends that the failure of the Town to require the filing of such information is neither a violation of the APRA or the Indiana Open Door Law as alleged in your complaint.

## ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an 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.

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). A public record is defined as follows:

*any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.*

Indiana Code § 5-14-3-2. [Emphasis added.] The general rule, therefore, is that a public agency is required to permit inspection and copying of public records under the APRA unless there is a valid statutory exception to disclosure. As an example, after the contractor submits the wage schedule required under Indiana Code section 5-16-7-2 to the Town, that document is a public record subject to the APRA. For this reason, the Town has agreed that it will honor your request for a copy of it under the APRA.

The definition of "public record" however, does not address whether any particular record must be collected by a public agency. You claim that the APRA and Indiana Code section 5-16-7-3 require the Town to collect certified weekly payroll information from the contractor. This claim is based upon

the language of Indiana Code section 5-16-7-3, which provides that:

(a) contractor or subcontractor who knowingly fails to pay the rate of wages determined under this chapter commits a Class B misdemeanor. If the contractor or subcontractor has committed a prior offense under this section, the contract on which the instant offense occurred shall be forfeited and the contractor or subcontractor may not receive any further payment on the contract nor may the state or the municipal corporation making the contract make any further payments on the contract from any of the funds under its charge or control.

Based upon the plain language of this statutory provision, I agree with Mr. Gifford that the Town is not required to collect certified payroll information under Indiana Code section 5-16-7-3 or the APRA. It is my opinion that Indiana Code section 5-16-7-3 does not require a public agency to collect, nor does it require a contractor to submit, certified payroll information. Similarly, the APRA does not impose any requirement for the Town to collect certified payroll information. It is also my opinion that if the Town did choose to collect certified payroll information, that information would be a public record under the APRA that would be subject to disclosure unless the Town could cite to a valid statutory exception to disclosure under Indiana Code section 5-14-3-4.

## CONCLUSION

It is my opinion that the Town of Bourbon did not violate the Access to Public Records Act by failing to require a contractor to submit certified payroll information to the Town. If such certified payroll information were submitted to the Town, however, it is my opinion that this information would be a disclosable public record unless the Town could cite to a valid statutory exception to disclosure under Indiana Code section 5-14-3-4.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: The Honorable Jacqueline Murphy  
Mr. Ronald Gifford

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<sup>1</sup> You also provided the Town with a copy of the federal form WH-347 for reporting payroll. This form, even by its own instructions, is clearly a voluntary form that may be used by contractors and

subcontractors required by their federal or federally-aided construction-type contracts and subcontracts to submit weekly payrolls.

<sup>2</sup> The Open Door Law applies to meetings of governing bodies of public agencies. Given the nature of your complaint, it appears that you meant to refer to the public policy statement of the APRA, which provides that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees, whose duty it is to provide the information." Ind. Code §5-14-3-1.