

March 31, 2006

Sent Via Facsimile

Jon C. Seidel
Post-Tribune
902 Calumet Avenue, Suite 4
Valparaiso, IN 46383

Re: Formal Complaint 06-FC-47; Alleged Violation of the Access to Public Records Act by the Portage Township (Porter County) Trustee

Dear Mr. Seidel:

This is in response to your formal complaint alleging that the Portage Township Trustee (“Trustee”) violated the Access to Public Records Act (“APRA”) by charging you an excessive fee for a copy of a township record. I find that the Trustee violated the Access to Public Records Act.

BACKGROUND

Around February 9, 2006, you verbally requested of Trustee Jack Jent records accounting for money that Portage Township had received through a lease agreement for property of the township at 326 W. 700 N. in Valparaiso. He denied your request. On February 10, 2006, you sent a written request to one of Jent’s attorneys, Ken Elwood. In your written request, you specify the records you sought: a copy of the lease, redacted for identifying information about the occupants of the property to “make the inspection of this lease possible” and any documents “such as receipts, claim forms, or budgets noting the receipt of this money by Portage Township and noting what fund this money was deposited into.” Again, you stated in your request that the agency could redact identifying information about the occupants to allow the records to be inspected.

Mr. Elwood responded orally that there would be a cost associated with providing the documents. You asked another of Mr. Jent’s attorneys, Scott McClure, to send you that response

in writing. The February 22 letter from Mr. McClure recited that the Post-Tribune would be charged \$252.50 for 1.5 hours of work to “edit or delete identifiable information” in the documents.

You contacted my office and spoke with staff attorney April Schultheis, who advised you in writing that an agency may charge the direct cost to reprogram a computer, but otherwise the agency would be governed by IC 5-14-3-8. You filed this formal complaint on March 1, 2006, alleging unwarranted fees have been charged.

I sent a copy of your complaint to the Mr. Jent. Attorney Scott McClure responded by letter, a copy of which is enclosed for your reference. Mr. McClure cited Indiana Code 12-20-7-5 for the position of the Trustee. This provision implicitly states that information that is received through the use of a consent form described in IC 12-20-7-1 is confidential. Mr. McClure declares that “Mr. Seidel’s most recent request contains all the information obtained through the above referenced consent.” He also maintains that the fee represents time for an attorney to redact the documents to remove identifying information, undertaken on Mr. Seidel’s behalf “in order to provide as much information as possible.” I contacted Mr. McClure by telephone to ask for clarification regarding whether the property was township property and whether the property was provided to the lessee as part of township assistance. He confirmed these facts. In addition, I inquired how a lease and financial records were confidential under IC 12-20-7 as information received through the use of a consent form. Mr. McClure informed me that no written lease actually exists.

ANALYSIS

The policy of the APRA is stated in the preamble to the law:

It is the public policy of the state 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. Providing persons with the 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.

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). If a request is made orally, either in person or by telephone, a public agency may deny the request orally. If an oral request that has been denied is renewed in writing, a public agency may deny the request if: 1) the denial is in writing or by facsimile, and the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and 2) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c). If a public record contains disclosable and nondisclosable information, the public agency is required to separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a).

A public agency may charge a fee for a copy of a record. 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. The fee may not exceed the actual cost of copying, and the fee must be uniform to all purchasers. "Actual cost" means the cost of paper and the per-page cost for use of the copying equipment. IC 5-14-3-8(d). The fee for the actual cost of the copies does not include labor costs or overhead costs. IC 5-14-3-8(d). A public agency may not charge any fee under the APRA to inspect a public record or to search for, examine, or review a record to determine whether the record may be disclosed. IC 5-14-3-8(b).

A public agency is required to deny a request for a record if the record is declared confidential by state statute. IC 5-14-3-4(a)(1). Indiana Code 12-20-7 provides that each applicant and adult member of the household seeking township assistance consent to a disclosure and release of information about the applicant and applicant's household before township assistance may be provided by the township trustee. IC 12-20-7-1. The types of information being solicited include 1) countable income; 2) countable assets; 3) wasted resources; 4) relatives capable of providing assistance; 5) past or present employment; 6) pending claims or causes of action; 7) a medical condition if relevant to work or workfare requirements; and 8) any other information required by law. IC 12-20-7-1(a)(2). Among the agencies or persons that are required to provide information to the trustee are the county office of the division of family and children, the department of employment and training services, the employer of the applicant, and a person holding title to assets of the applicant. IC 12-20-7-2, -2.5, -3, -3.5.

Information that is received through the use of a consent form described in IC 12-20-7-1 and that is not a public record open to inspection and copying under any statute may be used only in connection with the administration of the township trustee's township assistance program, and the administration of public assistance programs that are administered by the division of family and children and county offices. IC 12-20-7-5. A township trustee and other specified state agencies who knowingly disclose or use information that is obtained through the use of a consent form described in section 1, except as authorized by the chapter, commits a Class A misdemeanor. IC 12-20-7-6.

I interpret IC 12-20-7 to make confidential information that is obtained by the trustee through the use of the consent form. Hence, I agree that this statute makes certain information contained in the records of the trustee confidential by state statute, and thus nondisclosable under IC 5-14-3-4(a)(1).

Manifestly, information or records maintained by the trustee that are *not* received through the use of a consent form are *not* declared confidential under IC 12-20-7. The Trustee, through Mr. McClure, told me that your request "contains all the information obtained through the consent" but does not explain how a lease agreement (if one exists) and the financial records showing how the trustee accounted for lease payments was obtained through use of the consent form. Rather, in my opinion, these records are created by the trustee in furtherance of township assistance.

Even if these records contain information that *is* received through use of the consent form, such as current income of the applicant, that information, classified as confidential under

IC 12-20-7, is required to be separated, and the remainder of the record disclosed. IC 5-14-3-6(a).

The Trustee's position is that he may exercise discretion with respect to the records you seek, and as such, he is allowed to charge a fee that is not provided for in the APRA, since he is not required to give you the record. I do not agree with this premise. If records or parts of records are classified as confidential, a public agency may not exercise discretion to disclose it or not. Rather, a public agency may not disclose a confidential record. If the record is not subject to an exemption, it is required to be disclosed. IC 5-14-3-3(a). Any fee charged for a disclosable record may only be the actual cost of copying. Therefore, the fee you were assessed for the labor to redact the record is not permitted under the APRA.

Moreover, the Trustee failed to respond properly to deny the written request for a record. No written denial was issued that stated the basis for the denial with citation to IC 12-20-7-5 and IC 5-14-3-4(a)(1). This was a violation of the Access to Public Records Act.

A public agency bears the burden of showing that the record comes within the exception claimed by the public agency. IC 5-14-3-1; IC 5-14-3-9(f). It is my opinion that the Trustee has not sustained his burden to show that the records you requested are declared confidential under IC 12-20-7.

CONCLUSION

For the foregoing reasons, I find that the Portage Township Trustee denied you the record regarding the lease and financial records without citing the legal basis for its denial, that the Trustee has not sustained his burden to show that the records you requested are confidential under state statute, and that the Trustee charged you an excessive fee that is not provided for in the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Scott McClure