

April 26, 2006

Judy Whitaker
P.O. Box 487
Cloverdale, IN 46120

Re: Formal Complaint 06-FC-58; Alleged Violation of the Access to Public Records Act by the Cloverdale Town Council

Dear Ms. Whitaker:

This is in response to your formal complaint alleging that the Cloverdale Town Council (“Council”) violated the Access to Public Records Act by refusing to respond to your March 16 request. I find that the Council did not violate the Access to Public Records Act.

BACKGROUND

You filed your formal complaint against the Council on March 27, 2006. You are a member of the Council. You allege that on March 6, you wrote the Town of Cloverdale, attention Don Sublett, President of the Council, requesting the names of the insurance companies who challenged the Town Fire Department’s ISO rating. Mr. Sublett had written a letter to the Fire Chief on March 6 stating that “the State Fire Marshal has had numerous calls regarding the recent ISO rating. The rating has also been challenged by insurance companies.”

In your March 6 letter to Mr. Sublett, you refer to the February 28 letter from Mr. Sublett to the Fire Chief. You then requested “the documentation and/or communication that supports this statement made by the President of the Council. This documentation should include the names of agents (as well as the name of their insurance company) who challenged the Town’s Fire Department rating of 5.”

Following this request, Mr. Sublett wrote to you on March 8 to inform you that “The ISO rating of “5” was questioned by Bright and Williamson Insurance. The communication was by telephone. I contacted them and they said the national database for the Cloverdale town fire

department had not been updated! The rating was so new. Insurance companies access this database to determine their customer's ISO rating. I hope this answers your request."

In response to this information, you wrote to Mr. Sublett on March 16. In part, you wrote: "You provided me with information on one insurance company but no other company was named...Your indication in your letter to Chief Cassida was more than one company was challenging. I requested of you in a March 6, 2006 communication the names of the 'other' companies. I have yet to receive that information. Please let me know who they were and provide that to me in writing." You now allege that the Town Council has not responded to your March 16 request, either written or verbally; hence, you allege a denial of access under the APRA.

I sent a copy of the complaint to the Town, to the attention of Mr. Sublett. Mr. Sublett wrote the April 1, 2006 letter that I enclose for your reference. In it, he stated that a Mr. Roger Johnson of the State Fire Marshal's office called Mr. Sublett and told him that he had received many complaints about the ISO rating of 5. He also told Mr. Sublett that some insurance companies were questioning the '5' rating. He did not provide Mr. Sublett with names of persons or names of insurance companies. Mr. Sublett further stated that when you requested documentation for insurance company names and agents, he did not have any names or agents from Mr. Roger Johnson. However, in order to appease you, Mr. Sublett was able to obtain one name. It was the one name that Mr. Sublett reported to you on March 8, 2006.

I subsequently spoke to you by telephone to ascertain whether you had asked the Cloverdale Clerk-Treasurer Patti Truax for a copy of any responsive records. You indicated that you had not, but upon my suggestion, requested any responsive records from Ms. Truax. Ms. Truax told you that she had no responsive records.

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 records via U.S. Mail or facsimile, the public agency is required to respond within seven (7) days, or the request is deemed denied. A request for a record must identify the record with reasonable particularity. IC 5-14-3-3(a). The APRA does not require that a public official disclose information that is not contained in a public record. The APRA requires only that an agency make available for inspection and copying its existing public records. "Public record" is any document or other material that is created, received, retained, maintained, or filed by or with a public agency. IC 5-14-3-2(m). A town clerk-treasurer is required by statute to maintain custody of the town seal and the records of the legislative body. IC 36-5-6-6(a)(7). The Council is the legislative body for the Town. IC 36-5-2-2.

Although you made your March 6 request for records in the name of the Town of Cloverdale, you directed your request to the President of the Town Council. You state that you sent the request to Mr. Sublett because it was his letter to the Fire Chief that caused you to request the information. However, as stated above, your request for a record should have been

directed to the keeper of records of the Town Council, the Clerk Treasurer. In fact, the Clerk Treasurer has informed you that no records responsive to your request have been filed with the Town. To the extent that Mr. Sublett's response was on behalf of the Town, it was timely under the APRA, because it was sent within seven days of his receipt of your letter.

Mr. Sublett's March 8 letter gave you information about one insurance company that had questioned the rating. Mr. Sublett did not provide supporting documentation of the insurance companies that questioned the ISO rating in this March 8 letter. Yet, this lack of supporting documentation did not cause you to question Mr. Sublett's denial of a record. Rather, you challenged his assertion in the March 8 letter that only one insurance company had questioned the rating because his letter to the Fire Chief had referred to insurance companies in the plural. Hence, your March 16 request to Mr. Sublett asked that he "let you know who they were and provide that to me in writing." This clearly was a request that Mr. Sublett give you information that you believed he was in possession of. Had you requested documents under the APRA, you would not have asked him to provide the information to you in writing, since an APRA request presupposes that a person is seeking records. Your request clearly anticipates that Mr. Sublett would create written documentation containing the specific information that you seek. Your direction in the earlier letter that "this documentation should include the names of agents as well as their insurance companies" further demonstrates that you were requesting that Mr. Sublett create a record rather than disclose to you an already existing record. Hence, your complaint alleging a denial of access to records does not raise a denial of access to records maintained by the Town, only information in the possession of one member of the Council. As such, your complaint under the APRA is without merit.

This conclusion would be true even if you were a member of the public seeking confirmation from Mr. Sublett or any other member of the Council for written confirmation of facts that underlie the basis for public statements or writings. The APRA simply does not require that a public official of a public agency create a document to satisfy a request for information or a record. This conclusion does not question your right as a member of the Council for records of the Town.

In my opinion, Mr. Sublett reasonably believed that you were asking him a question and sought information as a fellow Council member. Although my office has recommended that public agencies clearly state whether a record exists or not, Mr. Sublett's response to your request for information appeared to acknowledge that no record already exists, and Mr. Sublett attempted to clarify what information (not record) he possessed that would answer your question.

In the future, I recommend that you state with reasonable particularity what record you are seeking, that you make your request to the keeper of the Town's records, and that the Town, in turn, respond whether any record exists or not. I also recommend that the Town state clearly whether any responsive records exist. The Town may, but is not required to under the APRA, create a record that will be responsive to a request for information.

CONCLUSION

For the foregoing reasons, I find that the Town Council did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Don Sublett