

April 30, 2007

Emily Paavola
Baker & Daniels LLP
300 North Meridian St. Suite 2700
Indianapolis, IN 46204

Re: Formal Complaint 07-FC-85; Alleged Violation of the Access to Public Records Act by the Gregg Township Trustee and Gregg Township Fire Department

Dear Ms. Paavola:

This is in response to your formal complaint alleging that the Gregg Township Trustee (“Trustee”) and Gregg Township Fire Department (“Fire Department”) violated the Access to Public Records Act by denying access to certain records.

BACKGROUND

On behalf of Gary and Sonjia Graf, on January 26, 2007, you submitted a request to the Trustee for records. The Grafts had been attempting to secure certain documents in preparation for a hearing on the township’s 2007 emergency loan request that was scheduled for March 9, 2007. Although the Trustee had agreed to produce documents, the following documents have not been produced:

- Copies of the documents showing the repayment plans for the proposed emergency loans for services for the years 2003, 2004, 2005, 2006, and 2007.
- Bank statements for the Trustee’s savings account at Citizen’s Bank for the months of January 2005, September 2006, January 2007, and February 2007. The Trustee produced illegible and/or incomplete copies of statements for the Trustee’s checking account at Citizen’s Bank for May 2005, October 2005, November 2005, December 2005, May 2006, October 2006, November 2006, and December 2006.
- Redacted copies of billing statements received from Gregg Township’s accountants and attorneys and any other consultants, including Mr. Eric Reedy who holds himself out as the Trustee’s financial advisor.
- Minutes of Gregg Township Board meetings for May 2006, June 2006, July 2006, August 2006, September, 2006, October 2006, November, 2006, December 2006, January 2007, and February 2007.
- All contracts, including addenda, with the Fire Department for the years 2002 through 2007.
- The check and bank records relating to the Trustee’s movement of money, in the amount of approximately \$33,000, from the township budget to the Fire Department sometime during the month of January 2007.

You allege that the above documents were not produced for the hearing, nor have they been produced as of the filing of your complaint, on April 2. The Trustee has told the Grafts that fire contracts do not exist, although the emergency loan request is predicated on the need to supplement the funding for the fire contract. This in spite of the fact that over the past four years, the contract amount as reported by the Trustee ranged from \$100,000 in 2003 to \$452,568 for 2007. The contracts either did not exist or are verbal agreements. In addition, the Grafts have received a copy of an “Addendum to Fire Protection Agreement for Gregg Township” that is dated November 10, 2005 and refers to an Agreement “in effect” for 2005. This undermines any claim that a 2005 contract does not exist or is verbal in nature. Moreover, Sonjia Graf was present at a meeting during which the Trustee made reference to a 2007 Contract.

With respect to the Grafts’ request to the Fire Department, the Fire Department attorney responded that many of the requests were not reasonably specific, and that some of the requests would have to be reworded to be more accurate. After the Grafts complied with this request in a February 20 letter, the Fire Department did not respond in writing. However, the Fire Department agreed to produce the requested documents in advance of the March 9 hearing. Some of the documents were produced on March 6, but the following have not been received:

- Copies of the Fire Department’s financial records, including balance sheets, financial statements, all statements of cash flow, general ledgers, accounts receivable, and accounts payable.
- Bank statements from all accounts for the years 2002 through 2007. The documents that have been produced under this category indicate that the Fire Department has more than one bank account. In addition, there were missing statements for November 2001, December 2001, all of 2003, January 2007 and February 2007 for the bank account for which the Fire Department did disclose documents. Further, all of the bank statements provided for 2002 are illegible.
- A budget estimate for the year 2003. The budget estimate for the year 2002 is illegible.
- All documents referred to or relied upon by the Fire Department in preparing its federal tax returns for the years 2001 through 2006. The Fire Department produced incomplete grant materials responsive to this request, but nothing else.
- Documents reflecting any liability of the Fire Department.
- Documents related to, supporting or referencing emergency loan and/or anticipatory loan requests for the years 2002 through 2007. In particular, the Fire Department has stressed the need for past and present loan requests to improve staffing and their response time, yet the Fire Department has not produced any documents concerning response time for the years 2002 through 2007.
- Fire contracts for 2005, 2006, and 2007.
- Documents demonstrating salaries, benefits, or other compensation paid to employees for the years 2002 through 2007.

The Trustee and Fire Department have produced no additional records following the March 9 hearing. The Grafts filed this formal complaint and requested priority status because the documents were sought for the purpose of presenting them in a proceeding before another public agency, the Department of Local Government Finance. I denied the request for priority because

the hearing for which the documents were to be presented had occurred before the complaint was filed. Therefore, I am issuing this opinion within 30 days after the complaint was filed.

In response to the complaint, the attorney for the Trustee and Fire Department, Mr. Stephen Buschmann, filed the enclosed response. For the Trustee, the records requested were compiled in the time that she could devote while performing other duties as Trustee. The Trustee has no employees, and is only a part-time Trustee. The Secretary of the township board has consistently refused to provide the Trustee with copies of the minutes of board meetings. Also, the current Trustee Carole Snyder has only served since early 2005, and the previous trustees have not provided many of their records to Ms. Snyder.

Mr. Buschmann declared that the Access to Public Records Act is not a substitute for trial discovery, which permits interrogatories, requests for admission, depositions, etc. The access laws do not contemplate nor authorize a citizen to require a government entity to answer questions or to quantify the importance or relevance of various records. Prior to filing their complaint, neither the Grafts nor their counsel have attempted to contact the Trustee or her counsel to resolve these issues. Had that occurred, the Trustee would be aware of which parts of the bank records the Grafts claim were illegible. The Trustee would have made the Grafts aware that many of the records do not exist and that the township board does not meet every month.

With respect to the specific allegations of denial of access directed to the Trustee, Mr. Buschmann stated:

- The repayment plans were produced with the filing of the emergency loan request, in the “Hearing Information Sheets.”
- Because the original request was January 26, the January and February 2007 bank statements were not public records filed with the Trustee. With the exception of the January 2005 statement, the remainder of the bank statements the Grafts stated were missing were actually produced on March 6 and March 8. The Grafts do not specify which statements were illegible and which were incomplete. To work in good faith, the township has mailed a second set of copies of the above listed bank statements.
- The Trustee’s records with respect to consultants and attorney billing statements were incomplete due to transition issues, so she has asked the respective consultants and law firm to provide their billing statements. Those copies have now been provided to Ms. Paavola.
- The Grafts complain about various board meeting minutes. The January 26 request predated any February 2007 meeting; hence, it cannot be a violation to not produce minutes for meetings yet to be held. There are no meeting minutes for May, June, July, August, October, November and December 2006. Ms. Lela Quillen, board secretary, has refused to provide the Trustee with minutes of the September 2006 meeting. Minutes of the January 2, 2007 and January 18, 2007 meetings which were not previously provided have now been provided.
- All existing fire contracts were produced on February 13, 2007. Mr. Buschmann states: “There have been oral discussions between the township and the Fire

Department, but there are no written contracts, other than those provided on February 13, 2007.” (Mr. Buschmann does not specify what contracts these were.)

- With respect to the movement of \$33,000 from the Township to the Fire Department, in January 2007, the township made “a budgetary transfer of \$33,000. There was no movement of money within the bank accounts, therefore no bank records exist concerning the action.”

The Fire Department states that your requests have been fulfilled at other times, and this request is largely a repetition of prior requests made to the Fire Department. Many of the records were scanned on a disk and provided by the law firm of Barnes & Thornburg. Mr. Buschmann has reviewed that CD and found that many of the claimed omissions are contained on the disk.

- All the financial statements were produced that the Fire Department maintains. This included the bank statements and general ledgers. The Fire Department does not maintain the other financial documents the Grafts requested; hence, that is why they were not produced.
- The 2001 bank statements were not produced because they were not requested in the January 26 request. In addition, the 2007 bank statements had not been generated by that date. After review of the CD, counsel found that the 2003 bank statements *are* on the disk. Further, the 2002 bank statements are legible. All requested records have been produced.
- As with the bank statements, the CD revealed that the documents showing budget estimates you allege are missing are on the CD and others are legible.
- The documents relied on to prepare tax returns would be the same bank statements and other documents already produced. Further, the accountant decides what documents are needed to prepare the return. A public records request does not require the Fire Department to determine which specific record the accountant used for each return.
- With respect to the request for all liabilities of the Fire Department, all financial records were provided to the Grafts. There are no ledgers showing liabilities; therefore, any responsive records have been produced. Any other document that the Grafts intend to request should be stated with particularity.
- All run logs have been produced to the Grafts. The Fire Department does not keep records that specifically show response times. However, the Fire Department maintains information in a patented software program, Firehouse, which could be used to create such a record. The Fire Department will make an effort to “create such records from verifiably accurate data.”
- All records regarding contracts with the Fire Department have been produced, including all those between the Fire Department and the Township.
- Some of the documents showing salaries of the Fire Department employees have been produced in the 2002 and 2003 ledgers. From 2004 forward, the records are in the possession of the Fire Department’s payroll services. The Fire Department has requested copies of those records and will produce them as soon as they are obtained.

The records have been produced within a reasonable timeframe, and any allegedly illegible documents could have been resolved with a telephone call to the township or their counsel.

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). “Public record” is any material that is “created, received, retained, maintained, or filed by or with a public agency.” IC 5-14-3-2(m). A request for a record must identify the record with reasonable particularity. IC 5-14-3-3(a). Records should be produced within a reasonable time, in the absence of any specific timeframe set forth in the APRA. A public agency shall regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 5-14-3-7(a). Section 7 does not operate to deny to any person the rights secured by section 3 of the APRA. IC 5-14-3-7(c).

If a public agency has no record that is responsive to a particular request, this office has counseled the public agency to clearly state that it has no responsive record. In the spirit of openness, this office advises that if a request is not reasonably particular, the public agency should contact the requester to seek clarification regarding what record is requested. Since “public record” includes only then-existing records of an agency, to the extent that specific records have not yet been created by or received by a public agency, it is not a denial of access for the agency to not produce the records. Also, a public agency is not required to supplement its production of records when records that had been requested are later created or filed with the public agency.

Trustee Records

With respect to the specific allegations of denial, I find that the Trustee did fail to provide you the January 2005 bank statement although you had specifically requested it. The Trustee provides no explanation for this omission. I find that the Trustee denied the January 2005 bank statements to the Grafts. It is not clear in what way the bank statements are illegible. Perhaps the records were rendered illegible in the scanning process. I agree that the Grafts should have contacted the Trustee about this specific problem and requested that it be rectified. The Trustee should have told the Grafts that the Trustee did not have specific meeting minutes, either because they were in the custody and control of the township board, or because they simply didn’t exist because no meetings took place. Communicating these facts may have saved the Trustee the time and expense of responding to the complaint.

From the explanation of Mr. Buschmann who has not provided specific information about what written contracts were produced, it appears that for some years, the Trustee paid for fire services for the township without a written contract or agreement. While this fact may present issues concerning accountability, there is no denial of access where there are no records to produce. I agree that having an addendum to an agreement strongly suggests that there was a written agreement in 2005, but Mr. Buschmann has stated that there was no written contract for 2005. I cannot make findings of fact. If you believe that the Trustee is withholding written

contracts with the Fire Department, or any other record that she claims does not exist, you may file a lawsuit to compel the Trustee to disclose the records, under IC 5-14-3-9(e).

Finally, Mr. Buschmann acknowledges that there was a transfer of \$33,000, but not between bank accounts. Your original request of January 26 was not limited to bank statements: “All documents related or referring to the Trustee’s movement of money, in the amount of approximately \$33,000 from the township budget to the Fire Department sometime during the month of January 2007.” Your complaint stated that you had not received documentation of “the check and bank statement” concerning this transfer. It is not clear whether you received some documentation of the transfer but expected that the documentation would include a bank statement, or whether there is an absence of *any* documentation of a transfer of \$33,000 in the Trustee’s production of records. If the latter, I would recommend to Mr. Buschmann that he produce any and all documentation of the transfer of \$33,000 in January 2007.

When faced with a request that will require that the public agency will have to compile voluminous records, the public agency should apprise the requester when the records will be produced, and produce the records as they become available. The Grafts appear to chiefly complain that the listed records were not provided from January 26 until the filing of the complaint on April 2. I am not convinced that the Trustee provided records in a timely manner. While the Grafts requested numerous documents and their requests covered five years, the records should have been provided sooner than nine weeks from the request.

The response of the Trustee also implied that the Grafts were required to use discovery to obtain the records. The APRA is an independent means by which a requester may get records. Mr. Buschmann implied that questions must be couched as interrogatories or requests for admission, but the Grafts’ January 26 request did not ask any questions. The January 26 letter requested records.

Fire Department Records

I find two issues of concern in the Fire Department’s response to your complaint about its records. First, the run times that Mr. Buschmann implies may be contained in the database are public records of the Fire Department despite being in electronic format. *See* IC 5-14-3-2(m). A public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records if the medium requested is compatible with the agency’s data storage system. IC 5-14-3-3(d). While the Grafts did not specifically request the data from the Firehouse system, the Fire Department should have informed the Grafts of the format in which this information *is* maintained. The Fire Department has stated it will make efforts to supply information about the run times, but it should have done so before your complaint.

Second, documents showing the salaries of Fire Department employees from 2004 forward are apparently in the possession of a vendor. I find that these records should have been produced since they were requested on January 26. As of the April 17 response of the Fire Department, it appears that the Department has requested the information from payroll services

and will provide it “as soon as the records are obtained.” This promise to provide information about salaries and benefits nearly three months after the Grafs’ request without a more specific timeframe is unreasonable. The Fire Department did not explain when the information was requested from the vendor, or what timeframe the vendor expected to have the material available. I strongly recommend that the Fire Department inform you when the records will be available. It is my hope that the records will be forthcoming immediately if they have not already been produced.

Sincerely,

Karen Davis
Public Access Counselor

cc: Stephen Buschmann