

January 28, 2008

Judy Whitaker
62 Diana Street
PO Box 487
Cloverdale, Indiana 46120

Re: Formal Complaint 08-FC-19; 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 the Cloverdale Town Council ("Council") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to the files maintained by the Council's attorney. A copy of the Council's response to your complaint is enclosed for your reference. It is my opinion the Council has not violated the APRA.

BACKGROUND

You were a member of the Cloverdale Town Council until the end of 2007. In your complaint you allege that in the past, Council members have been able to view the Council's legal files maintained by the Council's outside attorney by making an appointment with the attorney, Allen Yackey, and inspecting those files at Mr. Yackey's office under the supervision of his staff. On November 13, 2007, the Council voted to restrict Council members' access to those files because of the risk associated with damage to the files and resulting disorganization when Council members inspected them. On November 24, you asked Mr. Yackey for access to those files. You allege Mr. Yackey indicated the Council would need to vote on the request before you could access the files, and that vote would take place at the next meeting, scheduled for January 8, 2008. You filed this complaint December 28, alleging denial of access. Subsequent to filing the complaint, you sent two additional communications containing a newspaper article as well as letters related to your request.

The Council responded by letter dated January 8 from Mr. Yackey. Mr. Yackey contends this is more of an attorney/client communication issue than a public access issue. Mr. Yackey indicates that as the Council attorney he represents the Council as a whole rather than representing individual Council members. To avoid confusion as it relates to attorney/client

communication rules, Mr. Yackey communicates with the President of the Council regarding Council matters. Mr. Yackey explains that your present request was approached as a client communication request rather than an APRA request, which likely would have resulted in a request for more specificity regarding the records requested. Regarding the policy relating to viewing the Council's legal files, Mr. Yackey indicates that a majority of the Council voted to adopt the current policy primarily because the past policy was leading to disorganization and made it difficult for his office to locate documents necessary to his representation of the Council. Nonetheless, Mr. Yackey contends he has made efforts to address some of your requests and enclosed a related communication.

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." I.C. §5-14-3-1. The Council is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Council during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A "public record" means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2. The Indiana Court of Appeals in *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) extended this definition to include records created for or on behalf of a public agency, as those created by an outside attorney. *Id.* at 1133.

A public agency shall protect public records from loss, alteration, mutilation, or destruction. I.C. §5-14-3-7(a).

Here, you have requested access to the legal files of the Council maintained by the Council's attorney. Pursuant to the *Knightstown Banner* case, those records created for or on behalf of the Council are public records. Many of those records, though, would likely be excepted from disclosure under exceptions listed in I.C. §5-14-3-4 if they were requested by a member of the public through a request for access under the APRA.

It is my understanding, though, that your request is not a request made pursuant to the APRA. While nothing in the APRA requires you to declare your request is made under the APRA, the nature of this request and of the records to which you request access indicates to me this is a request you, as a former member of the Council, are making to the attorney for the Council. As such, this is an attorney/client communication matter and perhaps a matter relating to the Council's internal governance, but it is not an APRA matter. It is my opinion there is no alleged violation of the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion the Council has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Allen Yackey
Donald Sublett, Cloverdale Town Council President