

February 13, 2008

John Davis
204 North Lafayette
Cloverdale, Indiana 46120

Re: Formal Complaint 08-FC-36; Alleged Violation of the Access to Public Records Act by the Town of Cloverdale

Dear Mr. Davis:

This advisory opinion is in response to your formal complaint alleging the Town of Cloverdale (“Town”) violated the Access to Public Records Act (“APRA”)(Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Town’s response to your complaint for your reference. It is my opinion the Town did not violate the APRA.

BACKGROUND

You were a member of the Cloverdale Town Council until January 1, 2008. In your complaint you allege you submitted a request to the Town on December 11, 2007. You requested “copy of the towns [sic] billing documentation of the Attorney, for the Town of Cloverdale.” You further requested “a copy of the minutes or other supporting documentation showing the board action to proceed on the ordinances/resolutions presented to the board for the months of September, October, and November.” Finally, you requested a copy of the “rules and procedures handbook.” You received a response from the Town Council President, Don Sublett, dated December 13. Mr. Sublett indicated that for a copy of the attorney’s billing, meeting minutes, and the handbook you should direct your request to the Town’s Clerk-Treasurer. For email messages you requested, Mr. Sublett indicated you should contact the attorney directly.

You also received a letter from the attorney, Allan Yackey, dated December 12. Mr. Yackey addressed the letter to you as a member of the Council. Mr. Yackey indicated in the letter that he would collect the records responsive to your request. He further indicated that many of the records were covered by the attorney-client privilege and would be provided to you in your capacity as a member of the Council. Mr. Yackey indicated you would need to return the documents when your tenure on the Council was completed. You sent this complaint, alleging denial of access, to my office on January 13, and I received it on January 14.

The Town responded to your complaint by letter dated January 25 from Mr. Yackey. Mr. Yackey contends that your request to him was made as a member of the Council to the Council attorney. As such, this falls outside the APRA. Regarding your position that *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) requires Mr. Yackey to provide you with copies of all of his files related to his representation of the Town, Mr. Yackey argues that an attorney's creation, reception, retention, maintenance or filing of a document does not necessarily make it a public document. Instead, Mr. Yackey argues that *Knightstown Banner* says that placing a record in the possession of an attorney does not shield it from production if it qualifies as a public record.

Regarding your other requests, for records not maintained by Mr. Yackey, the Town contends that your request should have been submitted to the Town Clerk-Treasurer, who is the keeper of the Town's records. The Town contends that as a courtesy Mr. Sublett gave your request to the Clerk-Treasurer. The Clerk-Treasurer contends she received a summarization of your request from Mr. Sublett and that she provided you with the record she could identify from your request, the handbook. Regarding the remainder of the requests, the Clerk-Treasurer could not identify which records you sought.

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 Town 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 Town 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 request for records may be oral or written. I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond to the request within 24 hours of receipt, the request is deemed denied. I.C. § 5-14-3-9(a). A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

Here you delivered the request to Mr. Sublett on December 11. Mr. Yackey responded to your request on December 12, and Mr. Sublett responded on December 13. It is my opinion the response was sent within the time allowed by the APRA. I.C. § 5-14-3-9(a).

While you indicate you intended to make the request as a private citizen, I believe both Mr. Sublett and Mr. Yackey interpreted your request as coming from you in your capacity as a member of the Council. As such, Mr. Sublett sent you directly to Mr. Yackey, the attorney for the entire Council. If Mr. Sublett had interpreted your request as that from a private citizen, I cannot imagine that he would send you directly to the Council's attorney to review the attorney's records; instead I suspect Mr. Sublett would have contacted Mr. Yackey and discussed production of records. I addressed this issue of a Council member's request of the Council attorney in *Opinion of the Public Access Counselor 08-FC-19*. I believe this is the same issue.

As such, it is my opinion that here again 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.

Regarding your remaining requests, your requests were made to the Town Council. Mr. Sublett responded on behalf of the Town Council, indicating your requests should be directed to the Town Clerk-Treasurer. The Town Clerk-Treasurer has a duty to maintain custody of the town seal and the records of the town legislative body. I.C. § 36-5-6-6(a)(7). While the Council had a duty to respond to your request, it did not have a duty to provide the request to the appropriate agency or to compel the agency to respond to the request or produce records pursuant to the request.

Here, Mr. Sublett provided a summary of the request to the Clerk-Treasurer, and she provided you with a copy of the handbook, which I understand is the part of the request for which she could identify responsive records. It is my understanding the remainder of the request either was not communicated to her or did not identify with reasonable particularity records she could locate. It is my suggestion you submit your request to the Clerk-Treasurer, who is responsible for maintaining the records you seek.

CONCLUSION

For the foregoing reasons, it is my opinion the Town did not violate the Access to Public Records Act.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Don Sublett, Cloverdale Town Council President
Allan Yackey