April 28, 2004

Ms. LaDonna Snyder
P.O. Box 236
Dayton, Indiana 47941

Re: Formal Complaint 04-FC-55; Alleged Violations of Access to Public Records Act and Indiana Open Door Law by the Town of Dayton

Dear Ms. Snyder:

This is in response to your formal complaint alleging that the Town of Dayton (Town) violated Indiana's public access laws. Specifically, you allege that the Town violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3-1 *et seq*.), when it failed to produce records responsive to your record request within a reasonable time of receipt of that request. You further allege that the Town violated the Open Door Law (Open Door Law) (IC 5-14-1.5 *et seq*.), by holding an executive session without notice, and by making a decision to explore its options regarding litigation it might pursue against you in a subsequent executive session. The Town's response to your complaint is enclosed for your reference. For the reasons set forth below, I find that the Town did not violate the APRA. I further find that the Town did not violate the Open Door Law by failing to post notice of its March 10, 2004, executive session, but I find that the notice, while in substantial compliance with the law, was nonetheless in technical violation of the notice requirements. Finally, I find that the Town could properly decide to receive further information regarding its options in any litigation it might pursue against you, but any vote the Town Council took in that regard in executive session would violate the Open Door Law's prohibition against taking "final action" in executive sessions.

BACKGROUND

Your complaint alleges that you made two requests for records of the Dayton Town Council and the Dayton Utility Board. You made the first request on March 12, 2004, seeking copies of "minutes, agendas, and correspondence." This request also sought production of an audio tape that was previously requested but not yet tendered.

You demanded production of the responsive records within five days. You made a second request on March 16, 2004, seeking the Clerk-Treasurer's Annual Report and copies of various financial records. You demanded production by March 31, 2004. According to your complaint, the Town responded on March 17, 2004, offering to produce the minutes and agendas, but declining to produce any other responsive documents at that time pending review and advice from counsel. You assert that you were at that time advised that the delay in production was founded on a decision by the Town Council to initiate legal proceedings against you. According to your complaint, the Town Council is alleged to have made this decision in an executive session held on March 15, 2004. Your complaint also alleges that the Town Council held an earlier executive session on March 10, 2004, without giving any notice.

In response to your complaint, the Town provides copies of your written requests, and of its written response dated March 17, 2004. Those documents indicate that you were seeking records related to allegations by the Town that you removed or destroyed public records of the Town when you recently discontinued your tenure as a Town official and/or employee. Copies of your requests further indicate that in addition to seeking existing records, you also requested that the Town create statements making various representations about your conduct and the Town's conduct, and that it tender those statements to you with any other production made in response to your requests. The Town's March 17, 2004, response acknowledged your request for records and indicated the Town's intent to comply with your request to the extent required by law and upon review of the request and responsive documents by the Town's attorney. The response promised further communication regarding the status of your request by March 30, 2004.

You brought the instant complaint before any further response was made. For the sake of completeness, the Town wrote you again on March 26, 2004, stating that it did not have the equipment to make a duplicate record of an audio tape responsive to one of your requests, but inviting you to inspect the tape at a mutually convenient time and by appointment. And, the Town again wrote you on March 31, 2004, acknowledging that it had not produced all of the records responsive to your requests, but stating that counsel was still reviewing the request and any responsive documents toward compliance. In addition, the Town Clerk-Treasurer and the Town attorney contacted this office on multiple occasions during the period that your request was pending to seek guidance on the Town's obligations toward response and production, and with regard to allegations that you removed or destroyed various public records when you parted company with the Town.

The Town's response to your complaint further avers that on March 17, 2004, the Town produced to you all of the agendas, save one, and all of the minutes that were responsive to your request. The agenda that was not produced at that time is alleged to be included with the Town's response to your complaint. The Town denies that it has any correspondence that is responsive to your requests. With regard to the other documents that are the subject of your request, the Town avers that it is still in the process of

identifying and reviewing responsive records for production, and that the process involves redacting non-disclosable information as it relates to individual employees. The Town further asserts that its production has been delayed by the other business of the Town staff including preparation of tax documents.

The Town also responds to your complaints about the March 10, 2004, and March 15, 2004, executive sessions. With regard to the March 10, 2004, executive session, the Town effectively denies your allegation that it failed to post notice of that meeting, and provides with its response to your complaint a copy of the notice that was posted.[1] The notice did not cite to any specific enumerated section of the Open Door Law authorizing an executive session, but instead referred to two items in narrative form, specifically, (1) interviewing and hiring a deputy utility clerk; and (2) discussion of Clerk-Treasurer missing items from town hall. The Town asserts that the notice (styled "Agenda") was posted on March 8, 2004, by 6:00 p.m., and further asserts as evidence in support that your husband contacted Town personnel within an hour and one-half after that notice went up to discuss the item on the notice related to the alleged removal of public records from the Town offices. According to the response, the notice was amended on the following day to delete that item, although a copy of the amended notice is not provided. The Town asserts that only one matter was considered in that March 10, 2004, executive session, that being the receipt of information and interview of prospective applicants for employment pursuant to Indiana Code 5-14-1.5-6.1(b)(5). The Town provides a signed copy of the memorandum of that meeting citing to the specific statutory provision authorizing an executive session for that purpose and certifying that it was the only item addressed at that meeting.

With regard to the March 15, 2004, executive session, the Town provides a copy of the notice of that meeting citing to Indiana Code 5-14-1.5-6.1(b)(2) authorizing an executive session to discuss a strategy with respect to the initiation of litigation.[2] The Town does not provide a copy of any memorandum created for this meeting, but appears to concede that a "vote" was taken at that meeting. Specifically, the Town characterizes the "vote" as a decision to contact this office to determine its rights and responsibilities with regard to the request you had pending at that time and related allegations that you removed or destroyed public records when you left office. While the Town concedes a "vote," it asserts that no vote was required to take the action that was discussed in that executive session.

ANALYSIS

I first address your complaint regarding the delay in production of public records. A public agency that receives a request for records under the APRA has a specified period of time to respond to the request. IC 5-14-3-9. A timely response to the request

[1] The Town identifies this document as "Exhibit 7" to its response, but in what is obviously a clerical error that page is not numbered, and the document that is numbered "Exhibit 7" is actually the memorandum of the March 10, 2004, meeting.
[2] The proper citation would be Indiana Code 5-14-1.5-6.1(b)(2)(B).

does not mean that the public agency must expressly decline to produce or produce the documents that are responsive to the request within the statutorily prescribed time period. Of course, a public agency is free to take either of those actions, but may also comply with its response obligation under the statute by acknowledging receipt of the request and indicating the specific actions the agency is taking toward production.

I decline to find the Town's production (and delay in production) of records untimely under these facts. As noted above, a timely response to a record request does not mean that the public agency must produce the responsive records within that time. Certainly, a requesting party is not entitled to production of records "on demand" or on a specific date set by the requesting party. Rather, production or inspection of the records must occur within a reasonable time of the request. There are practical reasons for such a rule. A public agency may be able to produce public records immediately in some cases, but more time may be required for production when records are not in a central repository, are archived off-site, include information that may require counsel or other review for confidentiality, or include disclosable and nondisclosable information that the public agency must separate for purposes of producing what is disclosable. Other factors related to the business functions of the office and duties of the staff responsible for production may also affect resolution of the question. At bottom, interpreting Indiana Code 5-14-3-3 and 5-14-3-9 to require public agencies to produce records within a specific period of time would have the effect, in some cases, of requiring public agencies to stop activity on all other matters in order to provide the records requested. While providing information is an essential function of public agencies, the APRA also specifically provides that public agencies shall regulate any material interference with the regular functions or duties of their offices. IC 5-14-3-1; IC 5-14-3-7(a).

Here, the Town made at a partial production (agendas and minutes) within five days of having received your first request. This was certainly a reasonable period of time. Moreover, the fact that the Town made a partial production while at the same time acknowledging its continuing review for responsive documents and its continuing obligation toward further production establishes its good faith. The Town has further established the need to review records that are being identified as responsive to your request to separate what is alleged to be non-disclosable material, and avers that this process has been delayed by the absence of staff and the allocation of staff to other vital business functions of the agency. In my opinion these circumstances excuse the alleged delay in production of *all* of the records responsive to your request within the time that your request has been pending (and, more significantly, in the *11 days* between the date you first made your request and the date you signed this complaint).

That said, I offer the following additional observations. First, the Town is obligated to carry the burden of production here, and in keeping with the spirit of the APRA its response to you should identify a date certain for production or further response to advise of the status of the request. The Town should provide a date for further response and/or production. I also note that the Town has failed to produce one document that according to its response exists and is readily available. This document is

the *amended notice* of the March 10, 2004, executive session. The Town should produce this document upon receipt of this opinion. Finally, the Town suggests that some records or portions of records responsive to your request may be withheld from disclosure. The Town is reminded that any nondisclosure must be identified in writing and the written denial must include a citation to the specific statutory exemption authorizing the nondisclosure. IC 5-14-3-9(c)(2)(A). Of course, the Town's failure to produce records it alleges that it does not have (*e.g*., the correspondence requested), and its declination to create a record in response to your request (*e.g*., the statements you request that it create), do not constitute the denial of a public record in violation of the APRA. Neither is the Town's failure to provide you with a copy of the audio tape in violation of the law where it does not have a machine capable of reproducing the requested record and where it has offered to allow you access to the tape for inspection and manual transcription. *See* IC 5-14-3-8(e).

I write next on the Open Door Law issues. You allege that the Town violated the Open Door Law when it held an executive session on March 10, 2004, without posting any notice. Indiana Code 5-14-1.5-5 requires that a governing body post notice of its meetings and that it do so at least 48 hours prior to the meeting. The Town avers that it did so in this case, and it has presented evidence (specifically, the notice) in support. Accordingly, I decline to find that the Town violated the Open Door Law by failing to post notice of its March 10, 2004, meeting. That said, and while you do not challenge the *content* of the notice, I note that it fails to cite to the specific enumerated provisions of the statutory section authorizing executive sessions as required by Indiana Code 5-14-1.5-6.1(d). That statute requires that "[p]ublic notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection [6.1] (b)." The notice at issue did not cite to the code section, but only referred to the subject matter in a narrative form. While the omission of the statutory citation was certainly a "technical violation" of the statute, the narrative in the notice was in my opinion sufficiently specific to be in substantial compliance with the law. *Cf. Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind. Ct. App. 1998); *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. Ct. App 1988).

You also allege that the March 15, 2004, executive session was an illegal meeting because the Town Council made a decision in that meeting. Indeed, the Town met on that date to discuss strategy with regard to the initiation of litigation against you for alleged improprieties, and concedes that it decided at that meeting to confer with this office regarding its rights and responsibilities concerning missing records. The Town itself characterizes this decision as encompassing a "vote," although no memorandum of the meeting is provided.

The intent and purpose of the Open Door Law is that "the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed." Ind. Code § 5-14-1.5-1. The exception to the general rule that a meeting of the governing body must be open to the public is an

executive session. IC 5-14-1.5-6.1. An "executive session" is defined as a meeting "from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." IC 5-14-1.5-2(f). The Open Door Law sets forth the limited bases pursuant to which a governing body may hold an executive session, and includes among them where the meeting is for discussion of strategy with respect to the initiation or litigation or litigation that is either pending or that has been threatened in writing. IC 5-14-1.5-6.1(b)(2)(B).

You assert that the Town violated the Open Door Law in that it made a decision in an executive session noticed to discuss strategy with regard to the initiation of litigation. If the only "decision" the Town made was to further investigate and receive information regarding its rights concerning any litigation it might bring against you or refer to other authorities for the alleged destruction of public records, I would find no violation. Such a "decision" – to investigate or not investigate rather than to initiate or not initiate litigation – is not in my opinion improper "official action" in violation of the executive session provisions of the Open Door Law. While "[o]fficial action" is defined to include activities short of taking final action, such as receiving information, making recommendations, deliberating, establishing policy, and making decisions, the exceptions permitting executive sessions anticipate and expressly allow various of these activities. *See, e.g.*, IC 5-14-1.5-6.1(b)(2)(B) (for *discussion* of strategy); IC 5-14-1.5-6.1(b)(5) (to *receive information*); IC 5-14-1.5-6.1(b)(6)(B) (to *discuss, before a determination*); *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001), *transfer denied* (2002) ("The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public.").

The Town's response, while characterizing the decision to contact this office as including and following a "vote," was in the nature of a proper discussion of strategy. Still, the Town concedes a "vote." However necessary or unnecessary that was to facilitate the governing body's further discussion on the issue of litigation, it was nonetheless "final action" as that term is defined by the plain language of the Open Door Law. *See* IC 5-14-1.5-2(g) (Final action means "a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order"). If the Town Council took a vote on any motion or proposal in an executive session, that action would violate the Open Door Law.

CONCLUSION

For the reasons set forth above, I find that the Town did not violate the APRA. I further find that the Town did not violate the Open Door Law with respect to the March 10, 2004, executive session as alleged in your complaint. To the extent that the notice for that meeting failed to cite to the specific statute authorizing the executive session, it was a technical violation but was otherwise in substantial compliance with the law. Finally, I find that the Town could properly determine a strategy to pursue with regard to litigation without taking final action on whether to initiate or not initiate litigation, and that it could make that decision without running afoul of the Open Door Law. To the extent that the

Town took “final action” in its March 15, 2004, executive session as that term is defined in the Open Door Law, it violated the Open Door Law.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Randy J. Williams