June 10, 2004

Mr. Brian J. Zipperle
Greenville Concerned Citizens, Inc.
P.O. Box 134
Greenville, Indiana 47124

Re: Formal Complaint 04-FC-83; Alleged Violations of Access to Public Records Act and Indiana Open Door Law by the Floyd County Board of Commissioners

Dear Mr. Zipperle:

This is in response to your formal complaint filed on behalf of the Greenville Concerned Citizens, Inc., alleging violations of Indiana's public access laws. Specifically, you allege that the Floyd County Board of Commissioners (Commissioners) violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3 *et seq*.), when they failed to properly and timely respond to your request for records, and failed to produce records responsive to your record request within a reasonable time of receipt of that request. You further allege that the Commissioners held an illegal meeting in violation of the Indiana Open Door Law (Open Door Law) (IC 5-14-1.5 *et seq*.) when they gathered together and discussed an amendment to a subdivision zoning ordinance without posting notice and conducting the meeting in a manner that afforded the public with an opportunity to attend and record the meeting. A copy of the Commissioners' response to your complaint is enclosed for your reference.

BACKGROUND

Your complaint alleges that the Commissioners adopted a subdivision ordinance on January 1, 2004. You contend that the ordinance contained language changes from drafts previously obtained and circulated, and different from the version of the ordinance that was discussed by the Floyd County Plan Commission at its public hearing on the ordinance on December 4, 2003. Specifically, you allege that language regarding wastewater treatment was deleted from the ordinance without any discussion in a public

meeting. According to your complaint, the Commissioners told you that the changes were discussed by the plan commission at a special meeting held on December 29, 2004, when that governing body met and approved the ordinance that was forwarded to the Commissioners. You alleged that you were told that the minutes from the December 29, 2003, meeting of the plan commission reflected the alleged discussion of the changes, and that a memorandum passed between the Commissioners' counsel and counsel for the plan commission also included references to the language changes.[1] You assert that you attended the December 29, 2003, meeting of the plan commission, and aver that there was no discussion of any changes in the language of the proposed ordinance.

According to your complaint, a member of the Greenville Concerned Citizens, Inc., renewed the record request on April 6, 2004. It appears that the request on that date was oral, and made not to the plan commission but rather to the Board of Commissioners. In response to this request, on April 17, 2004, the Commissioners produced the minutes of the plan commission's meeting. You did not receive a copy of the memorandum shared between the attorneys. You note that the minutes do not reflect any discussion by the members of the plan commission on changes to the ordinance regarding the issue of wastewater treatment, although discussion of other changes to that ordinance are reflected in detail. You further note that the minutes were not approved by the plan commission until March 29, 2004, despite the fact that the plan commission met two times previously and failed to approve those minutes in alleged violation of its internal rules.

From all of the foregoing, you assert that the Floyd County Board of Commissioners made illegal changes to the Subdivision Control Ordinance of Floyd County. Your complaint asserts that the absence of any discussion of the changes in a public meeting of the Commissioners, and as evidenced by the absence of any reference to such a discussion by the plan commission, requires this office to find that the Commissioners must have gathered and discussed those changes in a meeting that was not properly noticed and was conducted outside public view. You further allege that the Open Door Law was violated because the memorandum of the December 29, 2003, meeting of the plan commission was not immediately available following the meeting, and was not produced in a timely manner. That claim also fuels your complaint under the APRA that you were denied access to public records within a reasonable time of making your request. In addition, you allege that the Commissioners' failure to produce a copy of the attorney's memorandum violates the APRA.

The Commissioners respond first that your formal complaint is not timely filed under Indiana Code 5-14-5-7. Specifically, the Commissioners allege that you knew or should have known of the alleged violations n December 2003, or certainly no later than

[1] You do not allege when you learned about the memorandum or when the Commissioners informed you that the changes had been proposed and discussed at the December 29, 2004, meeting, but it appears from the documents supporting your complaint that this occurred in late January, 2004, when you assert that requests to the plan commission for the minutes and the memo were not honored "under the explanation that they were 'unavailable.'" You do not provide a copy of any written request or response that was made at that time for the records at issue, and you do not say who made these requests.

January 2004 when you made your initial public records request and did not get records in response to that request. The Commissioners further assert that your substantive allegations challenge the conduct of the plan commission which is an agency apart from the Board of Commissioners, and you have therefore directed your claims against the wrong public agency. Finally, the Commissioners allege that they did not hold a meeting in violation of the Open Door Law, and that any records withheld from you are properly exempted from disclosure under the deliberative materials exemption set forth in Indiana Code 5-14-3-4-(b)(6).

ANALYSIS

Let me begin with some clean up.

The Commissioners assert that you have named the wrong party respondent; that is, that you directed your claims against the wrong public agency. Initially, I agree with the Commissioners that your substantive allegations read more like claims directed against the plan commission, and certainly you would have a basis to complain against the plan commission if it is your position that the *plan commission* met in violation of the Open Door law, or if the *plan commission* withheld *plan commission* records that it was required to maintain and disclose under the APRA. That said, it is your complaint to construct, you are certainly entitled to pick your respondent, and more than the caption of your complaint makes it clear that you intended to direct your claims against the Commissioners. Moreover, it is certainly conceivable in the context of your claims that the Commissioners would possess copies of the records you were seeking (thus, making them the Commissioners' records), and that the Commissioners could meet in violation of the Open Door Law and have the discussions you assert were lacking public scrutiny. Accordingly, I read your complaint to be solely directed against the Commissioners, and I offer no opinions concerning any conduct – good, bad or ugly – by the plan commission.

The Commissioners also assert that your complaint was not timely filed. Indiana law governing formal complaints filed with the Office of the Public Access Counselor provides that a formal complaint must be filed within 30 days after the denial of access or when the person or agency filing the complaint "receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice." IC 5-14-5-7(a). To the extent that your May 8, 2004, complaint, received and filed by this office on May 11, 2004, challenges the denial of records requested back in January, I agree with the Commissioners that it is untimely as to that claim. That said, your complaint challenges the Commissioners' response to your renewed request for records made on April 6, 2004, and for which a production (albeit partial) was made on April 17, 2004. As to those claims, your complaint is certainly timely. Moreover, I think that your complaint alleging an Open Door Law violation is also on time. I read your complaint to assert that the Commissioners met secretly and discussed the deletion of the wastewater treatment language sometime after December 4, 2003, and prior to January 1, 2004. You were told by the Commissioners, by whom you do not say, that public

discussion on that change occurred at the plan commission meeting on December 29, 2003, and that the minutes of that meeting would prove you wrong. You did not get the minutes from that meeting until April 17, 2004. Whatever they prove or do not prove, it is my opinion that the date of your receipt of those minutes is the date that triggers the time limitations for filing a formal complaint challenging a "secret meeting." That is to say, the Commissioners cannot be heard to direct you to the minutes as proof that they did not have a secret meeting, only to then turn around and use the delays you incurred in getting those minutes to seek dismissal of your complaint. I find that you have presented sufficient allegation and evidence to show that you did not receive notice in fact that an illegal meeting had been held until April 17, 2004, when you received the minutes that you allege support your claim that no public discussion on the amendment occurred. Your complaint, filed within 30 days of that date, is timely.[2]

Lastly, I note that your complaint and supporting materials do not indicate who made the January 2004 request for records, in what form it was made, and when and how the Commissioners responded to it (if at all). Your complaint also indicates that you did not make the April 6, 2004, request. Again, it contains no information clarifying how that request was made and, save the April 17, 2004, production, when and how the Commissioners responded. These details matter not only because they may fuel or douse specific violations, but also because they may affect your standing in this matter. The Commissioners do not raise any issues challenging your complaint in this regard. Accordingly, I offer my substantive opinions below, and note where appropriate when I think these deficiencies may matter to any further relief to which you might be entitled.

Your complaint alleges multiple violations of the Open Door Law, but with regard to the Commissioners (as opposed to the plan commission)[3], I address only the substance of your claim that the Commissioners met in secret and discussed the amendment to the ordinance with regard to wastewater treatment. 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." IC 5-14-1.5-1. Toward that end, except under very limited

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[2] Even assuming your formal complaint was not timely as to all of your allegations, this office is not precluded from issuing an informal inquiry response regarding any violations alleged to have occurred at any time. IC 5-14-4-10(5). Thus, to the extent that it is subsequently determined in any civil action you later file in this matter that your formal complaint was not timely filed under Indiana Code 5-14-5-7, it is my intention that this opinion serve as an informal inquiry response to your claims pursuant to Indiana Code 5-14-4-10(5), and that it have the full force and effect of an informal opinion of the Public Access Counselor under Indiana Code 5-14-3-9(i).

[3] Two of the three Open Door Law claims you assert relate to the availability of the memorandum or "minutes" of the December 29, 2004, meeting of the plan commission. Specifically, you allege that delays in producing the minutes from that meeting violate section 4(b) and (c) of the Open Door Law which require that the memoranda of a governing body's meeting be prepared "as the meeting progresses" (IC 5-14-1.5-4(b)), and that it be made available "within a reasonable period of time after the meeting" (IC 5-14-1.5-5(c)). As noted above, your complaint is directed against the Commissioners for failing to produce this record, assuming it to be a public record of that agency. Since the memorandum or "minutes" at issue are not the minutes of the Commissioners, that governing body cannot be found to be in violation of section 4 based on any deficiencies in the timely preparation of those minutes.

circumstances, all meetings of the governing body of a public agency must be open for the purpose of permitting members of the public to observe and record the meetings. IC 5-14-1.5-3(a). A "meeting" is defined as a "gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business." IC 5-14-1.5-2(c). "Public business" means "any function upon which the public agency is empowered or authorized to take official action." IC 5-14-1.5-2(e). "Official action" is very broadly defined by our state legislature to include everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. IC 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. IC 5-14-1.5-5(a).

Certainly, the adoption of the subdivision ordinance was the public business of the Commissioners, and any gathering of a majority of the Commissioners to discuss any aspect of that ordinance would constitute a "meeting" falling under the requirements of the Open Door Law. You allege that the Commissioners held a secret meeting to discuss the amendment of the ordinance concerning wastewater treatment. Your evidence supporting that claim is that there was no discussion of that amendment among the members of the Commission when the Commissioners met on January 1, 2004, and unanimously passed the ordinance. That is evidence to be sure, but standing alone it does not, in my opinion, prove your allegation. It is not at all uncommon for the members of a governing body to vote on a matter before them without any discussion whatsoever among the members of the governing body or input from the public (if public comment is allowed). Whatever is commonplace in meetings of county commissioners or of this particular county commission, I cannot say. However, it strikes me as not at all unusual that a discussion would not ensue when the governing body is reviewing a recommended ordinance or proposal that has been passed by another governing body after a hearing or meeting held the other governing body. Founded only on this evidence presented (that there was no discussion of the issue by the Commissioners), I am not willing to find that the Commissioners gathered together in secret to discuss the amendment at issue. While I do not find your claims substantiated as supported in this advisory forum, you certainly have the right to develop and present your evidence in any civil action you might file in a court of competent jurisdiction under Indiana Code 5-14-1.5-7.

You fare better, perhaps, on the allegations supporting your public records claims. Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as otherwise provided in the APRA. IC 5-14-3-3(a). A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in writing, the agency must respond to the request in writing. IC 5-14-3-9(c). If the request is made orally, or if it is written and hand-delivered, the agency must respond within 24 hours. IC 5-14-3-9(a). If the request is made by mail or facsimile, the agency must respond within seven days of

receipt. IC 5-14-3-9(b). Failure to respond within these times constitutes a denial in violation of the APRA.

That said, a timely response does not require production of the records or a denial of production within those statutory time periods; rather, the agency may meet its response obligation by acknowledging the request and stating its intent toward compliance with a date certain for production or further response. If the public agency denies the request, the denial must include "a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record." IC 5-14-3-9(c)(2)(A). If the public agency does not have the record requested, it should say so. A public agency is not required to create a responsive record or obtain a responsive record from another agency, and its failure to do so is not a denial of public records in violation of the APRA.

You do not say when in January 2004 you made your first request for the minutes and the attorney memorandum, and you do not say who made that request or how it was made. Neither do you say whether you received a response or how that response was made. With regard to the second request in April, you indicate who made it and when, but again you fail to indicate how the request was made and whether you received any response prior to the partial production on April 17, 2004. My opinions, therefore, are conditional.

With regard to each of these requests, if you did not make the request yourself, I am immediately doubtful about your standing to bring this formal complaint alleging a denial of access. *See* IC 5-14-5-6 ("A person or a public agency … may file a formal complaint"). If you did not make the requests at issue, you cannot be considered to be a person denied the right to inspect or copy records or denied any other right conferred by the APRA. IC 5-14-5-6.[4] Even interpreting the requests and the complaint to be submitted by the Greenville Concerned Citizens, Inc., would not salvage your complaint inasmuch as that entity is neither alleged nor established to be a "public agency." *See* IC 5-14-5-6; *see also* IC 5-14-3-2 (defining "Public Agency"). While your standing is a threshold issue, the Commissioners do not challenge your standing, and the papers supporting your complaint do not otherwise establish a basis for me to find you to be without standing.[5]

[4] I do not similarly question your standing to assert the Open Door Law claim above because, if a secret meeting was held in violation of the Open Door Law as you allege, you would certainly have been denied the right to attend that meeting as well as other rights conferred by the Open Door Law.

[5] In any event, even assuming you were without standing to bring a formal complaint, I would not be without authority to issue an informal inquiry response to your claims. *See* IC 5-14-4-10(5). To the extent that it is subsequently determined in any civil action you later file in this matter that you did not have standing to file this formal complaint under Indiana Code 5-14-5-6, it is my intention that this opinion serve as an informal inquiry response to your claims pursuant to Indiana Code 5-14-4-10(5), and that it have the full force and effect of an informal opinion of the Public Access Counselor under Indiana Code 5-14-3-9(i).

Turning to the merits, if your requests were made orally, or if they were made in writing and hand-delivered, the Commissioners were required to respond within 24 hours. If they did not do so, they violated the APRA. If your requests were made by mail or facsimile, the Commissioners had seven days from the date of receipt to respond. If they did not do so, they violated the APRA. If your requests were in writing, the Commissioners were required to respond in writing. If they did not do so, they violated the APRA.

You indicate that you did not receive any records (or any express denial, for that matter) in response to your January 2004, request. The Commissioners do not contest this allegation. Based on the allegations of their response to your complaint, it may well be that the Commissioners did not have the responsive records (at least, not the plan commission minutes). Regardless of whether or not they had the records requested, they were still required to respond to your request. Their failure to respond and, if they had the records, to provide you with nonconfidential responsive records within a reasonable time of receiving your January 2004 request, violates the APRA.[6]

You indicate that the Commissioners made a partial production on April 17, 2004, in response to your renewed request on April 6, 2004. You further indicate that one commissioner earlier responded that he would investigate and produce the requested records. Assuming your April 6, 2004, request was made orally, and further assuming that the commissioner made his oral response within 24 hours, the response was timely and proper under the statute. If these assumptions are not true, the Commissioners failed to timely and properly respond in violation of the APRA.

The April 17, 2004, production itself raises other issues. The production did not include the memorandum alleged to have been passed and shared between counsel for the Commissioners and counsel for the plan commission. The APRA requires that when a public agency denies production of a record, it must provide citation to the specific statutory exemption supporting the denial. IC 5-14-3-9(c)(2)(A). Of course, this does not apply if the request was made orally, and the denial was oral. However, if your April 6, 2004, request was made in writing, the Commissioners' failure to provide you with a written response citing to the statutory exemption supporting nondisclosure of any responsive record constitutes a violation of the APRA.

The Commissioners now assert a statutory exemption to support nondisclosure of the memorandum. Specifically, the Commissioners assert that the nondisclosure was proper under the deliberative materials exemption. This exemption provides that "records that are intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making" are excepted from public disclosure at the discretion of the

[6] It would not matter if they had the minutes but they were in draft form or had not yet been approved by the governing body; a draft public record is a public record subject to the disclosure requirements of the APRA. *See* IC 5-14-3-2. Assuming the Commissioners had the minutes, you were entitled to them at that time in whatever form they existed.

public agency. IC 5-14-3-4(b)(6). The exemption applies to protect the deliberative material of both staff of the public agency and deliberative material prepared by a private contractor under contract with the public agency. IC 5-14-3-4(b)(6). The purpose of this exemption is to "prevent injury to the quality of agency decisions" by encouraging "frank discussion of legal or policy matters in writing." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002); *see Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 909-10 (Ind. Ct. App. 2003).

The Commissioners do not establish the content or character of this record with sufficient specificity for me to determine whether it falls within the exemption cited. *See* IC 5-14-3-9(g). However, even if this record could meet the deliberative materials exemption to disclosure in Indiana Code 5-14-3-4(b)(6), the exemption does not protect all matters within the responsive record from disclosure. Rather, the APRA requires a public agency to separate disclosable from non-disclosable information contained in public records. IC 5-14-3-6(a). And, the most recent court to address application of the deliberative materials exemption held that factual matters which are not inextricably linked with other non-disclosable materials (specifically, the opinions and speculation of the author) should not be protected from public disclosure. *See The Trustees of Indiana University*, 787 N.E.2d at 913-14. *But see Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 831 (Ind. Ct. App. 1998) (wherein the court applied the exemption to permit disclosure of a group of documents as a whole). Accordingly, unless every word of every sentence of the record at issue constitutes the opinion or speculation of the author, the Commissioners may not rely on the deliberative materials exemption to withhold production of the entire record, and their continuing failure to produce the record would constitute a continuing violation of the APRA.

CONCLUSION

For the reasons set forth above, I decline to find a violation of the Open Door Law. I do find that the Commissioners' failure to produce the attorney memorandum violates the APRA to the extent that the Commissioners are withholding production of any information in that record that is not opinion or speculation. While I do not make any other findings that the APRA was violated based on the allegations and lack of support in the complaint, I offer the foregoing opinions regarding the rights and responsibilities of the parties to inform any further action you might take in this matter.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Max C. Mason