

May 4, 2005

Carolyn A. Marsh
1804 Oliver Street
Whiting, IN 46394

Re: Formal Complaint 05-FC-64; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Hammond Port Authority

Dear Ms. Marsh:

This is in response to your formal complaint alleging that the Hammond Port Authority (“HPA”) violated the Access to Public Records Act and the Open Door Law. I find that the HPA has not violated the Access to Public Records Act if it does not maintain the records you are requesting, but has violated the Open Door Law with respect to its March 22 executive session and meeting.

BACKGROUND

You have filed a formal complaint with respect to the Access to Public Records Act, because you have not received all the information that you believe must be in the files of the HPA regarding the Salvation Army Kroc proposal regarding Wolf Lake. With respect to your Open Door Law claims, you complain that a March 22, 2005 meeting of the HPA Board started 55 minutes late, and that the executive session notice for that same date did not meet the requirements of the Open Door Law because it did not state with specificity the purpose of the executive session. You also state that the HPA Board does not maintain minutes of its construction committee meetings or executive sessions of the HPA Board.

I sent a copy of your complaint to the HPA, and received a written response from Milan Kruszynski, Port Authority Director. You also received a copy of his April 14 letter. In it, Mr. Kruszynski stated that the HPA has already made available to you all the records it maintains on the Kroc proposal, and further explained that the HPA was not involved with the City of Hammond’s application for the Kroc Center proposal.

With respect to the late start of the March 22 meeting, Mr. Kruszynski stated that there was good cause for the delayed start of the meeting because preceding the scheduled public meeting, there was a pressing personnel matter, and the construction committee chairman arrived

late. It is the custom of the HPA Board to begin its meetings on time. He further claimed that the time was not so unreasonably departing from the posted time as to deprive the public from the opportunity to attend, observe and record the meeting.

Finally, with respect to the agenda, meeting notices, and memoranda of the construction committee and the HPA Board's executive sessions, Mr. Kruszynski stated that the executive session notice to discuss "litigation and personnel matters" is explicit, and is the customary practice of the HPA. He also believes that while the HPA Board is required to keep minutes, there is no requirement that each committee or subcommittee of the Board keep formal minutes, or that the HPA Board maintain minutes for executive sessions, when the discussion is concerning personnel and litigation matters.

ANALYSIS

Access to Public Records Act

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the Access to Public Records Act. Ind. Code 5-14-3-3(a). It is fair to characterize your complaint regarding the failure of the HPA to produce a record of the proposal made to the Salvation Army for a center at the south end of Wolf Lake, which is referred to as the Kroc proposal, as one where you believe that the record should exist. In particular, you state that the HPA is responsible for Wolf Lake, and "as the responsible party, they should have files, somewhere, regarding the proposal made to the Salvation Army." You state that you do not understand how the proposals can be resubmitted to the Salvation Army without the approval of the Hammond Port Authority. In response to your allegations, HPA Director Kruszynski states that his agency has already provided a January 18 contract that is the only record that is related to your request. He further explains that the HPA was not involved with the City of Hammond's application for the Kroc Center proposal.

It appears that you believe that the HPA should have a record of the Salvation Army proposal, yet HPA denies that it maintains such a record. Unless a public agency is required to create or maintain a record, it is not an actionable denial under the Access to Public Records Act to not disclose a record that the public agency does not have. If you believe that the HPA is failing to produce a record that it does maintain, you may file an action in superior court to compel disclosure of the record. IC 5-14-3-9(e). With the information before me, I cannot conclude that the HPA has denied you a record in violation of the APRA.

Open Door Law

There are three discrete issues that you have raised under the Open Door Law. The first concerns the late start of the March 22 meeting. You allege that the meeting, which was to start at 5:15 p.m., did not actually begin until about 55 minutes later, at 6:07 p.m. The HPA does not dispute the fact of the start time in its response, so I take this allegation as true for purposes of this opinion.

Under the Open Door Law, notice of the date, time, and place of a meeting, executive session, or of any rescheduled or reconvened meetings shall be given at least forty-eight (48) hours before the meeting, excluding Saturdays, Sundays, or legal holidays. IC 5-14-1.5-5(a). Notice has not been given in accordance with section 5 of the Open Door Law if a governing body of a public agency convenes a meeting at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting. IC 5-14-1.5-5(h). I do not find that the mere fact of the late arrival of a member of the governing body constitutes good cause, but in any case, there is no “good cause” exception to the requirement that the governing body convene the meeting at a time that does not unreasonably depart from the time stated in the notice. Where the March 22 meeting began nearly one hour after the stated time, I believe the time that the meeting was convened did unreasonably depart from the time stated in the public notice.

You raise a second issue with respect to the March 22 meeting. You state that executive sessions and construction meetings are not on the agenda, and that the reason for the executive session does not appear on the agenda.

As I stated earlier, notice of an executive session must include the date, time and place of the meeting. An additional requirement of executive session notice is contained in IC 5-14-1.5-6.1(d). Public 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 (b). If the governing body utilizes an agenda, the governing body must post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. IC 5-14-1.5-4(a).

The HPA provided a copy of the meeting notice, which included the date, time, and place of the March 22, 2005 meeting of the construction committee, the executive session, and the regular public meeting. This notice states that the purpose of the executive session was for “litigation and personnel matters.” This notice lacks the specificity required under IC 5-14-1.5-6.1(d), and was in violation of the Open Door Law. In particular, “personnel matters” is insufficient because there are at least three discrete instances for which an executive session may be held that involve discussions relating to personnel matters. On the other hand, other discussions regarding personnel may not fall into any of the listed executive session instances. A proper notice would have contained the text and the citation to each executive session instance that applied to the March 22 executive session (e.g., “for discussion of strategy with respect to the initiation of litigation, under IC 5-14-1.5-6.1(b)(2)(B)”).

The copy of the agenda does not show the executive session or the construction committee meeting, but those meetings were held at different times, and are not one meeting. The agenda that you supplied shows what I suspect is the agenda of the HPA Board for its regular meeting. Although the HPA Board’s notice could refer to three different meetings, it is not required that the agenda utilized by the governing body contain the agenda for all three meetings, so long as an agenda was posted if one was utilized.

For your third and final issue, you claim that there are no minutes taken during construction committee meetings or executive sessions. The response of the HPA is that only the

HPA Board is required to keep minutes of its public meetings, not the construction committee or the Board meeting in executive session.

The requirements of the Open Door Law apply to a governing body of a public agency. One of the definitions of “governing body” is two or more individuals who are any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. IC 5-14-1.5-2(b).

Memoranda must be kept as a meeting progresses, and those memoranda must be available within a reasonable period of time after the meeting. IC 5-14-1.5-4(b) and (c). Memoranda must contain 1) the date, time and place of the meeting; 2) the members of the governing body recorded as either present or absent; 3) the general substance of all matters proposed, discussed, or decided; 4) a record of all votes taken, by individual members if there is a roll call; and 5) any additional information required by statute. IC 5-14-1.5-4(b). The minutes, if any, are to be open for public inspection and copying. IC 5-14-1.5-4(c). The requirements for memoranda for executive sessions is modified from those of public meetings in one respect. The memoranda for executive sessions also must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. Also, the governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in executive session other than the subject matter specified in the public notice. IC 5-14-1.5-6.1(d). There is no exception for specific types of executive session discussions.

It is apparent that the HPA Board does not keep memoranda of its executive sessions concerning personnel and litigation matters. This is in violation of the Open Door Law. IC 5-14-1.5-6.1(d). Also, to the extent that the construction committee meets the definition of a governing body (if it was appointed by the HPA Board or its presiding officer to take official action on public business of the HPA Board), then its meetings are subject to all the requirements of the Open Door Law, including keeping memoranda. The HPA Board or a committee is not required to create minutes (a more detailed record of the meeting than memoranda) but if minutes are created, they must be available for inspection and copying. IC 5-14-1.5-4(c).

CONCLUSION

For the foregoing reasons, I find that the Hammond Port Authority did not violate the Access to Public Records Act. However, I find that the Hammond Port Authority has violated the Open Door Law with respect to its March 22 meeting and executive sessions.

Sincerely,

Karen Davis
Public Access Counselor

cc: Milan Kruszyński