November 15, 2007

Timothy Klusczinski
617 Park Avenue
South Bend, Indiana 46616

Re: Formal Complaint 07-FC-318 and 07-FC-319; Alleged Violation of the Access to Public Records Act and the Open Door Law by the South Bend Community School Corporation and Corporation Board of Trustees

Dear Mr. Klusczinski:

This is in response to your formal complaints alleging the South Bend Community School Corporation ("Corporation") and the Corporation Board of Trustees ("Board") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) and the Open Door Law ("ODL") (Ind. Code 5-14-1.5). I have enclosed a copy of the Corporation's responses to your complaints for your reference. You have filed three complaints, two of which have already been combined into Formal Complaint 07-FC-318. Because your complaint 07-FC-319 makes allegations regarding the same public agency, I am consolidating it with Formal Complaint 07-FC-318 and addressing all three complaints in this opinion. It is my opinion neither the South Bend Community School Corporation nor Corporation Board of Directors violated the APRA or the ODL.

BACKGROUND

07-FC-318 Part I

You allege that on October 4, 2007 a meeting was held at a church in South Bend at which all members of the Board were present. You allege the President of the Board sent an electronic invitation to all members requesting their attendance at the gathering. You provided a copy of that message, which was sent to the other Board members as well as other individuals. You also provided a copy of the agenda of the meeting, which contains an item entitled "Remarks from board members in attendance" and contains an item entitled "Distribution of invitation for attendance at City Council Meeting Oct. 8, 7p.m." The purpose of the October 4 meeting was to discuss the petition and remonstrance process under way regarding proposed financing of remodeling of schools maintained by the Corporation. You allege no public notice was posted for the October 4 meeting. You filed your complaint on October 16. You requested priority status but did not allege any of the reasons for priority status listed in 62 IAC 1-1-3, so priority status was not granted.

The Corporation responded to your complaint by letter dated November 1. The Corporation contends the October 4 meeting was not a meeting of the governing body of a public agency. The Corporation does not dispute that a majority of the Board was in attendance at the October 4 meeting, but the Corporation contends the meeting was not a meeting of a governing body because the purpose of the gathering was not to take official action on public business, which is any function upon which the agency is authorized or empowered to take official action. The meeting was not sponsored or organized by the Board but rather called by supporters of a proposed project. The Corporation further argues that public policy should allow Board members to attend gatherings in which issues important to their community are discussed.

07-FC-318 Part II

You allege that at the October 8, 2007 meeting of the South Bend Common Council ("Council"), six of the seven members of the Board attended, and four of them participated as remonstrators against the second reading of a bill. You allege that the majority presence of the Board was intentional and facilitated in part by a rescheduling of the bimonthly Board meeting from 5:30pm to 5:00pm. You allege that no notice was posted by the Board for its gathering at the Council meeting. You filed your complaint on November 7.

The Corporation responded to your complaint by letter dated November 13. The Corporation first contends that public notice was provided by the Council for its meeting and the Corporation has no duty to post notice for another agency's governing body. The Corporation further contends that the Board members had no authority to take official action on public business at the October 8 meeting. The Corporation asserts that the intent of the ODL will fail if the Board members are not allowed to individually attend a public meeting and public hearing of another public agency's governing body and that public policy should allow the Board to attend such meetings. Finally, the Corporation argues that the Board members have the right of free speech under the United States Constitution and Indiana Constitution.

07-FC-319

You allege that you submitted a request for access to records to the Corporation dated August 10, 2007. You allege the Corporation acknowledged receipt of the request on August 13. You filed your complaint on October 16, alleging the two months you had been awaiting any records constituted an unreasonable delay. You requested priority status but did not allege any of the reasons for priority status listed in 62 IAC 1-1-3, so priority status was not granted.

The Corporation responded to your complaint by letter dated November 1. The Corporation contends that it sent a response to you dated August 13, indicating that "to the extent that there exists [*sic*] public records which are responsive to your requests, as such term is defined by Ind. Code § 5-14-3, the request will be approved." The letter further indicates that you would be contacted as soon as records became available. The Corporation contends that a public agency is under no requirement to produce records within a certain period of time. The

Corporation indicates that the Director of Communications drafted a letter on August 28 to send to you along with the available records, but due to a clerical error the letter was not sent. The Corporation contends, though, that most of the records you requested had previously been provided to you. Regarding the specific records you requested, the Corporation contends you have already received a copy of the current plan for Marquette Building, no minutes exist for a June 28 meeting because no Board did not hold a meeting on that date, and that the Corporation sent you a copy of the "Corporation policy citing the authorized officials and procedures to call a meeting of the Board of Trustees" when it finally sent the August 28 letter on October 16.

ANALYSIS

07-FC-318 Part I

It is the intent of the Open Door Law 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. I.C. §5-14-1.5-1. Except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. I.C. §5-14-1.5-3(a).

The Board is clearly a governing body of a public agency for the purposes of the Open Door Law. I.C. §5-14-1.5-2. As such, except where authorized by statute, the meetings of the Board must be conducted openly and with proper notice to the public. I.C. §5-14-1.5-3.

"'Meeting' means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. It does not include: (1) any social or chance gathering not intended to avoid this chapter . . ." I.C. §5-14-1.5-2(c). "'Public business' means any function upon which the public agency is empowered or authorized to take official action." I.C. §5-14-1.5-2(e). "'Official action' means to: (1) receive information; (2) deliberate; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action." I.C. §5-14-1.5-2(d).

Here, you argue that the October 4 meeting constituted a meeting of the Board for which notice should have been provided. The President of the Board sent an electronic mail message including an invitation to the gathering to the other members of the Board, among the 45 people to whom she sent the email. The President in no way suggests the Board has previously discussed the meeting or has decided to attend the meeting as a group. It is my interpretation the President sent the message to the Board members as individuals whom she knows to be interested in and supportive of the issue. It is my opinion the Board members each made an individual decision whether to attend the gathering. Further, it is my opinion that requiring the members of a governing body to provide notice every time they receive an invitation and might attend the same event frustrates the purpose and intent of the ODL.

The ODL lists seven gatherings that are not meetings, and among those is "any social or chance gathering not intended to avoid this chapter." I.C. §5-14-1.5-2(c). It is my opinion that while the Board members were invited to the gathering by a fellow Board member, their decision to attend was an individual decision made by each member. As such, the gathering of all or a majority of the Board members at this meeting was a chance gathering not intended to avoid the chapter. If the Board had discussed the gathering at a Board meeting and agreed upon the importance of their attendance as a Board, I believe that action would remove this gathering from the classification as a chance gathering. I see no indication in the President's email or invitation that the Board had previously discussed their need to attend this gathering as a Board.

The Corporation argues that the gathering was not a meeting to take official action upon public business because the Board is not empowered or authorized to take official action on the matter being discussed, the organization of support for the proposed financing of a project. To the contrary, the Board and Corporation are prohibited from promoting the petition process from the time the Board adopts a preliminary determination resolution through the sixty day period commencing with publication of notice. I.C. §6-1.1-20-10(a). Furthermore, the Corporation cannot allow its facilities or equipment to be used for public relations purposes to promote a position on the petition and remonstrance unless equal access is provided to those with the opposite position. *Id*. at (a)(1).

While this is a sound argument, it comes very close to the delineation between what does and does not constitute a meeting. I am not prepared to say that because the Board is not empowered or authorized to take action relating to the remonstrance process that any gathering of the Board to discuss the remonstrance would not be defined as a meeting. It is conceivable that a gathering intended to be a discussion of the remonstrance could lead to official action on business on which the Board is empowered or authorized to take action. If, for instance, the Board gathered to discuss their actions as a Board, like whether they would attend the organizational meeting or the October 8 Council meeting together as a Board and address the financing issue, I believe that would cross the line and constitute a meeting. Since this did not occur here, though, it is my opinion the Board did not violate the ODL.

07-FC-318 Part II

The issue presented here is similar to that presented in Part I in that a majority of Board members attended a gathering without public notice. The difference is that the meeting at issue here was a properly noticed public meeting of the Council rather than a private gathering. While this is a different situation, my opinion is that again neither the Corporation nor the Board violated the ODL. Because the situation is so similar to that in Part I, I rely upon the same analysis used in Part I.

As I indicated previously in this opinion, the ODL lists seven gatherings that are not meetings, and among those is "any social or chance gathering not intended to avoid this chapter." I.C. §5-14-1.5-2(c). It is my opinion that the decision to attend the October 8 meeting was an individual decision made by each Board member. As such, the gathering of a majority of the Board members at this meeting was a chance gathering not intended to avoid the chapter. If the Board had discussed the gathering at a Board meeting and agreed upon the importance of their attendance as a Board, I believe that gathering would be a meeting. I find no indication the Board had previously discussed their need to attend the Council meeting as a Board.

I further see no evidence the Board attempted to circumvent the ODL. The activity about which you filed your complaint was activity taken in public at a properly noticed public meeting. While this fact does not negate the notice requirement for meetings of governing bodies of public agencies, it is certainly an important factor in weighing whether the Board violated or intended to violate the ODL. In my opinion, neither the Board nor the Corporation violated the ODL.

07-FC-319

The public policy of the APRA states, "(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." Ind. Code §5-14-3-1. The Corporation 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 Corporation 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 made by mail, electronic mail, or facsimile transmission and the agency does not respond within seven days, the request is deemed denied. I.C. §5-14-3-9. A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). Previous public access counselors have stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe.

Here the Corporation received your request via electronic mail on August 13 and issued a response to you on August 13, well within the seven days allowed by the APRA. I.C. §5-14-3-9. The Corporation argues that since the APRA does not have a required period of time for production of records, it did not violate the APRA by not providing either the records or a denial of access. The response was prepared on August 28, but clerical error kept it from being sent to you. The letter from the Corporation regarding production of records was prepared within three weeks of receipt of the request. As such, the consideration here is not related to the nature of the records, how old the records are, or the other factors usually taken into consideration. Since the records here were prepared within three weeks of receipt of the request, a reasonable time for production is certainly less than the two months you waited. But as I understand it, the Corporation intended to send the letter and clerical error was the reason you did not receive it.

The Corporation argues that it was not made aware of the clerical error which prevented the Corporation's letter and partial production from being sent to you until it received a copy of your complaint on October 16. If the Corporation is insinuating that it did not violate the APRA because you had a duty to follow up with the Corporation regarding your request, I do not agree. But I also do not agree with your allegation that the Corporation violated the APRA by not producing the records, since clerical error was the reason for the delay. As I often find, it appears this was a case of miscommunication or lack of communication on the part of both you and the Corporation. In an ideal situation, the Corporation would have sent the letter on August 28 when it was prepared. But I always recommend to a requester that he or she follow up with the agency to inquire about the status prior to filing a complaint with this office. As such, it is my opinion the Corporation did not violate the APRA.

Regarding the Corporation's assertion that some of the records you requested were previously provided to you, the APRA requires a public agency to provide one copy of a record upon request. I.C. § 5-14-3-8(e). Nothing in the APRA requires a public agency to provide multiple copies of the same record to a requester. If the Corporation has previously provided you with the requested records, it is under no obligation to provide those records again.

CONCLUSION

For the foregoing reasons, it is my opinion neither the South Bend Community School Corporation nor Corporation Board of Directors violated the APRA or the ODL.

Best regards,

Heather Willis Neal

Heather Willis Neal
Public Access Counselor

cc: Richard Hill
Dawn Jones, President, South Bend Community School Corporation Board of Trustees
Dr. Robert Zimmerman, Superintendent, South Bend Community School Corporation