

March 26, 2007

John T. Lewis
5664 N. White River Road
Campbellsburg, IN 47108

Re: Formal Complaint 07-FC-48; Alleged Violation of the Access to Public Records Act by the City of Salem

Dear Mr. Lewis:

This is in response to your formal complaint alleging that the City of Salem ("City") violated the Access to Public Records Act by denying access to a sign-in sheet for a June 3, 2003 public meeting of the City's common council.

BACKGROUND

You complain that the Mayor Judy Chastain is responsible for maintaining the sign-in sheet that documented the persons in attendance at a common council meeting of June 3, 2003. You allege that Clerk Treasurer Patricia Persinger gave Mayor Chastain the sign-in sheet, according to the assertions of the clerk-treasurer. You argue that because the minutes of the June 3 meeting refers to the sign-in sheet, which contained the names of 66 members of the public, the sign-in sheet became part of the minutes, and should be retained and protected against loss in accordance with IC 5-14-3-7.

You provided me a copy of a February 21 letter from Ms. Persinger stating that a sign-in sheet from the June 3 council meeting was distributed to the council members and used for the purpose of determining the number of members of the public present so that the number would be noted in the minutes. Because the law does not require that the memoranda note the members of the public who were present, she did not consider the sign-in sheet as a public record. Also, she normally discards personal papers that she does not consider public records. She likely discarded the sign-in sheet within three years of having created it. You claim that you have been denied access to this list.

The Mayor provided a response to your complaint. I enclose a copy of it. Mayor Chastain averred that she is not in possession of the sign-in sheet, and does not recall ever receiving a copy of it. Further, although the Mayor presides over the common council meetings, the clerk-treasurer is the keeper of the records. The Mayor is not aware of the existence of the sign-in sheet other than what was stated in the February 21 letter of the clerk-treasurer.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act. Ind. Code 5-14-3-3(a). "Public record" is any material that is "created, received, retained, maintained, or filed by or with a public agency." IC 5-14-3-2(m).

A governing body of a public agency is required to maintain memoranda that include:

- (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.
- (5) Any additional information required under IC 5-1.5-2-2.5 or IC 20-12-63-7.

There is nothing in the Open Door Law that requires a public agency to include in the memoranda the number of members of the public present at the meeting, or to incorporate in the memoranda the sign-in sheet created at the meeting.

Because a sign-in sheet is material that was created by the City, it was a public record of the City. If the clerk-treasurer had received a request for the sign-in sheet before it was lost or destroyed, she would have been required to disclose it, subject to any limitations on the right of a person to receive a copy of a list of names and addresses under section 3(f).

A public agency is required to protect public records from loss, alteration, mutilation, or destruction. IC 5-14-3-7(a). Notwithstanding section 7, public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention schedules under Indiana Code 5-15. IC 5-14-3-4(e)(1). Public records *not* subject to Indiana Code 5-15 may be destroyed in the ordinary course of business. IC 5-14-3-4(e)(2). Hence, the answer to your complaint lies in whether the sign-in sheet was required to be maintained longer than in the ordinary course of business, and if so, whether the sign-in sheet was destroyed in accordance with record retention schedules of the public agency.

"Record" means all documentation of the informational, communicative or decisionmaking processes of ... government, its agencies and subdivisions made or received by any agency of ... government or its employees in connection with the transaction of public business or government functions, which documentation is created, received, retained, maintained, or filed by that agency or its successors as evidence of its activities or because of the informational value of the data in the documentation." IC 5-15-5.1-1. Under IC 5-15-6-1.5, the definition of "record" is applicable to local government, which means a political subdivision. *See* IC 5-15-6-1.4.

Hence, if the sign-in sheet that was distributed during the meeting was a “record” as defined in IC 5-15, its destruction was governed by IC 5-15-6 and any approved record retention schedule. If the sign-in sheet was not a record, it could have been destroyed in the ordinary course of business. It is not within my purview to determine whether a specific public record is a record for purposes of IC 5-15. Rather, the county commission on public records has the authority to set forth the records management practices of the public agencies within that county, consistent with IC 5-15 and in accordance with record retention schedules approved by the oversight committee on public records. *See generally* IC 5-15-6.

Accordingly, I cannot determine whether the City violated the Access to Public Records Act when it lost or destroyed the sign-in sheet distributed at a common council meeting on June 3, 2003. However, if the sign-in sheet was subject to IC 5-15 *and* if the sign-in sheet was not destroyed in accordance with IC 5-15-6, the City would have violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Judy Chastain