STATE OF INDIANA

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October 20, 2010

Ms. Mona L. Myers
904 Lincoln Rd.
Kokomo, IN 46902

Ms. Dawn J. Clapperton
1950 N. Meridian St.
Indianapolis, IN 46256

Re: Formal Complaint 10-FC-217 & 10-FC-225; Alleged Violation of the Access to Public Records Act by the Howard County Commissioners

Dear Ms. Myers and Ms. Clapperton:

This advisory opinion is in response to your formal complaints alleging the Howard County Commissioners ("Commissioners") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. Because the two complaints concern the same issue, I have consolidated them into this single advisory opinion.

BACKGROUND

According to your complaints, you allege that the Commissioners denied your requests for access to a live stream recording (the "Recording") of a Howard County budget hearing held on September 8, 2010. The recording was streamed over the internet. During hearing recesses, the recording continued in error. During one recess, a councilman and a news reporter were discussing different members of the county government. According to Ms. Myers, both of those individuals have also requested that the recording be released.

Attorney Steven M. Badger responded to your complaints on behalf of the Commissioners. His response is enclosed for your review. Mr. Badger maintains that the Recording is exempt from disclosure under subsection 4(b)(7) of the APRA, which permits public agencies to, in their discretion, deny requests for access to "diaries, journals, or other personal notes serving the functional equivalent of a diary or journal." Mr. Badger argues that the Recording is the "functional equivalent" of a diary or journal because it contains the personal views of the individuals heard on the audio recording

rather than any official action or statement of any public official or employee. He also notes that although two individuals have consented to the disclosure of the Recording, other individuals whose voices are heard on the Recording have not done so.

ANALYSIS

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." I.C. § 5-14-3-1. The Commissioners constitute 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 Commissioners' public records during regular business hours unless the public records are exempt from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The Commissioners do not dispute that the Recording is a "public record" within the meaning of the APRA. I.C. § 5-14-3-2(m). Rather, they argue that it is exempt from disclosure as the functional equivalent of a "diary, journal, or other personal notes." I.C. § 5-14-3-4(b)(7). Under the APRA, a public agency that withholds a public record bears the burden of showing that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g). Exceptions to disclosure are narrowly construed. I.C. § 5-14-3-1.

There is some precedent that recordings of public meetings are, in general, disclosable public records. For example, in 2005, Counselor Davis opined that a tape recording of a meeting held by the Morgan County Health Department ("MCHD") was a disclosable public record:

> If the tape recording of the June 30 meeting [of the Morgan County Board of Health] was not erased or reused at the time of your request for the verbatim dialogue of the meeting, it was a violation of the Access to Public Records Act to not disclose it to you. In addition, if the tape recording was erased or reused prior to the official approval of the minutes at the next meeting of the Department's Board of Health, the Department violated IC 5-14-3-4(e). The Department cannot avoid disclosure of the tape recording of a meeting merely because the Department designates the tape recording as an aid to composing the minutes or memoranda of a meeting. The tape is a public record, even if an official substitute will be created some time in the future. In fact, the Open Door Law requires that memoranda be kept *as the meeting progresses*. Hence, if the tape recording is the functional equivalent of shorthand notes or other notes kept during the meeting, then the tape recording fulfills the governing body's obligation under IC 5-14-1.5-4(b) to keep memoranda as the meeting progresses. Since those memoranda are to be available within a reasonable time after the meeting, and because in any event, a tape recording constitutes a public record, the Department must maintain the tape recording and allow the tape recording to be inspected and copied upon request.

Opinion of the Public Access Counselor 05-FC-217. That said, the exceptions found in section 4 of the APRA would still apply to such records to classify them as confidential or nondisclosable in the discretion of the agency. Counselor Davis ultimately determined that no exception applied to classify the MCHD's tape recording as nondisclosable.

Unlike the Commissioners, the MCHD did not argue that the record fell within subsection 4(b)(7) of the APRA, which applies to "diaries, journals, or other *personal* notes serving as the functional equivalent of a diary or journal." I.C. § 5-14-3-4(b)(7) (emphasis added). Here, however, it is unclear whether any of the conversations captured on Recording were "personal" in nature. Indeed, they were presumably conversations held between more than one person, in a public building, and in a meeting room in which the meeting's proceedings were recorded. The Recording was streamed over the internet during the session for viewing by the general public. Even if the proceedings were recessed at a certain point, government buildings and public meeting rooms are often subject to surveillance camera recordings, so it is difficult to argue that individuals who are heard on the recording had a heightened expectation of privacy due to the fact that the meeting was recessed. That is not to say that no private conversations could ever occur inside a government building or a public meeting room, but nothing before me indicates that anything on the Recording was intended to be purely personal in nature. Consequently, it is my opinion that the Commissioners have not sustained their burden to show that the Recording falls within subsection 4(b)(7) of the APRA.

Even if the portion of the Recording created during the recessed portion of the meeting fell within the exception, however, I do not agree that the entire Recording would be nondisclosable. In an opinion issued in 2008, Counselor Neal determined that information in a record that did not fit within subsection 4(b)(7) should be separated and released to the requester:

> While I agree that . . . personal notes serving as the functional equivalent of a diary or journal contained in the materials may be nondisclosable at the discretion of the agency, I cannot agree that the entire record is thereby rendered nondisclosable. The APRA provides that when a record contains disclosable and nondisclosable information, the disclosable should be separated, and access should be provided to that portion of the record. I.C. § 5-14-3-6. The County argues that this office has previously interpreted I.C. § 5-14-3-4(b)(7) to apply to the entire record that meets the exemption. In support, the County cites *Opinions of the Public Access Counselor 01-FC-42 and 05-FC-152* (which cites the former).
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> In both of those opinions, the record at issue was a calendar maintained as a personal journal or diary. In Opinion 01-FC-42, Counselor O'Connor opined that "Indiana Code section 5-14-3-7 does provide that so long as the *entire* calendar functions as a diary or journal, then that calendar may be subject to nondisclosure as a whole." *Id*. I agree with Counselor O'Connor's opinion as applied to a record like a calendar, wherein all of the information falls under the exception. Here, though, it is my understanding the document at issue is a listing of nuisance complaints with Ms. Marbach's notes in one or more of the fields. In that case, it is my opinion the portion serving as a diary or journal could

> be redacted and the portion serving as the County's record of nuisance complaints filed should be made available.

Opinion of the Public Access Counselor 08-FC-240 (emphasis added). Here, the Commissioners do not allege that the entire Recording is the functional equivalent of a diary, journal, or other personal note, and the portions of the Recording that captured the meeting were not at all personal in nature. Because I agree with Counselor Neal's analysis, it is my opinion that the Commissioners should have, at a minimum, released the non-recess portions of the Recording.

CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners have not met their burden to show that the APRA permits the Commissioners to withhold the portion of the Recording that was created during the recessed portions of the September 8th meeting. Moreover, it is my opinion that the Commissioners violated the APRA by refusing to, at a minimum, release a redacted version of the Recording.

Best regards,

Andrew J. Kossack

Andrew J. Kossack
Public Access Counselor

Cc: Steven M. Badger