



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

March 2, 2010

Ms. Roxanna Hanford
1430 E. 900 N.
Lake Village, IN 46349

Re: Formal Complaint 10-FC-26; Alleged Violation of the Access to Public Records Act and the Open Door Law by Newton County Community Services

Dear Ms. Hanford:

This advisory opinion is in response to your formal complaint alleging that Newton County Community Services (“NCCS”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.*, and the Open Door Law (“ODL”), I.C. § 5-14-1.5-1 *et seq.* Enclosed is the response that NCCS sent to my office regarding your allegations.

BACKGROUND

In your complaint, you allege that NCCS violated the ODL when it failed to cite to a specific statutory instance in the ODL that would have permitted NCCS to hold its January 25, 2009,¹ meeting as an executive session. You further allege that you have made “numerous requests of [sic] information” to NCCS. In response, NCCS has submitted documents to you only once, which prompted additional questions. To date, NCCS has not answered your questions. You serve as a county commissioner for Newton County, which is the grantee of NCCS’ 5311 Transportation Grant. You state that you require information from NCCS in order to complete paperwork as NCCS’ lead agency.

My office forwarded a copy of your complaint to NCCS. In response, Debbie Wessels, the executive director of NCCS, claims that NCCS is not a public agency. Rather, Ms. Wessels claims NCCS is a not-for-profit agency that does not receive tax dollars. She claims that she was unaware of the need to cite to the ODL when posting notices of an executive session. She also states that NCCS “provided over 700 pieces of requested information about NCCS to the Commissioner’s Attorney last year,” and that

¹ I note that the two notices you enclosed with your complaint show two different dates for the relevant meeting: January 25th and January 26th.

you and the other Newton County commissioners receive quarterly reports and “[a]ll paperwork involving the 5311 grant.

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. NCCS disputes that it is a public agency for the purposes of the APRA and ODL. I.C. § 5-14-3-2(m); I.C. §5-14-1.5-2(a). The APRA and the ODL define “public agency” as “[a]ny entity which is subject to either: (A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or (B) *audit by the state board of accounts.*” *Id.* (emphasis added).

After receiving Ms. Wessels’ response, I contacted Tammy Baker, supervisor of non-governmental entities at the State Board of Accounts (“SBOA”). Ms. Baker informed me that NCCS is subject to audit by the SBOA. Therefore, NCCS is a “public agency” for purposes of the APRA and the ODL. *Id.* Accordingly, any person has the right to inspect and copy NCCS’ public records 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). Moreover, except as provided in section 6.1 of the ODL, all meetings of the governing body of NCCS 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).

Here, it is unclear what information NCCS has refused to provide to you. Initially, it is important to note that the APRA applies to disclosure of public *records* rather than *information*. *See generally* I.C. § 5-14-3-1 *et seq.* Generally, the APRA does not obligate public agencies to respond to questions or requests for information that is not included in the agency’s records. Rather, the APRA prescribes the following procedures and requirements with regard to public records.

Generally, a request for access to public records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). If the request is delivered in person and the agency does not respond within twenty-four (24) hours, the request is deemed denied. I.C. §5-14-3-9(a). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

If a request is made orally, either in person or by telephone, a public agency may deny the request orally. IC 5-14-3-9(c). When the request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or

part of the record and the name and title or position of the person responsible for the denial. I.C. § 5-14-3-9(c).

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. Therefore, if NCCS has denied any of your requests for access to NCCS' public records, the burden is on NCCS to show a legal basis for such denial. If NCCS cannot sustain that burden of proof before a court, NCCS has violated the APRA. If NCCS has denied your requests for access to public records without a legal basis, I encourage NCCS to either produce the requested records to you as soon as is practicable. If NCCS persists in its denial of access following the issuance of an advisory opinion from this office, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

With regard to your allegation that NCCS violated the ODL by failing to post proper notice its January 25th executive session. The ODL provides the following pertaining to public notices generally and executive session notices in particular:

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. . . .

* * *


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). . . .

I.C. § 5-14-1.5-5(a); I.C. § 5-14-1.5-6.1(d). Because NCCS' notice of its January 25th executive session did not "state the subject matter by specific reference to the enumerated instance" in section 6.1 of the ODL for which the meeting was held, it is my opinion that NCCS' notices violated subsection 6.1(d) of the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that NCCS violated the ODL by failing to post proper notice of its January 25th executive session. Moreover, if NCCS has denied your request(s) for access to NCCS' public records without a legal basis for doing so and/or failed to comply with the APRA's aforementioned procedures, NCCS violated the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, prominent 'K'.

Andrew J. Kossack
Public Access Counselor

Cc: Debbie Wessels, Newton County Community Services