



STATE OF INDIANA

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February 21, 2011

Ms. Lisa A. Durcholz
4882 S. St. Road 257
Velpen, IN 47590

Mr. Richard E. Bush
4624 S. State Road 257
Velpen, IN 47590

Re: Consolidated Formal Complaints 11-FC-37; 11-FC-38; 11-FC-40; Alleged Violations of the Access to Public Records Act and the Open Door Law by the Pike County Commissioners

Dear Ms. Durcholz and Mr. Bush:

This advisory opinion is in response to your formal complaints alleging the Pike County Commissioners ("Commissioners") 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.* Due to the relatedness of the issues presented in your complaints and the fact that they all involve the Commissioners, I have consolidated my responses to each into this opinion. Enclosed for your reference is the response from the Commissioners' attorney, Val J. Fleig.

BACKGROUND

Ms. Durcholz, you allege that the Commissioners violated the ODL by (1) failing to include in a meeting agenda that a vote would occur regarding the replacement of a bridge foreman; (2) holding a meeting of the Commissioners (Brian Davis and Mark Flint) at the Pike County Highway Garage on January 7, 2011; and (3) "[a]llegedly" holding meetings between those two commissioners without the third commissioner, Dale Nalley. Mr. Bush, you allege that the Commissioners violated the APRA by producing only 24 pages of a public employee's personnel file after the Commissioners admitted in a public meeting that the entire file consisted of 70 pages.

In response to your complaints, Mr. Fleig states that the purported meetings between Mr. Davis and Mr. Flint were both chance gatherings at which no public business was discussed. They were not aware that either would be at the Highway

Garage on January 7th; both Mr. Flint and Mr. Davis went there to inspect the cleanliness of the premises and a fireproof cabinet, respectively. The two commissioners also gathered by chance on January 14th when a representative from Verizon delivered new computers to the Commissioners' office. Mr. Flint and Mr. Davis went to the office to pick up their units and receive instructions regarding their use. No public business was discussed at that time. As to the "alleged" meetings held without Mr. Nalley, Mr. Fleig notes that no specific meeting is alleged, but that Mr. Flint and Mr. Davis deny that claim generally. With regard to your request for the personnel records, Mr. Fleig states that the Commissioners provided you with all records required to be disclosed by subsection 4(b)(8) of the APRA. He claims that the balance of the records is nondisclosable at the Commissioners' discretion.

ANALYSIS

With regard to your allegations regarding illegal meetings of Mr. Flint and Mr. Davis, the ODL provides that certain gatherings of a majority of the governing body of a public agency are not "meetings" subject to the ODL. Specifically, the Commissioners do not hold a meeting under the ODL if a majority is present at "(1) any social or chance gathering not intended to avoid this chapter," or "(2) any on-site inspection of any (A) project; (B) program; or (C) facilities of applicants for incentives or assistance from the governing body." I.C. § 5-14-1.5-2(c). Here, Mr. Fleig states that Mr. Flint and Mr. Davis gathered by chance on January 7th when each was inspecting the Highway Garage without knowledge that the other would be present, and on January 14th when each happened to be present to pick up their computers. In my opinion, these appear to be chance gatherings that the General Assembly intended to except from the requirements of the ODL. Even if the January 7th meeting was not a chance gathering, it appears to fit within the ODL's exception for on-site inspections. I.C. § 5-14-1.5-2(c)(2). With regard to the latter gathering, I do not believe that the General Assembly enacted the ODL with the intent that two county commissioners would need to hold a public meeting to merely pick up new pieces of computer equipment.

Regarding Mr. Bush's request for personnel records, the APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and
- (C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

I.C. § 5-14-3-4(b)(8). In other words, the information referred to in (A) - (C) above must be released to you upon request, but a public agency may withhold any remaining

personnel records. Because Mr. Fleig states that the Commissioners have provided all information listed in subsections 4(b)(8)(A) - (C), it is my opinion that the Commissioners did not violate the APRA by withholding the remaining personnel records.

CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners did not violate either the ODL or the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: Val J. Fleig