



# STATE OF INDIANA

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February 27, 2012

Gladys Rita Kopala  
66559 Ivy Road  
Lakeville, Indiana 46536

*Re: Formal Complaint 12-FC-28; Alleged Violation of the Access to Public Records Act by the South Bend County Council and South Bend Common Council*

Dear Ms. Kopala:

This advisory opinion is in response to your formal complaint alleging the South Bend County Council ("County Council") and South Bend Common Council ("Common Council") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Kathleen Cekanski-Farrand, Common Council Attorney, responded on behalf of the Common Council and the South Bend City Clerk ("Clerk"). Her response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you submitted a request to the County Council on or about January 5, 2012 for audio recordings of meetings held on October 11, 2011, November 15, 2011, and December 6, 2011. You spoke with Ms. Joan Pawlowski, County Council Secretary, regarding your request on January 5, 2012. Ms. Pawlowski informed you that you would need to speak with the Auditor's office regarding the recordings due to the County Council did not provide this information. You further allege that you thereafter spoke with a representative of the Auditor's Office, who provided that pursuant to the County Retention Schedule, audio recordings of County meetings are destroyed after the minutes were signed and approved at the following meeting. You thereafter provide that the Auditor's representative informed you that they do not provide minutes for the County meetings. You also state that the Common Council has failed to completely disclose various records consisting of budget information and previous meeting minutes. In addition, you make general accusations that you have been denied the right to speak at public meetings and are now required by the Common Council to fill out a form prior to being allowed to speak.

In response to your formal complaint, Ms. Cekanski-Farrand advised all of the Standing Committee meetings of the Personnel and Finance Committee and all of the

Common Council's meetings held last calendar year on the proposed budget for the City of South Bend met the notice requirements of the ODL. Copies of the following notices were provided by Ms. Cekanski-Farrand, which I have enclosed for your review: August 24, 2011 notice of the Personnel and Finance Committee meetings held in August and September on the 2012 Operating Budget, September 22, 2011 notice of the Personnel and Finance Committee meeting held on September 26, 2011 regarding Bill No.'s 53-11, 54-11, and 55-11, August 26, 2011 and September 2, 2011 proof of publications of the September 26, 2011 public hearing before the Common Council, August 26, 2011 proof of publication of the September 26, 2011 public hearing, September 2, 2011 proof of publication of the 2012 budget, and the September 2, 2011 and September 9, 2011 proof of publication of the 2012 budget, tax rate, and levy.

On September 23, 2011, you filed an APRA request with the City of South Bend, which was approved by Assistant City Attorney Thomas Bodnar on September 26, 2011. Ms. Kopala did not request any records related to her alleged violation in her most recent complaint of "notification of budget meeting." The Clerk tendered to Ms. Kopala all requested written documents and DVD of each meeting that was sought. All other requested records sought by Ms. Kopala were provided to her on January 17, 2012 as indicated by the Clerk's staff notations. Thus, all available information has been provided to Ms. Kopala in response to any records request filed by her with the City of South Bend.

#### ANALYSIS

The public policy of the APRA states that "(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." *See* I.C. § 5-14-3-1. The County Council and Common Council are public agencies for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the either Council's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and 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. *See* I.C. § 5-14-3-9(c). 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.



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The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). I would note that the general County/Local Retention Schedule provided by the Indiana Commission on Public Records states that magnetic audio tapes may be destroyed after the official minutes taken have been approved. I have enclosed a copy of the general retention schedule for your benefit. As long as the audio recordings you seek were disposed of in accordance with the applicable adopted retention schedule, the County Council did not violate the APRA by failing to maintain the record beyond the retention period. As to your alleged pending records requests of the Common Council, Attorney Cekanski-Farrand has advised that all records responsive to your requests were provided to you on January 17, 2012 which I trust is in satisfaction of your complaint.

It is the intent of the ODL 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. *See* I.C. § 5-14-1.5-1. Accordingly, 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. *See* I.C. § 5-14-1.5-3(a).

You provide that the Common Council requires an individual to complete a form (titled "Privilege of the Floor") prior to being allowed to speak. You believe that this practice violates the ODL. The form that you have submitted required the individual to provide a name, address, telephone number, and e-mail. The form requests that you briefly summarize the concern or issue if you wish to receive a formal update. At the bottom of the form, it provides who the issue presented to the Common Council is referred to and a space for the Common Council's President. You do not indicate when this form is required to be turned in or alternatively, if you have ever been denied the right to speak after not submitting the requested form.

Counselor Neal noted in Formal Complaint 08-FC-149, Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. *See Opinion of the Public Access Counselor 08-FC-149, citing Brademas v. South Bend Cmty. Sch. Corp.*, 783 N.E.2d 745, 751 (Ind. Ct. App. 2003), *trans. denied*, 2003; *see also* I.C. § 5-14-1.5-3 ("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."). "Indiana law does require a governing body to allow public testimony in certain instances (e.g. a hearing on a proposed budget), but as a general rule the ODL does not guarantee the right to speak at a meeting." *Opinions of the Public Access Counselor 08-FC-149 and 10-FC-240*. Thus, it is my opinion that the Common

Council did not violate the ODL by allowing public comment only after the individual completes a form that provides identifying information; which in turn allows the Common Council to address the complaint or issue raised and respond accordingly.

#### CONCLUSION

For the foregoing reasons, it is my opinion that neither the County Council nor Common Council has violated the ODL or the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage  
Public Access Counselor

cc: Kathleen Cekanski-Farrand