



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

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

April 7, 2014

Mr. Kurt Disser
7210 E. County Rd. 700 N.
Brownsburg, IN 46112

Re: Formal Complaint 14-FC-42; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Town of Brownsburg

Dear Mr. Disser,

This advisory opinion is in response to your formal complaint alleging the Town of Brownsburg ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. and the Open Door Law ("ODL") Ind. Code § 5-14-3-1 et. seq. The Town has provided a response to your complaint Mr. Kevin Koons, Esq. His response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on March 7, 2014.

BACKGROUND

Your complaint dated March 7, 2014 alleges the Town of Brownsburg violated the Open Door Law by holding meetings not open to the public. Additionally, you allege the Town Council ("Council") violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

As to the Open Door Law violation, your formal complaint speculates the five-member Town Council met behind closed doors to meet and discuss an annexation proposal. You base your allegations on a series of calendar meeting invites from the Town Manager, who is not on the board. Furthermore, certain actions were taken at a public meeting which you surmise could not have happened without the Town Council meeting in private to discuss those matters first.

The Town responds to your ODL violation allegation arguing the invites clearly indicate at no time did a majority of the Council meet. They confirm members met individually with the Town Manager, but at no time were more than two (2) of the five (5) members present.

ANALYSIS

It is the intent of the Open Door Law (ODL) 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 Ind. Code § 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 Ind. Code § 5-14-1.5-3(a).

Although the alleged closed door meeting occurred in January 2013, you first received notice of them via a public records request by another individual in February 2014. Ind. Code § 5-14-5-7 states a person...that chooses to file a formal complaint with the counselor must file the complaint not later than thirty (30) days after...the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. Your complaint satisfies this requirement, because you did not receive notice of the January 2013 meetings until February 11, 2014, less than thirty (30) days before you filed your complaint.

Substantively, there is not enough evidence for me to conclude determinatively if a violation of the Open Door Law occurred. The meetings were set up by the Town Manager and the Town maintains only two (2) of the five (5) members were present at any given time. Note also the series of meetings would not meet the definition of a serial meeting as three (3) members were never present at once. See Ind. Code § 5-14-1.5-3.1(a). It appears they did meet individually. This would confirm your assumptions that Council members had prior subject matter knowledge before the subsequent public meeting. Because there is no indication a majority of the Council was present at any one time, however, there can be no violation of the Open Door Law.

As to the Access to Public Records Act violation, 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 Ind. Code § 5-14-3-1. The Town of Brownsburg is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Town of Brownsburg's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

You indicate in your formal complaint you were denied access to records on the following dates: July 10, 2013; July 19, 2013; August 2, 2013; and November 4, 2013. The Town is correct in that, similar to the Open Door Law allegation, you have thirty (30) days to file a formal complaint from the date of the denial pursuant to Ind. Code § 5-14-5-7. Your APRA complaint was not filed until March 13, 2014 and therefore will be considered moot. I have reviewed the denials and the Town has properly followed the procedure for denial pursuant to Ind. Code § 5-14-3-9 et. seq.. Whether the denials were justifiable exceptions under the APRA would have been an appropriate inquiry for an Opinion had you filed your formal complaint on or before December 4, 2013.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the Town of Brownsburg has not violated the Open Door Law or the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Mr. Kevin Koons, Esq.