



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

January 28, 2013

Benjamin Conner
302 S. Sycamore St.
Odon, Indiana 47562

Re: Informal Inquiry 13-INF-03; Odon Town Council

Dear Mr. Conner:

This is in response to your informal inquiry regarding the actions of the Odon Town Council ("Council") and its compliance with the Open Door Law ("ODL"), Ind. Code 5-14-1.5 *et. seq.* and the Access to Public Records Act ("APRA"). Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. Rita Baldwin, Attorney, responded on behalf of the Council. Her response is enclosed for your reference.

BACKGROUND

You provide that you have previously submitted a request to the Council to be notified of all emergency meetings, special meetings, or executive sessions held by the Council. The Council denied your request. You inquire what is considered to be "news media" under the ODL. You advised that Odon maintains a single newspaper which is published weekly on Wednesday. It is owned and operated by one of the members of the Council. You attend and videotape all public Council meetings and publish on a Facebook page ("Page") titled "Odon Town Council." You further request copies of meeting minutes and other public records from the Council that are posted on the Page in order to inform the public.

In operating the Page, you receive no outside funding nor do you accept advertisements. You have not maintained the Page for more than three years and you are not certain as to how many subscribers or visitors access the Page. The Page is accessible to any party, there are no fees required, and any party is allowed to comment, post videos, pictures, etc...

You have previously filed a formal complaint against the Council and you believe that the local newspaper, via its owner, is attempting to intimidate you in order to keep you from making requests under the APRA or from attending meetings. You inquire how a "qualified" newspaper can inform the public if it is only published once a week.

You provide that the citizens of the Town need to be informed and requiring them to drive to city hall on a daily basis is too burdensome.

In response to your informal inquiry, Ms. Baldwin has advised that the Council does not believe that you qualify as a news service pursuant to I.C. § 34-6-2-87. The Council also advised in response to your request for records that was submitted on January 4, 2013, it does not maintain any records that are responsive to your request.

ANALYSIS

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).

A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. *See* I.C. § 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). “Public business” means to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. 5-14-3-2(e).

The ODL requires that 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 hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing, requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2). I.C. § 5-14-1.5-5(b)(2) provides that the governing body of a public agency shall provide public notice by delivering notice to all “news media” which deliver annual written request for the notices not later than December 31 for the next succeeding calendar year to the governing body of the public agency. The governing body shall give notice, at its election, either via U.S. Mail, email, or facsimile. *See* I.C. § 5-14-1.5-5(b)(2)(A)-(C).

I.C. § 5-14-1.5-2(j) defines “news media” as all newspapers qualified to receive legal advertisements under Indiana Code 5-3-1, all news services (as defined in Indiana Code 34-6-2-87), and all licensed commercial or public radio or televisions stations. I.C. 5-3-1-0.4 defines “newspapers” as:

Sec. 0.4. As used in this chapter, “newspaper” refers to a newspaper:
(1) that:

- (A) is a daily, weekly, semiweekly, or triweekly newspaper of general circulation;
 - (B) has been published for at least three (3) consecutive years in the same city or town;
 - (C) has been entered, authorized, and accepted by the United States Postal Service for at least three (3) consecutive years as mailable matter of the periodicals class; and
 - (D) has at least fifty percent (50%) of all copies circulated paid for by subscribers or other purchasers at a rate that is not nominal; or
- (2) that:
- (A) is a daily, weekly, semiweekly, or triweekly newspaper of general circulation;
 - (B) has been entered, authorized, and accepted by the United States Postal Service as mailable matter of the periodicals class;
 - (C) has at least fifty percent (50%) of all copies circulated paid for by subscribers or other purchasers at a rate that it not nominal; and
 - (D) meets the greater of the following conditions:
 - (i) The newspaper's paid circulation during the preceding year is equal to at least fifty percent (50%) of the paid circulation for the largest newspaper with a periodicals class permit located in the county in which the newspaper is published, based on the average paid or requested circulation for the preceding twelve (12) months reported in the newspaper's United State Postal Service Statement of Ownership published by the newspaper in October of each year or based on the newspaper's initial application for a permit from the United States Postal Service.
 - (ii) The newspaper has an average daily paid circulation of one thousand five hundred (1,500) based on the average paid or requested circulation for the preceding twelve (12) months reported in the newspaper's United States Postal Service Statement of Ownership published by the newspaper in October of each year or based on the newspaper's initial application for a permit from the United States Postal Service."

Pursuant to I.C. § 34-6-2-87, "news services" is defined as an entity that is either a membership association or a corporation with subscribers that gather and transmits news to its members or subscribers and maintains an office in Indiana.

You concede that your Page has been published for less than three (3) consecutive years and there are no fees charged to view or interact within the Page. As such, the Page would not qualify as a "newspaper" pursuant to I.C. § 5-3-1-0.4. You have not provided

that you are part of a membership association or corporation with subscribers that gather and transmit news to its member or subscribers and maintain an office in Indiana. As such, you would not qualify as a “news service” under I.C. § 34-6-2-87. Lastly, you have not provided that you operate a licensed commercial or public radio or television station. Accordingly, it is my opinion that the Council would not have violated the ODL by refusing to provide you with notice pursuant to section 5(b)(2) as you do not meet the definition of “news media” pursuant to I.C. § 5-14-1.5-2(j).

However, I would note that in 2012, the General Assembly amended the notice requirements for certain governing bodies under the ODL. Specifically, I.C. § 5-14-1.5-5(b)(3) provides:

(3) This subdivision applies only to the governing body of a public agency of a political subdivision described in section 2(a)(2), 2(a)(4), or 2(a)(5) of this chapter that adopts a policy to provide notice under this subdivision. Notice under this subsection is in addition to providing notice under subdivisions (1) and (2). If the governing body adopts a policy under this subdivision, the governing body of a public agency shall give public notice by delivering notice to any person (other than news media) who delivers to the governing body of the public agency an annual written request for the notices not later than December 31 for the next succeeding calendar year. The governing body shall give notice by one (1) of the following methods, which shall be determined by the governing body:

(A) Transmitting the notice by electronic mail, if the public agency has the capacity to send electronic mail.

(B) Publishing the notice on the public agency's Internet web site at least forty-eight (48) hours in advance of the meeting, if the public agency has an Internet web site.

As provided in the subsection, the Council *may* adopt a policy that would allow for meeting notices to be provided to individuals who have requested as such (emphasis added). The notices shall be delivered either via electronic mail or by the Council publishing the meeting notice on its internet website. It should also be noted that the notice requirements contemplated under (b)(3), are in *addition* to the notice requirements found under I.C. § 5-14-1.5-5(b)(1)-(2) (emphasis added). It is not evident whether the Council has adopted a policy pursuant to I.C. § 5-14-1.5-5(b)(3). If the Council has not adopted a policy pursuant to (b)(3), it would not violate the ODL by failing to provide notice in the manner defined in the subdivision. The decision to adopt a policy under (b)(3) is left to the Council.

As to the issues regarding your request for records that was submitted on January 4, 2013, a “public record” means any writing, paper, report, study, map, photograph,

book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. *See* I.C. §5-14-3-2. That being said, generally the APRA does not require public agencies to produce records that the agency does not physically maintain. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”).

In 2005 the Court of Appeals in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005) (“*Knightstown*”), held that because a private entity created a settlement agreement *for* a public agency, the settlement agreement was a public record subject to disclosure under the APRA. *Id.* at 1134. The Court did not find that the language “created, received, retained, maintained or filed by or with a public agency” in I.C. §5-14-3-2 excepted from the definition records created *for* or *on behalf of* a public agency. Furthermore, the Court said it would amount to a tortured interpretation of the statute if private attorneys could ensconce public records in their file room in order to deny the public access. *Id.* at 1133. In other words, where records are created or maintained for a public agency but kept in the possession of an outside entity, the Court of Appeals ruled that the agency is obligated to retrieve the records and make them available for inspection and copying upon request. *Id.*; *see also Opinion of the Public Access Counselor 08-FC-223*; *10-FC-219*; and *11-INF-43*.

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). Further, the APRA also requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. *See* I.C. § 5-14-3-4(e). A public agency shall protect public records from loss, alteration, mutilation, or destruction. *See* I.C. § 5-14-3-7(a). A public agency shall further take precautions that protect the contents of public records from unauthorized access, unauthorized access by electronic device, or alteration. *See* I.C. § 5-14-3-7(b). An agency would not violate the APRA by destroying records pursuant to the applicable retention schedule.

Please let me know if I can be of any further assistance.

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: Beth Haseman