



# STATE OF INDIANA

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December 20, 2013

Mr. Roger A. Young, Esq.  
c/o Young and Young  
40 W. Court St., Ste. D  
Franklin, IN 46131

*Re: Informal Inquiry 13-INF-63; Scribed Draft Minutes*

Dear Mr. Young:

This is in response to your informal inquiry regarding the practice by the Cordry-Sweetwater Conservancy District ("District") of withholding draft minutes of public meetings before the minutes are finalized. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

## BACKGROUND

Your client, the Cordry-Sweetwater Conservancy District, a public agency, regularly considers draft minutes of public meetings to be discretionary in nature and therefore would not have to be disclosed upon request.

According to your communication to this Office, the District Recording Secretary prepares draft minutes of a public meeting and then circulates the document for approval. Cordry-Sweetwater Conservancy District Board members are free to make suggestions, amendments, and often the minutes are altered to better reflect the actual progression of the meeting and the substantive content of the minutes. You refer to the document as draft minutes, however, you describe it as a communication method for members to opine on the goings-on of the meeting itself. Members do not deliberate amongst themselves as a majority; however, they submit proposed ideas to the Secretary.

## 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 Ind. Code § 5-14-3-1. The Cordry-Sweetwater Conservancy District is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the District’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise non-disclosable under the APRA. See Ind. Code § 5-14-3-3(a).

Ind. Code § 5-14-3-2(n) defines public records as 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 and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Memoranda are to be made available within a "reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings." Meeting minutes are not required under the APRA or the Open Door Law. However, if minutes are kept they must be available for inspection. See Ind. Code § 5-14-1.5-4(c). Several Public Access Counselors Opinions have addressed the issue of draft minutes and their disclosure to the public. I will reference them below; however, I am not aware that any Opinions address the specific fact pattern your present. Your client’s practice in handling draft minutes, as presented, would fall under the deliberative materials exception. This could be interpreted as a slight deviation from the most recent version of the 2013 Public Access Counselor’s Handbook. The reader of this Opinion should note that typical draft minutes, however, kept are to be available for inspection if they are prepared in order to simply reflect the actual events of the meeting.

Without exception, previous Advisory Opinions have opined that draft minutes are public records subject to disclosure. See Counselor Hoage’s Advisory Opinion 12-FC-85. While I consider said minutes to be public records (and must be retained under the State’s retention schedule), I find their release, in this narrow circumstance, is discretionary under the deliberative materials exception of the APRA at Ind. Code § 5-14-3-4(b)(6). I generally caution public agencies to not overuse the deliberative materials exception, as I find it is applied too broadly in order to justify withholding records. However, in this circumstance I agree with the practice of the District to consider the records deliberative. The APRA gives discretion to public agencies to release:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

*Id.* at Subsection (c).

The practice described by your client indicates the draft minutes are working documents. The process allows board members to weigh in on the substantive portion of the document and offer an opinion on the contents of the minutes. The document itself is the contemplative perceived version of meeting minutes by the recording secretary and the process as described is communication for the purpose of making a decision on the final memorialization of the minutes. Until it is finalized, it is not a true reflection of the District board as a collective, but an amalgamation of various board members' speculation and deliberation. Please note the input to the secretary is not to be done by a majority of the board, as that would be an official action. Individual's opinions communicated to the secretary would be appropriate.

Also note the deliberative exception would only apply to *scribed* minutes. It would not apply to any video or audio recording. Likewise, if there is a transcript of the meeting conducted under typical transcription methods, the transcript is not a deliberative material and would be subject to disclosure. Accordingly, if the draft minutes are merely a rote recitation of the facts of the meetings, then they would not be deliberative. But if the *expectations* of the minutes are to be fluid subject to the opinions of other board members than the secretary, then they are deliberative.

The opposing argument would be the necessity to review draft minutes to determine the accuracy of the final minutes. If there is a discrepancy as to the minutes, then the public should have access to that particular working document to determine if inaccuracies exist. While logical, I find there are protections in the Open Door Law which would override this consideration. The fundamental right of the public to observe and record public meetings under Ind. Code § 5-14-1.5-3(a) provides protection against a public agency altering minutes which do not reflect actual events. While this is a departure from previous opinions, I do not believe the public would be prejudiced by the discretionary withholding of draft minutes that are considered deliberative.

Please note this is a very narrow circumstance based upon the specific practice of your client. This Opinion is not intended to encourage other public agencies from withholding draft minutes or to amend their current practice to skirt open access.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a large, sweeping flourish at the end.

Luke H. Britt  
Public Access Counselor