



STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

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

February 21, 2017

Donald Robertson
Via email

Re: Informal Inquiry 18-INF-01; Destruction of Meeting Minutes

Dear Mr. Robertson,

This informal opinion is in response to your inquiry regarding the destruction of all electronic and hard copies of Lawrence County Election Board ("CEB") meeting minutes. Specifically, you asked the following questions:

1. Since [the destruction of meeting minutes by the former County Clerk] is a flagrant violation of the Open Door Law because CEB meeting minutes are required to be kept forever, should the CEB refer this matter to the County Prosecutor for further investigation?
2. Is the current County Clerk or CEB liable for any of the actions of the former County Clerk?
3. Is the Voter Registration Clerk liable for any of the negligent actions that she was instructed to do or not to do by the former County Clerk?

Analysis

The Open Door Law ("ODL") generally requires the meetings of the governing bodies of public agencies to be open to the public. Ind. Code § 5-14-1.5-3(a). The purpose of the ODL is to ensure the official action of public agencies is conducted and taken openly so the general public may be fully informed. *See* Ind. Code § 5-14-1.5-1.

1. Meeting Minutes

The ODL requires the creation of the following memoranda as a meeting progresses: (1) the date, time, and place of the meeting; (2) the members of the governing body recorded as either present or absent; (3) the general substance of all matters proposed, discussed, or decided; (4) a record of all votes taken by individual members if there is a roll call; and (5) any additional information under I.C. section 5-14-1.5-3.5 or I.C. section 5-14-1.5-3.6 or any other statute that authorizes a governing body to conduct a meeting using an electronic means of communication. Ind. Code § 5-14-1.5-4(b). If any meeting minutes are created, they are to be open for public inspection and copying. Ind. Code § 5-14-1.5-4(c).

The Access to Public Records Act (“APRA”) mandates that a public agency shall protect public records from loss, alteration, mutilation, or destruction. Ind. Code § 5-14-3-7. APRA also provides that public records subject to IC 5-15 (the Article governing public records) may be destroyed only in accordance with record retention schedules under IC 5-15. Ind. Code § 5-14-3-4(h).

In the County/Local General Retention Schedule, the Indiana Archives and Records Administration has designated the official meeting minutes of any county/local agency, board, commission, or of any division as a critical public record.¹ Meeting minutes are to be microfilmed pursuant to 62 IAC 2, and the original copies of the minutes are either to be retained by the county/local office or transferred to the Indiana State Archives pursuant to Indiana Code section 5-15-6-6.

Indiana Code section 5-15-6-8 provides that a public official or other person who recklessly, knowingly, or intentionally destroys or damages any public record commits a Level 6 felony unless (1) the [local public records] commission shall have given its approval in writing that the public records may be destroyed; (2) the commission shall have entered its approval for destruction of the public records on its own minutes; or (3) authority for destruction of the records is granted by an approved retention schedule established under this chapter. *See also* Indiana Code § 35-44-2-4-7. Given that the IARA has deemed meeting minutes as critical public records that should be preserved in perpetuity, it is unlikely that any local public records commission has approved the destruction of the meeting minutes of the Lawrence County Election board.

Unless there is another local retention schedule approved pursuant to Indiana Code section 5-15-6 that allows for the destruction of meeting minutes, it is my opinion that it would be appropriate to report the destruction of all meeting minutes to the county prosecutor based on the information provided to my office. I suggest also notifying the Indiana Archives and Records Administration of the destruction of minutes as well. However, prior to reporting the destruction of the minutes, the current County Election Board should first confirm that the former County Clerk did not transfer the minutes to microfilm and to the Indiana State Archives pursuant to 62 IAC 2 and Indiana Code section 5-15-6-6.

2. Liability of the Current Clerk and County Election Board

Because Indiana Code section 5-15-6-8 states that destruction of records constitutes a felony when done “recklessly, knowingly, or intentionally,” it is unlikely that the Current Clerk or the County Election Board would be found criminally liable for the actions of the former County Clerk based on the information provided to my office. Furthermore, when there is a change in administration after an election, the responsibility falls on the outgoing administration to ensure a smooth transition and not destroy or otherwise mutilate records. In this situation, the responsibility fell on the former County Clerk to ensure the protection of public records from destruction.

¹ https://www.in.gov/iara/files/county_general.pdf

3. Individual Liability of the Voter Registration Clerk

The question of whether the Voter Registration Clerk may be individually liable for actions taken at the instruction of the former County Clerk is beyond the scope of this office's authority pursuant to Indiana Code section 5-14-4-10. My recommendation is that either the Election Board consult with the County's attorney or the Voter Registration Clerk consult with her attorney to discuss any potential liability.

Please do not hesitate to contact me with any questions.

Best regards,

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

Luke H. Britt
Public Access Counselor