

March 7, 2005 Alleged Violation of the Open Door Law and Access to Public Records Act by the Greene County Commissioners

March 7, 2005

Kathy Crouch
Commissioner, Greene County
R.R. 3 Box 454
Bloomfield, IN 47424

Re: Informal Inquiry Response; Alleged Violation of the Open Door Law and the Access to Public Records Act by the Greene County Commissioners

Dear Ms. Crouch:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

You sent me a memorandum on February 10, 2005, seeking an informal opinion regarding three issues. The first issue is whether you were denied access to records of the Greene County Building Corporation regarding the courthouse renovation project, prior to January 31, 2005. The second issue is whether an executive session held on January 4, 2005 at 8:30 a.m. was in accordance with the Open Door Law. The third issue, also under the Open Door Law, is whether a February 4 meeting, advertised as an emergency meeting, was held with sufficient notice.

Access to Public Records of the Greene County Building Corporation

You assumed office as a Greene County Commissioner on January 1, 2005. On January 25, 2005, you sent a letter to the Greene County Building Corporation (“Corporation”), through Marilyn Hartman, attorney to the commissioners and attorney for the Corporation, requesting certain records regarding the courthouse renovation project. On January 31, 2005, Ms. Hartman responded by letter. She states that you already had a right to access the records of the Corporation, but denied that you could pursue your right to those records through the Access to Public Records Act, since you are a commissioner and you have full access to the records.

She also stated that your request must be made to the individual designated by the public agency to be responsible for the release of Corporation records, and neither Jim Corey nor Ms. Hartman were responsible for those decisions. Ms. Hartman then stated that Commissioner Beard had requested that the Auditor provide secure space in his office to house Commission

files, including those of the Corporation. Finally, Ms. Hartman states that the Greene County Auditor, David Bailey, is an elected county official, and the commissioners have no authority over the Auditor's office. Consequently, Ms. Hartman recommends that you speak to him regarding what procedure or accommodation, if any, he may be willing to make to assist you in copying any Corporation files.

You have asked me to render an opinion regarding whether this letter evidences a violation of the Access to Public Records Act, particularly prior to the letter's issuance, when you believed that you did not have full access to the Building Corporation's files.

Under the Access to Public Records Act ("APRA"), any person may inspect and copy the public records of a public agency during the agency's regular business hours, except as provided in section 4 of the APRA. IC 5-14-3-3(a). A request for records must be made to the public agency that maintains the record. A public agency that receives a request for records in person or over the telephone must respond to the request within 24 business hours of receipt. IC 5-14-3-9(a). If the agency receives a request via U.S. Mail, facsimile, or e-mail, the response time is seven (7) calendar days. IC 5-14-3-9(b).

The first issue is whether you made the request to the public agency that maintains the record. The public agency that you allege maintains the records regarding the courthouse renovation project is the Greene County Building Corporation. I assume for purposes of this opinion that the Greene County Building Corporation issues bonds for the purpose of constructing public facilities. It is this condition that makes a building corporation a "public agency" under the Access to Public Records Act. IC 5-14-3-2. You sent your request to the attorney for the Greene County Building Corporation, Marilyn Hartman, at her private law office.

Although Ms. Hartman declares in her letter that she is not the designated keeper of the Corporation's records, her letter does not affirmatively state who is, or was. I searched the online records of the Indiana Secretary of State for the Greene County Building Corporation. The Corporation's entity address is listed as "c/o Marilyn A. Hartman, 44 S. Franklin Street, Bloomfield, Indiana 47424." I have enclosed a copy of this record, which was viewed and printed on March 3, 2005. From the information that I have, it appears that the Corporation's address is the same address and person that you sent your record request to. In my opinion, you sent your request to the Corporation, and the Corporation, via Marilyn Hartman, responded on January 31, 2005. Since this response was within seven days of your request, it was timely under the APRA.

It is not correct that you do not have any rights under the APRA as a Commissioner. You had a right to receive a timely response to your request for Corporation records, and you did receive a timely response. *See Consolidated Opinion of the Public Access Counselor 04-FC-88, 04-FC-89.* In fact, the Corporation is a separate public agency for purposes of the APRA. Nevertheless, Ms. Hartman appears to be saying that you had unfettered rights to the Corporation records as a commissioner. In any event, it appears that the Auditor, itself a separate public agency, now exercises dominion and control over the Corporation records, at least according to the January 31 Hartman letter. I recommend that you pursue any request for records through that

office, in accordance with the instructions in the Hartman letter, but send a copy to Ms. Hartman who still appears to be the Corporation's legal contact. The Corporation did not violate the Access to Public Records Act by denying you access to a record.

January 4, 2005 Meeting

You allege that at 8:30 a.m. on January 4, there was a meeting involving all three Greene County Commissioners who had gathered in the office of Marilyn Hartman. Also present were individuals connected with the courthouse renovation project such as the Corporation representative and litigation attorneys who were participating by telephone. In the January 31 Hartman letter, Ms. Hartman states that the telephone conference was an attorney-client conference which is confidential, not an executive session subject to the Open Door Law. You allege that no notice was posted of the meeting. Further there is nothing in the letter that indicates that the meeting was held for strategy discussions regarding pending or threatened litigation. Rather, Ms. Hartman stated in her letter that the meeting's purpose was for you and another commissioner to be informed about the financial state of the project, the legal impact that a shortfall could have on the county's contractual obligations, and the "A & E" issue.

Ind. Code 5-14-3-3(a) states that the official action of a public agency is to be conducted and taken openly unless otherwise expressly provided by statute. [Ind. Code § 5-14-1.5-3](#) states that all meetings of governing bodies of public agencies must be open except as provided in [Ind. Code § 5-14-1.5-6.1](#). [Ind. Code § 5-14-1.5-6.1\(b\)](#) lists the only instances in which an executive session is authorized by the statute--it does not give a public agency the authorization to meet in executive session with its attorney except for discussion of strategy with respect to initiation of litigation or litigation which is either pending or has been threatened specifically in writing. [Ind. Code § 5-14-1.5-6\(b\)\(2\)\(B\)](#). *Simon v. City of Auburn*, 519 N.E.2d 205 (Ind. Ct. App. 1988).

Here, it appears that the purpose of the January 4 meeting would not fall under IC 5-14-1.5-6.1(b)(2)(B) regarding litigation strategy. Even if it did, notice of an executive session must be posted 48 hours before the meeting, excluding Saturdays, Sundays, and legal holidays. You allege that no notice was posted at all. Therefore, because the January 4 gathering of the commissioners was not for any purpose for which an executive session may be held, and because there was no notice of the meeting, it appears that the January 4 gathering was in violation of the Open Door Law.

February 4, 2005 Meeting

You allege that the commissioners met on February 4, 2005, giving notice of an emergency meeting. You allege that notice was posted on February 3, 2005, less than 48 hours before the meeting, which was held at 9:00 a.m on February 4. You provided me with a copy of the notice. The notice is headed "Notice of Emergency Meeting of the Greene County Board of Commissioners," and states the following purpose: "To discuss the hiring a design firm (sic) to undertake the remaining architectural and engineering work for the Greene County Courthouse Project." The notice is dated February 3, 2005.

As stated previously, the Open Door Law requires that notice of a meeting or an executive session be posted at least 48 hours before the meeting, excluding Saturdays, Sundays, and legal holidays. IC 5-14-1.5-5(a). When a governing body calls a meeting to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice under this section shall not apply. IC 5-14-1.5-5(d).

The stated purpose of the February 4 meeting was to discuss hiring a design firm. Although there may have been some urgency to the discussion, no threat to person or property, or disruption of governmental activity is evident from the statement of purpose. Barring a different set of facts brought forth by the commissioners (and you are one of those commissioners), it appears that the February 4 meeting did not meet the grounds for an emergency meeting, and the notice of February 3 was not in accordance with the time requirements for posting notice under the Open Door Law.

Please let me know if you have any other questions.

Sincerely,

Karen Davis
Public Access Counselor

cc: Bart Beard
Larry Hasler
Marilyn Hartman