

September 24, 1998

Mr. Roger Harnack, Associate Editor
The Decatur Daily Democrat
Post Office Box 1001
141 S. 2nd Street
Decatur, IN 46733-5001

Re: PAC Opinion 98-4; Records disclosure by the Town of Monroeville.

Dear Mr. Harnack:

You have asked the following questions concerning records disclosure by the Town of Monroeville (hereinafter "Town"):

1. Did the Town violate the Access to Public Records Act, Indiana Code 5-14-3, (hereinafter, "Act") by providing disclosure of non-investigatory¹ police records only on Thursday evenings at 8 p.m?
2. Did the Town violate the Act by failing to provide a copy of a draft ordinance that was discussed in a public meeting upon request?
3. Is the Town, which has no town hall, in violation of the Act by failing to keep public records at a public building, as opposed to local officials' homes or other private buildings?

The Town, through its attorney, Mr. George Martin, has responded to your concerns and I have attached a copy of his response for your information.

For the reasons set forth below, it is my opinion that non-investigatory records of the Monroeville Police Department must be made available during the regular business hours of that department. The department must also comply with the requirement of accessibility of records twenty-four hours after created under Indiana Code 5-14-3-5(c). A draft ordinance, after the contents were revealed at a public meeting, must be disclosed upon request. Finally, it is my opinion that the failure to keep public records at a public building is not a violation of the Act, but keeping public records at private buildings does not relieve a public official of the responsibilities to permit inspection and copying under the Act.

¹Investigatory records of a law enforcement agency are disclosable at the discretion of the agency under Indiana Code 5-14-3-4(b)(1). The non-investigatory records referenced throughout this opinion are the public records other than those not disclosed under IC 5-14-3-4(b)(1).

Background

You have stated that Town officials initially refused access to their non-investigatory police records, but later reversed their decision and permitted access during the business hour of the town police department; Thursdays at 8 p.m. When your reporter went to the police department to get access to these records, however, the town police chief was not available and there was no one who could accommodate the request for public records. You have also related an incident in which the Town refused to provide access to a draft ordinance that was read and discussed in an open meeting of the Town Council. Further, you allege that the failure to keep town records at a public building is part of the effort of the Town to discourage requests for information and is contrary to the Act.

Town officials, through their attorney Mr. Martin, has suggested that they would prefer not to disclose arrest and other police records, especially for minor offenses, as this may cause embarrassment to town residents. Mr. Martin indicates that, despite their misgivings, the Town never refused to provide access to these records. The Town had set a time and place to allow access to the records, Thursdays at 8 p.m., as this is the regular business hour. Mr. Martin states that this hour has been set aside not only for media, but all others who may want access to these records. The Town also suggested that disclosure be denied as to one draft ordinance because it is "deliberative" material that is disclosable at the discretion of the Town under Indiana Code 5-14-3-4(b)(6). Finally, the Town has pointed to the fact that there is nothing in the Act that requires public records to be maintained at a public building under the control of another public entity merely because there is no town hall.

Analysis

1. Regular business hours of a public agency

Public records are to be available for inspection and copying "during the regular business hours of the agency, except as provided in [Indiana Code 5-14-3-4.]" IND. CODE α 5-14-3-3(a). A public record is defined as "any writing, paper, report . . . that is . . . generated on paper." IND. CODE $\alpha\alpha$ 5-14-3-2. A police department has public records, such as arrest records, that are available for inspection and copying under the Act, specifically, Indiana Code 5-14-3-5. It is clear that these non-investigatory records are disclosable, despite the concern of the Town that such records may lead to the embarrassment of town residents.

The question remains whether the Town's limited time for accessing such records is contrary to the Act. "Regular business hours" is not defined, but in this case, the town appears to have identified one hour on a specific day of the week for access to police records. It is understandable that part-time officials may have more limited hours than full-time officials and the hours may be outside of the typical business hours of 8 a.m. to 5 p.m. Under the Act, there is no requirement that a public agency be open for any particular hours of the day or for any number of hours, but it

is the responsibility of a public official and a public agency to ensure that there is adequate opportunity and time for persons who wish to inspect and copy public records to do so.

Providing persons with the 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.

IND. CODE α [5-14-3-1](#) (emphasis added.)

Further, under Indiana Code [5-14-3-5\(c\)](#), information concerning suspected crimes, accidents or complaints "shall be made available for inspection and copying . . . (and) the record containing this information must be created not later than twenty-four (24) hours after" the incident was reported to the department. The General Assembly clearly intended that this type of information be available within a day after the report of the incident. The Town's limited opportunity for access to this information would frustrate efforts to obtain this information, even if it was created within the required twenty-four hour period. For this reason, the Town may wish to revisit its policy of one hour only for public access one day each week to some time for access each business day of the week to ensure that information is available as contemplated under Indiana Code 5-14-3-5(c).

2. *Disclosure of draft ordinances*

According to your account, a draft ordinance was read and discussed at a town council meeting, but you were not allowed access to a copy. The Town claims that this is deliberative material and that they exercised their discretion under the Act to withhold disclosure. Indiana Code [5-14-3-4\(b\)\(6\)](#) provides that a public agency may or may not disclose, at its discretion

(r)ecords 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 purposes of decision making.*

(Emphasis added.) This provision is often referenced by public agencies, but until recently, we had no Indiana case law directly on point.

On August 25, 1998, the Indiana Court of Appeals rendered a decision in *The Journal-Gazette v. The Board of Trustees of Purdue University*, ___ N.E.2d ___ (Ind. App. 1998). One of the issues in that case was whether certain documents related to an internal grievance process concerning an alleged NCAA violation were properly withheld from disclosure under Indiana Code 5-14-3-4(b)(6). When a court reviews a denial of disclosure under Indiana Code 5-14-3-4(b), the public agency must meet the burden of proving that the records in question fall within any of the exceptions from disclosure under that subsection. IND. CODE α 5-14-3-9(f)(1). The public agency must also establish the content of the record, with "adequate specificity," so that the court can make a determination of whether the exemption applies. *Id.*

After considering the various documents in the *Journal-Gazette* case, the Court of Appeals determined that documents gathered during the course of an investigation, despite their origin or content, became interagency documents used for a decision making purpose. The decision indicated that some of these documents may have been speculative or statements of opinion as well. In any event, the Court held that all of the documents requested concerning the investigation could lawfully be withheld from disclosure under the Act.

The Court's decision, however, does not address all of the components required under Indiana Code 5-14-3-4(b)(6) in the assessment of the variety of documents presented. This statute includes a number of requirements that must be met before any record may be considered exempt from disclosure. The records must be "*interagency or intraagency*," which implies documents created and shared within a public agency or between public agencies. Also, Indiana Code 5-14-3-4(b)(6) provides that the records must be "*advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision-making*" in order to be exempt from disclosure. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. In order to withhold them from disclosure under Indiana Code 5-14-3-4(b)(6), however, the documents must also be interagency or intraagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature.

"Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, ____ N.E.2d ____ (Ind. 1998), *citations omitted*. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), *citations omitted*.

Applying these principles of statutory construction to this case, the Town claims that they are not required to disclose a draft ordinance that was discussed and read aloud at a public meeting because it falls within the exemption provided at Indiana Code 5-14-3-4(b)(6). While the draft ordinance at one time may have been an intraagency or internal document, once it was shared in a public meeting, this claim no longer stands. Further, a draft ordinance is just that--a draft of a law at the town level that may or may not be adopted by the governing body. The document itself cannot be characterized as advisory or deliberative² as it constitutes an idea or proposal to be considered by a governing body. It takes a simple majority of its members, typically, to take action on such items and that action would have to take place at an open meeting. *See* IND. CODE \S 5-14-1.5-3(a). The content of the draft ordinance may reflect a particular position, but it is not a statement of opinion, it is a statement of a potential policy direction of the Town. And, while the future of the ordinance may be speculative, the contents of the document are not. For these reasons, it is my opinion that the draft ordinance is not subject to the exemption from disclosure provided at Indiana Code 5-14-3-4(b)(6) and that the Town should have made it available upon your request.

3. *Storage of public records at public buildings*

The final issue presented is whether the Town's public records must be stored at a public building to ensure access to those making requests under the Act. There is nothing within the Act that requires public records to be stored in a public building, but the Act does apply to public records stored in private buildings.

It is the duty of the public official to provide access to public records, and it is the duty of every public official to ensure against the loss, alteration or destruction of public records under Indiana Code 5-14-3-7. If town officials are required to store public records at their homes or other private buildings, the officials must provide opportunities for access, in other words, set up regular business times for inspection and copying, and protect those records from destruction or damage.

Conclusion

It is my opinion that non-investigatory records of a town police department are disclosable and must be made available during the regular business hours of the department. A public agency has the responsibility to ensure that there is an adequate opportunity for access to public records. In the case of a police department, Indiana Code 5-14-3-5(c) requires the creation of a record within twenty-four hours of the report of a suspected crime, accident or complaint and it is clear that the General Assembly intended this information to be readily available. For this reason, the Town may wish to expand its current business hour policy to more days, such as each day of the business week, to ensure that these records are available on a timely basis. A draft ordinance shared at a public meeting is not exempt from disclosure under Indiana Code 5-14-3-4(b)(6) and should have been disclosed upon request. Finally, there is no requirement that a unit of government stores its public records at a public building, but if stored in private buildings, the requirements of the Access to Public Records Act must be met.

²The plain meaning of "deliberative" is "assembled or organized for [or] . . . characterized by or for use in deliberation or debate." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 349 (1981). "Deliberation" means "thoughtful and lengthy consideration . . . [t]houghtfulness in decision or action." Id. In the context of the Act, deliberative material includes information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process.

Sincerely,

Anne Mullin O'Connor

Enclosure

CC: GEORGE G. MARTIN, TOWN OF MONROEVILLE, W/O ENCLOSURE