



STATE OF INDIANA

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September 24, 2013

Ms. Sara L. Goedde
10938 N. 450 E.
Morristown, IN 46161

Re: Formal Complaint 13-FC-250; Alleged Violation of the Access to Public Records Act and Open Door Law by the Town of Morristown

Dear Ms. Goedde,

This advisory opinion is in response to your formal complaint alleging the Town of Morristown, ("Town") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* and the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* The Town has responded to your complaint through Mr. Mark McNeely, Esq. His response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 24, 2013.

BACKGROUND

Your complaint alleges the Town of Morristown violated the Access to Public Records Act by denying your request in violation of Ind. Code § 5-14-3-3(b) and also violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.*

On August 6, 2013, you allege the Town deleted one of your comments from their Facebook social media page and also deleted you as a 'friend'. Upon your request, they also denied access to certain Facebook records and data. You also allege a meeting on August 14, 2013 was reconvened on August 15, 2013, wherein the Town discussed matters not on the original agenda. You also claim they did not allow you to record the meeting.

The Town responded to your Facebook record request by claiming they do not maintain the Facebook data you requested and they are not the custodian of those online records. The Facebook server is the repository of that information. Furthermore, they assert they were in compliance with the ODL by reconvening the August 14, 2013 meeting the next day. Additionally, they concede the recording prohibition was in violation of the ODL

and therefore rescinded their policy and voted accordingly. No one was actually prohibited from recording any meeting held by the Town as they remedied the issue before any harm was done to the public.

ANALYSIS

The alleged APRA violations will be addressed first. 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 Town of Morristown is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Town’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

Social media has not been addressed *ad nauseum* in prior opinions. The ever-changing landscape of electronic communication presents unique challenges for determining the accessibility of public information. Although I do not suggest the Town intentionally violated the APRA, it is important to note public agencies should not use social media as a way of avoiding the obligations of the law. Based upon Ind. Code § 5-14-3-2(o):

“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 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.

It is my opinion that Facebook data clearly falls within this definition. If a public agency creates a website or social media account and maintains its content, then any records request relevant to that site would need to be fulfilled. This would be the case even if the agency needs to petition the site’s server to gain access to the information. It is no different than any other third-party contractor or vendor an agency would employ to maintain certain information. It is recognized it may take some time to retrieve, but it must be released pursuant to a request. The Town is obligated to satisfy the information request and work with the third-party vendor to do so.

As to the allegation the site has deleted your comment(s), it is my opinion an agency can moderate comments to a social media site as they see fit. For example, if an inflammatory or inappropriate comment is posted to a site, then an agency, as administrator of the site, has discretion to remove it. I am aware of nothing in case law or statute that would restrict the discretionary rights of a public agency to moderate public forums. The caveat to this is the agency *must retain a copy of the comment or discussion* and also make them available for inspection. This can be in electronic format as a file of a screen shot or a comment print-out or however the information presents itself. The important consideration to remember is that all comments to an agency web site must be retained. Of course, the agency administrator of the site may also restrict all comments and not create a public forum for such discussion.

Turning to the alleged Open Door Law violations, it is the intent of the ODL 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* Ind. Code § 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* Ind. Code § 5-14-1.5-3(a). Generally, notice must be given 48 hours in advance for all meetings, however, the ODL is clear that reconvened meetings need not be posted in advance if the time, place and agenda of the reconvened meeting is announced at the original meeting. *See* Ind. Code § 5-14-1.5-5(a).

In the present case, you allege the August 14, 2013 meeting was reconvened until August 15, 2013. You suggest in your complaint you were aware of the announcement that the meeting would be reconvened. The Town claims the new time and place was announced to the audience and everyone was notified. This is clearly permissible under the ODL.

Ind. Code § 5-14-1.5-5(a) also provides there is to be no change in agenda from one meeting to the next. You assert that during the August 15, 2013 reconvened meeting, the Town discussed the original items, but also passed three new rules concerning parliamentary procedures. If a violation exists under this portion of the ODL, there must be clear intent to deviate from the agenda and vote on topics to avoid the requirements of transparency and public discussion. Agency meetings frequently go off-topic and an agency is not bound to a specific agenda. Items are often discussed in reference to a public concern brought to the attention of the governing body. Agendas are posted in order that the audience has sufficient time to prepare for a meeting and make arrangements to attend. The rules passed by the Town at the meeting were administrative in nature. As discussed below, one of those rules was rightfully rescinded. The other two were issues that dealt with the procedures for public discussion. The Town suggests they were necessary to appropriately regulate that meeting and others.

The Town does not address the allegation they passed a rule establishing policy for Facebook comment deletion. It is unclear if this was on the original agenda. As this is more policy than procedure, it is likely voting on this topic would be a violation of the

agenda requirement of the ODL, as it substantially deviates from the original purpose of the meeting.

Finally, a prohibition on recording the meetings would clearly be a violation of the ODL. See Ind. Code § 5-14-1.5-5(h). It appears, however, this matter has been remedied before a violation could occur. The Town has voted on and rescinded this policy.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Office of the Public Access Counselor the Town of Morristown has violated the APRA in denying your request for the social media information, but they are not in violation of the Open Door Law.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long horizontal flourish extending to the left.

Luke H. Britt
Public Access Counselor

cc: Mark W. McNeely, Esq.