

March 23, 2001

Mr. Mahlon L. Houlihan
6829 Lawnwood Drive
Fort Wayne, IN 46815

Re: *Advisory Opinion 01-FC-19*;

Allegations of Open Door Law Violation, Access to Public Records Violations, and Violation of IC 36-1-10-13.

Dear Mr. Houlihan:

This letter is in response to your formal complaint filed in this Office on March 16, 2001.¹ You have alleged that the Board of Commissioners of Allen County ("Commissioners") has violated the Leasing and Lease-Purchasing Structures statute ("Leasing Statute"),² Indiana Open Door Law ("ODL"), and the Access to Public Records Act ("APRA"). Specifically, you claim that any modifications of the "Contract of Lease between the Allen County War Memorial Coliseum Bldg. Corp and Allen County, Indiana, by "The Board of Commissioners of the County of Allen" ("lease") should be subject to the entire Indiana code section 36-1-10-13 process. You also assert that a lease with modifications has not been made available for public inspection. Mr. G. William Fishing, Allen County Attorney, responded to your complaint in a letter dated March 19, 2001. A copy of his response is enclosed for your reference.

For the following reasons it is my opinion that the Commissioners did not violate either the ODL or the APRA. However, it is beyond the scope of my authority to render an opinion with respect to your question concerning the Leasing Statute.

BACKGROUND

According to the facts as you have presented them, in the year 2000 the Commissioners correctly followed each of the statutorily proscribed rules of Indiana Code section 36-1-10-13 regarding public notification and public hearings for a lease-rental agreement for the Additions to and Renovations of the Allen County War Memorial Coliseum ("Coliseum") project. As of the date of the lease and the public hearing, the lease contained material elements including an original purchase price of the Coliseum project of no more than \$28 million. According to your complaint, the lease and the letter agreement contained language allowing for the original purchase price to be lower than \$28 million, but in no event could the amount exceed \$28 million.

However, the project bids came in at over \$28 million for construction costs alone. The

Commissioners rejected these bids, according to your complaint because they were over budget. The project was re-bid in January of 2001. The second bid amount was higher than the originally estimated costs of \$28 million, however, the Commissioners chose to award the contract rather than reject the bids. According to your complaint the total borrowing size for the project now stands at \$32,195,000.00³ in contrast to the \$28 million stated in the lease and the rental agreement. You then filed this complaint alleging that the Commissioners violated the Leasing and Lease-Purchasing Structures Act ("Leasing Act"), the ODL, and the APRA.

Mr. Fishing stated in his response that the Commissioners approved the new cost at a public meeting. Mr. Fishing supplemented his response with copies of the minutes of the February 14, 2001 meeting of the Commissioners. The minutes indicate that the financing of the project was discussed at a public meeting, and that the Commissioners' motion to "concur with the recommendation of the Allen County War Memorial Coliseum Board of Trustees to proceed with the Renovation and Expansion of the Allen County War Memorial Coliseum" passed.

The Commissioners then asked the Allen County Council ("Council") for approval on the matter. Although the Council's approval is not required by statute, the Commissioners sought this approval pursuant to their agreement to do so. The Council decided to conduct a public forum to allow the public an opportunity to speak on this subject prior to giving their consent to move forward with the financing. The Council conducted the public forum on February 14, 2001. According to the Council's minutes that have been provided to this Office, they approved the lease purchase agreement for the total price of \$32,195,000.00.

ANALYSIS

Indiana Code 36-1-10-13

You have alleged that when the Coliseum project cost increased after the execution of the lease to \$32,195,000 the Commissioners should have once again followed the steps required under Indiana Code section 36-1-10-13. Specifically, you reference Indiana Code section 36-1-10-13(a) and (d).

Indiana Code section 36-1-10-13(a) provides:

After the leasing agent and the lessor have agreed upon the terms and conditions of the lease but before the execution of the lease, the leasing agent shall publish notice, in accordance with IC 5-3-1, of a public hearing to be held before the leasing agent. The cost of publication of the notice shall be paid by the lessor. Notice of the hearing must be given at least ten (10) days before the hearing is held.

Indiana Code section 36-1-10-13(d) provides:

All persons entitled to be heard at the hearing as to whether the execution of the lease is necessary and whether the rental is fair and reasonable for the proposed structure or

system. After the hearing, which may be adjourned from time to time, the leasing agent may modify, confirm, or rescind the proposed lease, but the rental as set out in the published notice may not be increased. The leasing agent may rely on the testimony of independent experts as to the fairness and reasonableness of the lease.

You have complained that the Commissioners did not follow the proper procedures when a lease is modified after the lease has already been executed. In essence your question is whether Indiana Code section 36-1-10-13 should be interpreted to mean that if a lease is executed and then modified, the modified lease must once again go through the entire Indiana Code section 36-1-10-13 process.

The Public Access Counselor has the power and duty to "issue advisory opinions to interpret the public access laws upon the request of a person or a public agency." Indiana Code section 5-14-4-10. Your question is not about whether you were denied access to a public meeting or a public record, but whether the Commissioners should have been required to comply with Indiana Code section 36-1-10-13 again after the modification of the lease. This question, therefore, is not a matter upon which we can issue an advisory opinion.

ODL

The intent and purpose of the ODL is that "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." Ind. Code § 5-14-1.5-1. The provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Board of County Commissioners is clearly a governing body subject to the provisions of the ODL. Ind. Code § 5-14-1.5-2.

You admit and I concur that in the year 2000 "Allen County officials correctly followed each of the statutorily proscribed rules of IC 36-1-10-13 regarding public notification and public hearings concerning a lease-rental agreement" for this project. Although, you have complained that the Commissioners should have held additional meetings, you have provided no evidence that the Commissioners have failed in any way to follow the ODL in conducting any of the meetings that have been held regarding the Coliseum project. Consequently, it is my opinion that the Commissioners have not violated the ODL.

APRA

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." Ind. Code § 5-14-3-1. The Board of Commissioners is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2.

Any person has the right to inspect and copy the public records of the Board of Commissioners during the regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

A public record is defined as:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, 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.

Indiana Code § 5-14-3-2. The general rule, therefore, is that a public agency is required to permit inspection and copying of public records under the APRA unless there is a valid statutory exception to disclosure.

It is unclear from your complaint what your specific allegation is with respect to denial of access to public records. You have made no allegation that you requested any record(s) and were denied access. You have alleged that a lease stating that the Coliseum project cost is not to exceed \$32,195,000.00 has not been subjected to the requirements of Indiana Code section 36-1-10-13. However, you conceded that no lease exists which states that the actual cost of the project to the public is \$32,195,000.00. A public agency is only obligated to allow for inspection and copying of public records that actually exists, and it is beyond the scope of this office to say that this lease must be created. Consequently, it is my opinion that you have not been denied access to public records in violation of the APRA.

CONCLUSION

It is my opinion that the Board of Commissioners of Allen County did not violate the Indiana Open Door Law and that, from the information provided, you were not denied access to public records under the Indiana Access to Public Records Act. As stated above, under the facts presented, it is outside of the scope of the powers and duties of this Office to render an opinion concerning the proper application of Indiana Code section 36-1-10-13.

Sincerely,

Anne Mullin O'Connor

cc: Mr. G. William Fishing, Allen County Attorney

¹ You have asked that your complaint be given priority status under 62 IAC 1-1-3(1). Due to the factual circumstances surrounding your complaint your complaint has been given priority status.

² Indiana Code section 36-1-10-13.

³ According to Mr. Fishing, the amount to be financed is approximately \$32, 250,000.00.