



# STATE OF INDIANA

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November 12, 2009

Mr. Thomas E. Mason  
4800 S. 930 E.  
Wolcottville, IN 46795

*Re: Formal Complaint 09-FC-235; Alleged Violation of the Access to Public Records Act and Open Door Law by the LaGrange County Board of Commissioners*

Dear Mr. Mason:

This advisory opinion is in response to your formal complaint alleging the LaGrange County Board of Commissioners ("Commissioners") 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.* For the following reasons, it is my opinion that the Commissioners did not violate either the APRA or the ODL.

## BACKGROUND

In your complaint, you allege that you requested copies of several types of records from the Commissioners on September 20, 2009: (1) agenda; (2) minutes; (3) persons in attendance; (4) "all documents presented, reviewed and generated from administrative staff meetings." On September 23, 2009, you received a response from the LaGrange County attorney, Kurt R. Bachman, regarding three administrative staff meetings on February 26, 2009, June 10, 2009, and July 1, 2009, (collectively, the "Meetings") but the Commissioners denied your request for the remainder of the records you requested. You also allege that the Commissioners violated the ODL by holding "administrative staff meetings" in a location that is inaccessible to an individual with a disability.

My office forwarded a copy of your complaint to the Commissioners. The response of Kurt R. Bachman, attorney for the Commissioners, is enclosed for your review. In it, Mr. Bachman states that the Commissioners held the Meetings for the purpose of handling and carrying out the administrative functions of the county pursuant to I.C. § 5-14-1.5-5(f)(2). According to Mr. Bachman, "[o]nly the activities permitted under I.C. § 5-14-1.5-5(f)(2) took place at the Meetings and no contracts were awarded or entered into at the Meetings, nor was any other action taken to create an obligation or otherwise bind the County." As the Meetings progressed, memoranda of the meetings

were kept indicating the dates, times, and places of the Meetings; the members of the Commissioners that were present or absent at the Meetings; and the general substance of all matters proposed and discussed pursuant to the requirements of I.C. § 5-14-1.5-4(b). Because no matters were decided and no votes were taken, no mention of decisions or votes were included in the memoranda prepared for the Meetings. The memoranda from the Meetings were made available to the public shortly after each meeting.

With regard to the location of the Commissioners' meetings, Mr. Bachman asserts that regular meetings are typically held in the county annex building. However, due to space concerns at the county's offices, scheduling conflicts, or the involvement of the county's attorney, the Commissioners have at times met in a large meeting room located in the same building as the county attorney's office. That building is directly across the street from the courthouse, directly adjacent to the county annex building that houses most county offices, and is separated only by a parking lot that contains handicap parking spaces. The parking lot and other on-street parking is available to and used by any person attending any meeting of the Commissioners, regardless of the building in which the Commissioners meet.

Mr. Bachman further responds by stating that all Meetings were open to the public and any member of the public who appeared was allowed to observe and record the Meetings. Mr. Bachman says there are no doors or other impediments between either the front or rear door of the building and the meeting room itself. According to Mr. Bachman, you have never appeared or attempted to enter the building for the purpose of attending or observing the Meetings.

With regard to your allegation that the Commissioners violated the APRA with respect to your requested records, Mr. Bachman acknowledges that the Commissioners received your request and responded in the following manner: The Commissioners denied your request for agendas and meeting minutes on the basis that no such records exist and the Commissioners are not required to create such records. Although you did not request the Commissioners memoranda from its public meetings, the Commissioners informed you that all memoranda would be available for you to inspect and copy. The response also showed that your request for a record of all attendees at the Meetings was denied on the basis that no such record existed other than in the memoranda, which indicated which of the Commissioners were present or absent in accordance with I.C. § 5-14-1.5-4(b). Finally, your request for all documents presented, reviewed and generated from the Meetings was denied on the basis that it did not identify with reasonable particularity the records you requested. The Commissioners requested that you provide additional information in order to assist in identifying the records you sought. According to Mr. Bachman, as of his response dated October 21, 2009, you "neglected or refused to contact this office or the County with any additional information which would assist the County in responding to [your] request."

## ANALYSIS

### A. Alleged violations of the Access to Public Records Act.

The public policy of the APRA states, “[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.” I.C. § 5-14-3-1. The Commissioners do not dispute that they constitute a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Commissioners during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

#### 1. Request for Minutes and Agenda from the Commissioners’ Meetings.

Mr. Bachman is correct that the ODL contains no requirement that a governing body utilize an agenda or create minutes of its meetings. Regarding minutes and memoranda, the ODL provides the following:

(b) As the meeting progresses, the following memoranda shall be kept:

- (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.
- (5) Any additional information required under IC 5-1.5-2-2.5.

(c) The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. The minutes, *if any*, are to be open for public inspection and copying.

I.C. § 5-14-1.5-4 (emphasis added). Thus, if the Commission does not keep any minutes of its meetings, it did not violate the APRA (or the ODL) by denying your request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [Agency] could not be required to produce a copy....”).

**2. Request for Access to a Complete List of Meeting Attendees.**

According to Mr. Bachman, the Commissioners did not produce a complete list of all persons in attendance at the Meetings because no such list exists. Neither the APRA nor the ODL requires the Commissioners to create a list of all attendees of their public meetings. The ODL does require public agencies to create memoranda regarding their public meetings in accordance with I.C. § 5-14-1.5-4(b), but the only reference to attendance is the ODL requirement to include “[t]he *members of the governing body* recorded as either present or absent.” I.C. § 5-14-1.5-4(b)(2). Thus, the ODL does not obligate public agencies to take attendance of anyone other than the members of their own governing bodies. Consequently, it is my opinion that the Commissioners did not violate the APRA by failing to create such a record or produce it in response to your request.

**3. Request for Administrative Meeting Records.**

With regard to your request for “all documents presented, reviewed and generated from administrative staff meetings,” the Commissioners responded by informing you that no record was kept of which documents, if any, were “presented, reviewed and generated from” the Meetings. The Commissioners further informed you that the county does not maintain its documents by meeting date and that more information would be needed to identify such documents. The Commissioners asked you to provide more information as to what specific documents you were seeking, but according to Mr. Bachman, you made no attempt to assist the county in responding to your request.

A request for inspection and copying must identify with reasonable particularity the record being requested. I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but Counselor Neal noted that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *Opinion of the Public Access Counselor 08-FC-176*. In my opinion, the Commissioners have not violated the APRA by requesting clarification with regard to this element of your records request. It is my suggestion that you provide additional identifying information to the Commissioners so that -- if the office maintains the records you identify -- they can fulfill your request.

**B. Alleged violations of the Open Door Law.**

It is the intent of the ODL 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. I.C. § 5-14-1.5-1. 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. I.C. § 5-14-1.5-3(a).

**1. Meetings Accessible to an Individual with a Disability.**

You allege that the Commissioners violated the ODL by holding meetings in locations not accessible to an individual with a disability. The ODL provides that “a public agency may not hold a meeting at a location that is not accessible to an individual with a disability.” I.C. § 5-14-1.5-8(d). However, the Commissioners are correct that section 8 only applies to certain public agencies specifically listed in the ODL. *See* I.C. § 5-14-1.5-8(d); I.C. § 5-14-1.5-2(a)(1), (5). Because the Commissioners are not a public agency subject to section 8 of the ODL, it is my opinion that the Commissioners have not violated section 8 of the ODL.

I note that the Commissioners have presented evidence that it “makes all reasonable efforts to accommodate any person, with or without a disability, wishing to attend a meeting of the Commissioners.” For example, Mr. Bachman states in his response that you and several other individuals (whose identities were apparently not specified by you) recently requested in writing to be provided with notice and an opportunity to attend the Commissioners’ next meeting. Mr. Bachman states that “[d]espite the fact that no notice was required by statute, the Commissioners, via letter . . . provided written notice of the date, time and place of the next meeting.” That meeting was at the County Annex Building “to ensure that both the size of the room and its accessibility was sufficient for the unknown number of ‘other individuals’ desiring to attend, and their disability status. However, according to Mr. Bachman, “[n]either [you], nor any other member of the public, appears at said meeting.” Counselor Neal has stated,

Inclusiveness is consistent with the policy of the Open Door Law. At a minimum, persons who wish to attend a meeting should be accommodated upon request, and notice should be published prior to every meeting explaining how such accommodation can be requested. A better policy that accommodates individuals who regularly attend meetings is to hold the meetings in a location that is accessible to individuals with a disability.

*Opinion of the Public Access Counselor 07-FC-49.* In my opinion, it appears as though the Commissioners have acted in accordance with these standards.

**2. The County’s Failure to Conduct its Meetings at the County Courthouse.**

Finally, you allege that the Commissioners violated the ODL and I.C. § 36-2-2-9 by failing to conduct its Meetings at the county courthouse. While the ODL does not require governing bodies to meet at any specific location, section 36-2-2-9 is more specific and requires the Commissioners to hold meetings in the county courthouse unless it is “not suitable, is inconvenient, or has been replaced or supplemented by other buildings to house county government offices.” Here, the Commissioners have stated that space concerns at the county’s offices, scheduling conflicts, or the involvement of

the county's attorney have caused the Commissioners to occasionally meet in a large meeting room located in the same building as the county attorney's office. That building is near the county courthouse and even shares a parking lot. In my opinion, the Commissioners have not violated any public access law by holding its meetings in a location near the courthouse when it did so for the reasons it has asserted.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners have not violate either the APRA or the ODL.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack  
Public Access Counselor

Cc: Kurt R. Bachman, Beers Mallers Backs & Salin, LLP