



# STATE OF INDIANA

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December 1, 2011

Ronald S. Bennett  
9780 Farmers Lane NE  
New Salisbury, Indiana 47161

*Re: Formal Complaint 11-FC-283; Alleged Violations of the Access to Public Records Act and Open Door Law by the North Harrison Community School Board*

Dear Mr. Bennett:

This advisory opinion is in response to your formal complaint alleging the North Harrison Community School Board ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* and the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.* Marcus M. Burgher IV, Attorney, responded on behalf of the Board. His response is enclosed for your review.

## BACKGROUND

In your formal complaint, you allege that the Board violated the ODL by discussing Joe and Angie Hinton and taking final action at the September 2011 executive session. You allege that the Board issued a directive to all athletic directors and administration to block any recommendation to allow the Hinton's to volunteer in any capacity.

On October 31, 2011, you submitted a written records request to John Thomas for a copy of the Board Directive regarding the Hinton's. Mr. Thomas responded to your request on behalf of the Board on November 2, 2011 and provided that the Board had never maintained a signed written directive; the Board had merely made a statement concerning a majority consensus of the Board regarding the issue.

In response to your formal complaint, Mr. Burgher advised that the Board did not violate the ODL at its September 8, 2011 executive session by taking final action and issuing a Board Directive. The Board only conducted one executive session in September 2011. The Board did not discuss or take any action involving Mr. Hinton, in any fashion, during the September 8, 2011 executive session. The Board has provided a

copy of the minutes from the September 8, 2011 meeting and executive session, which I have enclosed for your review.

As to alleged violations concerning the APRA, the Board further advised that it did not violate the APRA in response to your request for a copy of the Board Directive. On October 26, 2011, you submitted a request to the Board for a copy of the Board Directive. On November 2, 2011, Mr. Thomas responded on behalf of the Board within the timelines provided by section 9 of the APRA. In response to your request, Mr. Thomas provided that there was not a signed written directive, only a statement made from the consensus of the Board. As such, there were no records responsive to your request. After conducting a further investigation into your records request, Mr. Burgher speculated that you may have desired a copy of the "letter e-mail to Mr. Pearson dated September 21, 2011." Pursuant to the APRA, a request for a public record must be made with reasonable particularity. The September 21, 2011 correspondence is not a "Board Directive." However, if the September 21, 2011 was the actual record that you sought, you must make a reasonably particular request of the Board, who will provide you with a copy pursuant to the APRA.

#### ANALYSIS

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. *See* I.C. § 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* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2). The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001). "Final action" means a vote by a governing body on a proposal, motion, resolution, rule, regulation, ordinance or order. *See* I.C. § 5-14-1.5-2(g).

Under the Open Door Law, public agencies that conduct meetings are required to keep memoranda. 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. I.C. § 5-14-1.5-4(b).

In the case of executive sessions, the memoranda requirements are modified in that the memoranda "must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given." *See* I.C. § 5-14-1.5-6.1(d). The public agency must also certify in a statement in the memoranda that no subject was discussed other than the subject specified in the public notice. *Id.*<sup>1</sup>

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. Here the facts are clearly in dispute as to the Board's actions. You allege that the Board violated the ODL by discussing Joe and Angie Hinton at the September 2011 executive session and thereafter by taking final action at the executive session. The Board advised that it conducted one executive session during the month of September 2011, and that it did not discuss or take any action involving Mr. Hinton at the September 8, 2011 executive session. Thus, if the Board met in executive session on September 8, 2011 and discussed issues beyond those exemptions found under I.C. § 5-14-1.5-6.1(b) and thereafter took final action in the executive session, then it acted contrary to the ODL. But, if the Board during its September 8, 2011 executive session did not discuss issues beyond those found in I.C. § 5-14-1.5-6.1(b) or take final action, then it did not violate the ODL.<sup>2</sup>

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

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<sup>1</sup> Although not alleged, the memoranda provided by the Board for the executive session held on September 8, 2011 does not comply with I.C. § 5-14-1.5-6.1(d). The memoranda only includes a general reference to I.C. § 5-14-1.5-6.1 in citing the relevant enumerated instances that the executive session was held and does not include a statement that no subject matter was discussed during the executive session other than the subject matter specified in the public notice. *See Opinion of the Public Access Counselor 11-FC-170*.

<sup>2</sup> In a September 21, 2011 correspondence between the Jerry Renneker, member of the Board, and Lance Richards, Mr. Renneker provided the following forward to a letter sent from the Board to Hal Pearson:

"Final revision with all board members approving this action. Please forward to Hal and get this initiated."

The letter from the Board to Mr. Pearson provides that the Hinton's would not be allowed to be involved with the coaching programs. You have specifically alleged that the Board discussed and took final action regarding the Hinton's at an executive session held in September 2011; the Board had denied this claim. However, if "all board members approved this action" as Mr. Renneker indicated in his correspondence, when and where did the Board approve this action? If the Board's action would be considered "final action", it would be required to comply with the requirements of the ODL.

duties of public officials and employees, whose duty it is to provide the information.” See I.C. § 5-14-3-1. The Board is a public agency for the purposes of the APRA. See I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Board’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. See I.C. § 5-14-3-3(a).

A request for records may be oral or written. See I.C. § 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 I.C. § 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 I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. See I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Board responded to your request within the time period required by the APRA.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the 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....”). Here the Board has advised that it does not have a record responsive to your request for the Board Directive involving the Hinton’s. As such, it is my opinion that it did not violate the APRA in response to your request. The Board did provide that if your request sought the September 21, 2011 correspondence to Mr. Pearson, if you were to make a reasonably particular request of the Board for said correspondence, it would be provided to you.<sup>3</sup>

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<sup>3</sup> A copy of the September 21, 2011 correspondence referenced by Mr. Burgher is included with the Board’s response to your formal complaint.

## CONCLUSION

For the foregoing reasons, it is my opinion that if the Board failed to comply with the requirements of meeting in executive session provided under I.C. § 5-14-1.5-6.1(b) and took final action at the September 8, 2011 executive session, then it acted contrary to the requirements of the ODL. But, if the Board complied with the requirements of I.C. § 5-14-1.5-6.1(b) during the September 9, 2011 executive session and did not take final action, then it has not acted contrary to the ODL. As to all other issues, the Board has not violated the APRA in response to your request for records.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke.

Joseph B. Hoage  
Public Access Counselor

cc: Marcus M. Burgher IV