July 21, 2005

Michael A. Laurenzano
7970 Oak Hill Drive
Plainfield, IN 46168

Re: Formal Complaint 05-FC-120; Alleged Violations of the Open Door Law and Access to Public Records Act by the Monrovia Town Council and Monrovia Plan Commission.

Dear Mr. Laurenzano:

This is in response to your formal complaint alleging that the Monrovia Town Council ("Council") and Monrovia Plan Commission ("Plan Commission") (collectively, the "Town") violated the Open Door Law ("ODL") and the Access to Public Records Act ("APRA").

BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor on June 21, 2005. Your complaint was assigned formal complaint # 05-FC-120. In your complaint you alleged violations of both the ODL and the APRA. Mr. Steven C. Litz, attorney for Monrovia, responded to your complaint by letter dated June 24, 2005. A copy of that letter is enclosed for your reference.

You alleged that the Town violated the ODL by taking final action at an executive session, on May 23, 2005, contrary to IC 5-14-1.5-6.1(c). You also provide a copy of the memoranda of the executive session, which you believe do not conform to the requirements of IC 5-14-1.5-6.1(d). You also question whether the Town could properly hold an executive session under IC 5-14-1.5-6.1(b)(2)(B).

Mr. Litz responded to your allegations by stating that the Town felt that your complaint regarding the job performance of the building inspector could lead to litigation and that it involved the job performance of a town employee. Further, he stated that under these circumstances he felt that it was appropriate to hold an executive session under IC 5-14-1.5-6.1(6)(2)(B) and (b)(9). Mr. Litz stated that no vote was taken and that, "[t]here was no 'final action' because there did not need to be anything further done."

You also alleged that the Town violated the APRA. You stated that you mailed a request for documents to the Plan Commission on May 31, 2005. Your letter stated that you would be visiting the Monrovia Municipal Office to review the requested documents. You visited the municipal office on June 2, 2005. At that time you were informed that the documents were not available for your review and that you would need to make your request to Mr. Litz. You stated that there was no requirement to make your requests to the town attorney. Mr. Litz was called to speak with you. He told you that your request would need to be made more clearly. He then asked you to leave the premises. You did not leave, but rather sat down to write your request more specifically. At that time Mr. Litz called the Morgan County Sheriff to remove you from the premises. While waiting for the Sheriff you were provided with a list of the members of the Council and a copy of the memoranda from the May 23rd executive session. You also requested a list of the home addresses of the Council members. Mr. Litz denied your request. On June 3, 2005 you mailed a second request for records that you believe was more specific than the first. You stated in that letter that you would make your examination during the regular business hours of the Monrovia Municipal office during the week of June 6, 2005. You visited the office on June 9, 2005. You were informed at that time that your request had been received, but that the documents were not available for your inspection. When you inquired as to where the documents were, you were informed that you would need to ask Mr. Litz. On June 6th, 2005 Mr. Litz sent you a letter that informing you that you would have to review the documents at his office because your "presence at the Monrovia Town Hall is unauthorized." He stated that the documents would be available on or after June 13, 2005. He informed you that you could visit the Town Hall for the purposes of attending public meetings only. On June 16, 2005 you received a letter from Mr. Litz advising you that you could pick up copies of the requested documents at his office, upon the payment of the $2.10 copying fee, and that the documents could be mailed to you for an additional $0.83. You state that you made no request to have copies made. You also contend that you should have seen the documents on June 9th.

Mr. Litz responded by saying that he informed you that your request did not comply with IC 5-14-3-3. He said that he also explained to you in person that certain information, regarding personal information about Board members, would not be provided at all, but that if you wished to submit your request in writing that the Town would respond to it. He then stated that you continued to badger the Clerk about the requested information, at which point he asked you to leave the premises. He stated that when you refused he called the Sheriff's deputies to escort you from the building. He stated that he informed you that you were no longer welcome at the Town Hall except to attend pubic meetings. He stated that both the Clerk and the Plan Commission Supervisor felt intimidated by you. He then stated that the documents that you requested were copied and are available for you to pick up. He also stated that the Town is not obligated to immediately produce the records upon request. He states that he explained to you that IC 5-14-3-3 allows the Town a reasonable opportunity to evaluate and process the request, as well as the option of providing the copies to you. Finally, he indicated that the Town would not ordinarily prohibit someone from coming on to its premises, but that it also has never had to call the police to have someone removed from the premises either. He asserts that it is your own conduct that has created the delay about which you complain.

ANALYSIS

Open Door Law

It is the intent of the Open Door Law 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. Hence, all meetings of a governing body of a public agency must be open at all times for the purpose of permitting members of the public to observe and record them, except as provided in section 6.1. IC 5-14-1.5-3(a). A meeting is defined as a gathering of a majority of a governing body for the purpose of taking official action on public business. IC 5-14-1.5-2(c). "Official action" means to: receive information; deliberate; make recommendations; establish policy; make decisions; or take final action. IC 5-14-1.5-2(d). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order. IC 5-14-1.5-2(g).

A governing body utilizing an agenda shall post a copy of the agenda at the location of the meeting prior to the meeting. IC 5-14-1.5-4(a). An executive session is a meeting from which the public is excluded. IC 5-14-1.5-2(f). Executive sessions may be held only for the instances contained in IC 5-14-1.5-6.1(b). Notice of an executive session must be posted at least 48 hours in advance of the executive session, excluding Saturdays, Sundays, and legal holidays. IC 5-14-1.5-5(a). The notice must contain the date, time and place of the meeting, and for executive sessions, must state the subject matter of the session by specific reference to the enumerated instance or instances for which executive sessions may be held under IC 5-14-1.5-6.1(b). IC 5-14-1.5-6.1(d).

Executive Session Exemptions

Mr. Litz stated that the May 23rd executive session was held for the purposes of discussing possible litigation under IC 5-14-1.5-6.1(b)(2)(B) and to discuss the job performance of a town employee pursuant to IC 5-14-1.5-6.1(b)(9). However, there was no mention that the potential litigation had been threatened in writing, which is required under IC 5-14-1.5-6.1(2)(B). In fact, you state in your letter that you never discussed litigation in your complaint against the building inspector.

Whether the Town believes a person has a "propensity for litigation" is immaterial under the ODL. The potential litigation must be threatened specifically in writing in order for the Town to hold an executive session on that basis. It is clear that the General Assembly placed limitations on strategy discussions concerning litigation. Any "potential" or "possible" litigation must be threatened specifically in writing to permit a governing body to meet privately to discuss it under the plain language of IC 5-14-1.5-6.1(b)(2)(B). It is my opinion that if the May 23rd executive session was held to discuss potential litigation, where no written threat of litigation had been received by the Town, then it was held in violation of IC 5-14-1.5-6.1(b)(2)(B).[1]

[1] I note that there is a discrepancy between Mr. Litz's stated exemptions under which the executive session was held and the memoranda of the executive session. The memoranda specifically identify "personnel discussion" as the

Additionally, Mr. Litz stated that the executive session was held to discuss the job performance of a town employee pursuant to IC 5-14-1.5-6.1(9)(b). A governing body may meet in executive session to:

> "[D]iscuss a job performance evaluation of an individual employee. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process."

IC 5-14-1.5-6.1(b)(9).

It is the public policy of the ODL that it is to be construed liberally in favor of disclosure. For this reason, Indiana courts have generally held that exceptions to the general rule of openness are to be narrowly construed. IC 5-14-1.5-1.

> "Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . '[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions.'"

Robinson v. Indiana University, *659 N.E.2d 153, 156 (Ind. Ct. App. 1995)* [Citations omitted.], quoting, *Common Council of City of Peru v. Peru Daily Tribune, Inc. 440 N.E 2d 726, 729 (Ind. Ct. App.1982)* [Citations omitted]. Hence, the burden is on the Town to show that its May 23rd executive session was held for the stated purpose under IC 5-14-1.5-6.1(b)(9), the "job performance evaluation exception."

A discussion of a matter that involves a government employee's job and possibly an employee's job performance does not necessarily constitute a discussion that falls into the job performance evaluation exemption under the APRA. Not all complaints regarding official action of an employee are necessarily a job performance evaluation. It is particularly difficult to find that the discussion concerning your complaint about the building inspector fits into the job performance evaluation exception in a situation such as this where it appears that the Town's purpose in meeting was to discuss the merits of your complaint. That discussion would be broader than that allowed under this exception. Given the rule that exceptions are narrowly construed and the burden is on the agency, the agency has not alleged sufficient facts here to indicate that discussion of an isolated complaint regarding an employee was a job performance evaluation.

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topic discussed and makes no mention of litigation. Neither party has provided the notice of the executive session; therefore, this issue cannot be resolved.

Memoranda of Executive Sessions

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.
> 5. Any additional information required under Indiana Code 5-1.5-2-2.5 or Indiana Code 20-12-63-7"

IC 5-14-1.5-4(b). These 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." IC 5-14-5.1-4(c). In addition, since these are memoranda of executive sessions, they must also conform to the requirements under IC 5-14-1.5-6.1(d), which provides that memoranda from an executive session must:

> "[I]dentify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda . . . that no subject matter was discussed in the executive session other than the subject matter specified in the public notice."

IC 5-14-1.5-6.1(d).

The Town's memoranda for the May 23rd executive session state that the executive session was held for the purpose of personnel discussion. The memoranda failed to comply with IC 5-1.5-6.1(d) in two ways. First, the memoranda fail to provide the required identification of the subject matter discussed by specific reference to the enumerated instance or instances for which public notice was given. Second, the memoranda fail to include the required statement certifying that no subject matter was discussed in the executive session other than the subject matter specified in the public notice. Therefore, the Town's memoranda for the executive session are in violation of the ODL.

Additionally, the memoranda only refer to the exception for discussion of personnel job performance evaluation. If the other stated purpose of the meeting, possible litigation, was discussed, then the failure to note that discussion in the memoranda would also be a violation of the ODL.

Executive Session Final Action

Mr. Litz stated that no vote was taken at the executive session and that no "final" action was taken because there did not need to be anything further done. As previously stated, this may not have been a proper executive session, therefore no action could have been taken in a meeting

not open to the public. To the extent that an executive session might have been proper, if no vote was taken, then that would not make an otherwise proper executive session improper.

Additional ODL Matters

Additionally, you complain that you were not given the opportunity to attend the executive session, but the building inspector was in attendance. By its very nature an executive session is closed to the public; therefore, the Town would not be required to allow you to attend a proper executive session. A public agency may, however, admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f).

Although you do not specifically state that you believe it to be a violation of the ODL, you complain that the Plan Commission did not post an agenda for a bi-monthly meeting on an unspecified date. You requested a copy of the agenda and were told that there was none, as the Plan Commission likes to keep the meetings informal. The Plan Commission would be required to post an agenda only if it was utilizing an agenda for a meeting. The Open Door Law contains no requirement that a governing body utilize an agenda.

Access to Public Records Act

Reasonable Production Time

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). If a public agency receives a request for records via U.S. mail, facsimile, or e-mail, it has seven days in which to respond. IC 5-14-3-9(b). A response may be an acknowledgment that the request for records was received, and a statement of how and when the public agency intends to comply.

Your complaint appears, in part, to be that the agency must provide you with the requested records within seven days. However, as stated above the agency is merely required to respond within seven (7) days. That response could be a letter acknowledging receipt of the request and indicating when the agency expects to provide the documents.

The APRA does not specify a time for production or inspection of responsive records, but this office has stated that records must be produced within a reasonable time of the request. Often, this Office is asked to make a determination as to the reasonableness of the time for production by a public agency. What is a "reasonable" time period under one circumstance may not be reasonable under other conditions. Production need not materially interfere with the regular discharge of the functions and duties of the public agency. IC 5-14-3-7(a). The determination of what is a reasonable time for production, therefore, depends upon the public records requested and circumstances surrounding the request.

Mr. Litz was correct when he stated that the APRA allows the agency a reasonable opportunity to evaluate and process a request. There is no requirement in the APRA that the agency produce the documents at a date and time specified by the requestor. Therefore, the Town had no duty to make the records available to you when you decided to visit the Municipal

offices on June 2nd and June 9th. The town was also not required to provide you with the documents within seven (7) days, only within a reasonable time. The Town did, in fact, tell you that the documents, other than those specifically denied, were available for your review and pick up as early as June 6, 2005. You were notified that the documents were available within seven (7) days of your initial May 31st request. I do not find this to be an unreasonable production time.

Reasonable Particularity

When any person makes a request for records from a public agency, he must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a). While the phrase "reasonable particularity" appears to be clear, were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary meaning. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. App. 1992).

> "'Particularity' is defined as 'the state of being particular rather than general.' THE AMERCIAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1981, 956. Statutory interpretation also requires that one construe the phrase 'reasonable particularity' in light of the entire APRA."

Deaton v. City of Greenwood, 582 N.E.2d 882, 885 (Ind. App. 1991). Since the APRA favors disclosure and the burden of proof for nondisclosure is on the public agency, the agency should contact the requestor for more information if it is necessary to respond to a request. *See generally*, IC 5-14-3-1.

In his May 31, 2005 letter to you Mr. Litz stated that the agency has no duty to answer questions. He is correct that the APRA governs access to public records and does not require an agency to answer questions or create documents responsive to questions. However, when an agency requests more specificity from the requestor, the agency should provide explanation as to why the original request did not provide enough clarity to identify the requested documents.

The APRA requires the requestor to identify the records with reasonable particularity; it does not require the requestor to specifically identify by exact title the documents sought. The reason for this is obvious -- agencies are in a better position to know the documents within their possession than a member of the public is. If the requestor can do a credible job of describing the document, the agency may not turn him away based merely on form. See *Consolidated Opinion of the Public Access Counselor*, 05-FC-105 and 05-FC-111. When a request for records is presented in the form of questions, such as yours, the agency should make an effort to identify documents that would respond to those requests. If the agency cannot identify any document within its possession that contains the requested information then it has the duty to notify the requestor that it does not possess a document responsive to that request.

Upon reading your request it appears likely that the Town must have some documents that are readily available and responsive to at least a portion of your request.[2] On the other hand, some questions may require further clarification, such as "What is the purpose of the Monrovia Town Board and the Plan Commission?" It is conceivable that Mr. Litz may need to request clarification as to what you intended by the word "purpose."[3] However, Mr. Litz may not delay the entire request if only portions of it are not reasonably particular. Additionally, an agency may not claim that a request for records is not reasonably particular on the basis that it only asks questions and does not identify specific documents.

Therefore, I find that the Town should have responded to those portions of your request that could have been answered by readily identifiable documents and should have provided to you more specific explanation as to why other portions of your request were not reasonably particular.

Request for list of Council Members Including Home Addresses

A denial, if any, to a written request for records must be in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c). In his May 31st letter to you Mr. Litz stated that, "[a]ny request for personal information on any Board member or employee will not be honored . . ." Mr. Litz provided no statutory citation upon which he intended to base the denial of this request. The denial must include the statutory basis of the denial, including a citation to the exemption authorizing withholding of the record. For this reason, the Town's denial of your request for the names and addresses of the Board members was in violation of the APRA.

Denial of Access to Town Hall, Requirement to View Records at the Office of the Town Attorney, and Requirement to Obtain Copies.

There is some dispute over whether your actions and conduct warranted removing you from the premises of the Town Hall and barring you from returning.[4] Issues of trespass are not in and of themselves Open Door Law or APRA issues. These issues only become matters of public access when they constructively deny the public the right of access.

Mr. Litz has stated that you may enter upon the premises of the Town for the limited purpose of attending public meetings. Therefore, he has not denied you access to meetings under the ODL. He has stated that if you become disruptive during a public meeting that he will have you removed from the meeting. This office has held that a person who is disruptive to the meeting may be removed without violation of the ODL.

[2] For example, your questions as to who was in attendance at the executive session could easily be answered by providing a copy of the required memoranda.
[3] For example, did you intend to learn what the duties are, what the functions are, or obtain a mission statement?
[4] You have raised the issue that you believe that you have a contractual relationship with the Town, which you believe allows you access to the Town Hall. That is not an issue that this Office can address.

> "Although you may raise the public's right to attend a meeting, I cannot say that the Town violated the Open Door Law by removing you or anyone else who threatens to disrupt the conduct of a meeting. In so stating, I am not judging the merits of the Town's actions with respect to your removal from the meeting. I am merely stating that the Open Door Law is not at issue here, where your inability to observe the meeting was not due to the meeting being closed to the public or limited in some way so that the public in general could not hear or observe the meeting."

Opinion of the Public Access Counselor, 05-FC-24.

While there are no similar Public Access Counselor opinions regarding trespass and the APRA, I believe that the analysis is similar. While you may not enter upon the premises of the Town Hall, the Town has made those documents available to you for review at another location. You have not stated that this would cause you any greater degree of difficulty in obtaining the documents. Subsequent to his June 6th letter informing you that the documents would be available for inspection at his office, Mr. Litz sent you a second letter stating that the copies were available to be picked up upon payment of the copying fee or could be mailed to you if you would include the cost of mailing. It is not clear whether the Town intended by this letter to require you to obtain copies of the documents or whether it was merely providing you an alternative option to viewing the records at Mr. Litz's office.

To be clear, the Town must provide you with the opportunity to merely inspect the documents if you so desire. IC 5-14-3-3(a). It is not necessarily a violation of the APRA to require that the review be at an alternative location absent circumstances that would indicate that the Town is trying to deny you access by the choice of an alternative location. Additionally, the Town may not require you to obtain copies of the documents at your cost if you do not wish to obtain copies. If the Town intended, by the June 16th letter to require you to obtain copies and deprive you of the opportunity to inspect the records then it would be in violation of the APRA. However, if the Town was merely trying to provide you with additional options for viewing or obtaining the records then it would not be in violation of the APRA.

It appears that as of Mr. Litz's June 24th response to this complaint that you have not attempted to avail yourself of any of these options for viewing or obtaining copies of the records. Therefore, you cannot complain that you have not been provided with these documents.

For the forgoing reasons I find that the Monrovia Town Council and Plan Commission violated the Access to Public Records Act and Open Door Law in some respects but that not all of your complaints constituted violations of the public access laws.

Sincerely,

Karen Davis
Public Access Counselor

cc: Steven C. Litz