



STATE OF INDIANA

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December 14, 2009

Mr. Craig Klugman
The Journal Gazette
600 W. Main St.
Fort Wayne, IN 46802

Re: Formal Complaint 09-FC-268; Alleged Violation of the Access to Public Records Act by Imagine - Fort Wayne Charter School, Inc., et al.

Dear Mr. Klugman:

This advisory opinion is in response to your formal complaint alleging Imagine - Fort Wayne Charter School, Inc. and IFWCS Campus III (the "Schools") 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 Schools violated the ODL but did not violate the APRA.

BACKGROUND

A. The Complaint

In your complaint, you allege that on September 18, 2009, your newspaper requested the agenda and board minutes from each meeting of the Schools' boards during this calendar year. On September 22, 2009, you broadened the request to include every agenda and set of minutes since the Schools' inceptions. The Schools responded to your requests in a timely manner and "appeared at the time to be complete."

You subsequently requested records from Ball State University regarding the Schools. Included in the university's response to you were resolutions adopted by the Schools' boards "in lieu of a meeting." After reviewing these records, you submitted another request to the Schools for resolutions approved outside of meetings. The Schools produced those records to you as well. You note that the resolutions carry board members' signatures and "waive notice of the time, place, and purpose of the meeting of the Board of Directors of the Corporation" and "consent to the adoption of the vote in favor of the following resolutions." The resolutions cite to the Indiana Nonprofit Corporation Act of 1991 as authority for the boards' actions.

You list several of the actions that the boards took in the resolutions, including but not limited to adopting bylaws of a corporation, naming officers, authorizing officers to take specific actions, amending and restating the bylaws of a corporation, creating to limited liability companies in Texas, amending and restating an agreement with two charter schools in Texas, and amending the Imagine Bridge Academy's charter. You allege that none of these actions was taken or discussed during a public meeting and no record of them is included in the minutes that the Schools produced.

You argue that the signed resolutions were adopted in violation of the APRA and that the Schools failure to disclose the resolutions in your requests for minutes "may be" in violation of the APRA.

B. The Schools' Response

My office forwarded a copy of your complaint to the Schools. Don Willis, Chair of Imagine - Fort Wayne Charter School, Inc., responded on their behalf. His letter is enclosed for your review. Mr. Willis notes that your complaint does not allege that the Schools held board meetings in a manner that violated the ODL. He argues that the Schools did not violate the ODL with regard to what he calls "written consents" (which you refer to as resolutions) because "(i) action that was taken by written consent was not taken at a meeting; and (ii) the use of written consents is not prohibited by the [ODL]."

Mr. Willis claims that the Schools did not violate the ODL by use of written consents because "action taken by written consent is unanimous action [that is taken 'without a meeting' of the board of directors of a nonprofit corporation [pursuant to] IC 23-17-15-2." Mr. Willis argues that the scope of the ODL is limited to action taken by governing bodies at public meetings. Because the Schools' boards did not meet to adopt the written consents, Mr. Willis believes no violation occurred. Mr. Willis further claims that the ODL "does not prohibit the use of written consents." He also notes that although the Schools have taken action through written consents, they have continued to regularly hold board meetings and have a policy that requires any action taken by written consent be subsequently addressed and ratified by the board at a public meeting. Moreover, Mr. Willis claims that the intent of the ODL was satisfied because each of the Schools' actions was taken with unanimous support of the board members. Therefore, the public was not deprived of the opportunity to hear opposing views. He notes that "the matters were largely procedural matters for which the Board used written consents simply as a matter of convenience, rather than to avoid a different outcome in a public meeting."

With regard to the alleged violation of the APRA, Mr. Willis states that the Schools provided complete and accurate responses to your requests for agendas and minutes on September 18 and September 22, 2009. He claims that the School's failure to provide written consents was not a deliberate refusal to comply with a request, but rather a reasonable interpretation of the requests. Moreover, when the Schools later received a request for copies of written consents on October 20, the Schools promptly provided copies of all signed written consents.

ANALYSIS

A. Application of the Access to Public Records Act and Open Door Law to Charter Schools

The Schools do not contest that they are public agencies for purposes of the APRA and ODL. Charter schools are established pursuant to I.C. § 20-24-1-1 *et seq.* A charter school is a public school. I.C. § 20-24-4-1(4). Among other requirements, a charter school's charter must specify that records of the charter school are subject to inspection and copying to the same extent that records of a public school are subject to inspection and copying under the APRA and that meetings of the school's governing body are subject to the requirements of the ODL. I.C. § 20-24-4-1(13), (15).

B. Alleged Violations of the Open Door Law

The General Assembly enacted the ODL intending 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).

Initially, it is important to identify the nature of the records that are referred to as "written consents" or "resolutions" by the respondent and the complainant, respectively. The relevant records include titles such as, "Written Consent In Lieu Of Meeting of the Board of Directors Of Imagine - Fort Wayne Charter School, Inc.," and "Action By The Board Of Directors By Unanimous Written Consent Without A Meeting." Based on these titles alone, the Schools' characterization of the documents as "written consents" seems reasonable. However, the word "resolved" also appears several times in all capital letters in each document. The ubiquitous presence of that word, which is often placed before actions of the board, indicates that the written consents functioned as resolutions. Thus, it appears as though the documents were, in essence, resolutions¹ of the Schools' boards.

The ODL explicitly states that, "[a] final action must be taken at a meeting open to the public." I.C. § 5-14-1.5-6.1 (c). "'Final action' means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order." The written consents contain language noting that "the undersigned, being the members of the Board of Directors of the Corporation, . . . consent to the adoption of and *vote in favor of the following resolutions*" (emphasis added). Thus, to the extent that the boards took such final actions (i.e., votes on resolutions) outside of a public meeting, the boards violated Section 6.1(c) of the ODL.

¹ I note that although it is my opinion that the documents in question are "resolutions" within the meaning of the ODL, I use the term "written consent" and "resolution" interchangeably throughout this opinion to refer to the same documents.

I note that the Schools appear to have been operating under the impression that they could adopt written consents pursuant to the Indiana Nonprofit Corporation Act of 1991, I.C. § 23-17-1-1 *et seq.* That statute does, in fact, authorize nonprofit corporations in Indiana to take action “without a meeting of members if the action is approved by members holding at least eighty percent (80%) of the votes entitled to be cast on the action.” I.C. § 23-17-10-4(a). Because each of the resolutions in question was adopted unanimously, it appears that the Schools were indeed acting in compliance with the Nonprofit Corporation Act when they took action outside of a meeting via the use of written consents. The Charter School Act of 2005, however, operates to require charter schools to also comply with the requirements of the APRA and the ODL. I.C. § 20-24-4-1(13), (15). Thus, although the boards acted in compliance with the Nonprofit Corporation Act, that statute does not relieve the Schools of their corresponding duties under the ODL. While other nonprofit and non-public agencies may be subject to only the Nonprofit Corporation Act, the Schools’ status as public schools triggers applicability of the ODL and the APRA. Consequently, it is my opinion that the ODL required the Schools’ boards to vote on any resolutions (and engage in any other “final action”) during public meetings.

C. Alleged Violation 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. Again, the Schools do not dispute that they constitute public agencies for purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Schools’ public records during regular business hours unless the records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Here, it appears the Schools produced all records that you specifically requested. Although the Schools did not initially produce the written consents in response to your first two requests for access to agenda and minutes, when you specifically requested those records in your subsequent request on October 20, 2009, the Schools promptly produced them to you. A request for access to public records must identify the records sought with reasonable particularity. I.C. § 5-14-3-3(a). Public agencies are not required to produce records that exceed the scope of a request. *See Opinion of the Public Access Counselor 07-FC-78*. Thus, it is my opinion that the Schools did not violate the APRA when they did not produce the written consents in response to your first request.

CONCLUSION

For the foregoing reasons, it is my opinion that the Schools violated the ODL to the extent that their governing bodies took any final action outside of a public meeting. It is also my opinion that the Schools did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Don Willis