



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

February 21, 2011

Mr. Eric B. Knox
1904 E. Southdowns Dr.
Bloomington, IN 47401

Re: Formal Complaint 11-FC-36; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Monroe County Community School Corporation

Dear Mr. Knox:

This advisory opinion is in response to your formal complaint alleging that Monroe County Community School Corporation ("MCCSC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.* Enclosed for your reference is the response from MCCSC attorney Thomas Bunger.

BACKGROUND

I note that this complaint relates to a previous matter between you and the MCCSC. *See Op. of the Public Access Counselor 10-FC-309.* In that opinion, I concluded that the MCCSC improperly posted notice of an executive session that had not yet occurred at the time you filed your complaint. After you filed that complaint, but before I issued my advisory opinion on December 14, 2010, the MCCSC held an executive session on December 7, 2010. On December 14th, at a public work session of the MCCSC, you claim that the board admitted to making decisions and taking official action during the December 7th executive session. You also express concerns about the wording of a memorandum from the MCCSC regarding the executive session. You argue that the MCCSC's certification that no matters were discussed other than those related to receiving information about and interviewing prospective employees under Ind. Code § 5-14-1.5-6.1(b)(5) is false due to the purported admission by the MCCSC on December 14th, and that the MCCSC's approval of the certification was "potentially a criminal violation because the veracity of the certification is covered by the sworn oath of office taken by Mr. Klein and the five other school board members [who were] in attendance [at the MCCSC board meeting] on January 11th." You request advice from this office regarding "appropriate wording [of the certification] so that this memorandum can be amended during a future school board meeting."

You also claim that the MCCSC violated the APRA by denying your request to inspect proposed minutes¹ of its December 7th executive session. You went to the MCCSC Administration Center on January 3, 2011, and requested to inspect the record. In response, MCCSC staff required you to complete a request form, which you did. Later that day, you received a telephone call from the MCCSC informing you that you would not be permitted to inspect the records and that you should refer your request to MCCSC legal counsel Jim Whitlatch. When you contacted Mr. Whitlatch, he informed you on January 4th that the executive session memoranda “are not official documents until approved at the next months [sic] public Board meeting and then signed by a Board officer. There are no other public documents regarding [the December 7th executive session] and the draft memorandum for which approval will be sought will be part of the Board packet sent out no later than Friday of this week.” You claim that the MCCSC’s failure to grant your request to inspect the minutes by January 4th violated the APRA.

In response to your complaint, Mr. Bunger states that at the time you requested the memoranda from the December 7th meeting, the record did not yet exist. He notes that Mr. Whitlatch informed you on January 6th of wording that the MCCSC was considering for the memorandum, but the document had not yet been created. He adds that as soon as a draft of the minutes was completed, it was posted to the MCCSC website. That occurred on January 10, 2011. Mr. Bunger notes that in response to your concerns about the December 7th meeting minutes and suggestion to the MCCSC that approving the first draft of the minutes could constitute perjury, the MCCSC revised the minutes and posted a second draft on its website on January 11th. He argues that the minutes are accurate and consistent with the requirements of the ODL.

¹ I note that it appears that the parties here appear to use “minutes” and “memoranda” interchangeably to refer to the same record, which appears to be the memoranda from the December 7th executive session. 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). Although memoranda are required, the ODL does not explicitly mandate that governing bodies create minutes of their meetings or executive sessions. *Id.* For executive sessions, the requirements in section 4 of the ODL for memoranda and any minutes being made available to the public is modified in that the memoranda and minutes must identify 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 and minutes that no subject matter was discussed other than the subject matter specified in the public notice. I.C. § 5-14-1.5-6.1(d).

ANALYSIS

As an initial matter, I note that some of the allegations in your complaint are untimely. Formal complaints alleging violations of the ODL must be filed not later than 30 days after the alleged violation or, if the meeting was held secretly or without proper notice, the date the complainant received notice that a meeting occurred. I.C. § 5-14-5-7. You allege that the content of the MCCSC's executive session on December 7, 2010, violated the ODL and state that you attended a public meeting of the MCCSC on December 14th at which the content of the December 7th meeting was discussed. However, you did not file this complaint until January 21, 2011, which was more than 30 days following both the executive session and the meeting at which you clearly received notice of the session at issue. Consequently, to the extent your complaint alleges violations of the ODL that are based upon actions that occurred more than 30 days prior to the date you filed your complaint, those portions of your complaint are untimely and will not be addressed in this opinion.

With regard to your concerns about the content of the MCCSC's memoranda for its December 7th executive session, the only language in the ODL on point is the requirement that a "governing body shall certify by a statement in the memoranda and minutes that no subject matter was discussed [at an executive session] other than the subject matter specified in the public notice." I.C. § 5-14-1.5-6.1(d). The MCCSC has included such a certification in the memoranda for its December 7th executive session in compliance with this language. I am also not a finder of fact. Because the parties dispute the factual circumstances surrounding the content of the December 7th executive session (and because your argument regarding the *content* of that certification is based upon the content of a meeting that lies outside of the statute of limitations for filing complaints with this office), I cannot opine as to whether or not the wording of the certification is factually accurate. Moreover, the ODL does not specifically address a scenario where governing body members issue a certification that is untrue or inaccurate, so I am not in a position to offer advice about what is or is not "appropriate wording" of the certification at issue here. If you feel that the MCCSC committed criminal acts in approving the memoranda, you should refer your concerns to the appropriate law enforcement agency for investigation.

As to your allegation that the MCCSC violated the APRA and ODL² by denying your January 3rd request for access to the minutes of the December 7th meeting, the ODL requires that meeting 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. § 5-14-1.5-6.1(d). Here, according to Mr. Bunger, the MCCSC did not create³ a draft of

² I cite the APRA because you allege you were improperly denied access to records, but the ODL is also implicated due to its provisions regarding minutes and memoranda of public meetings.

³ With regard to Mr. Whitlatch's statement that "memorandum [sic] from executive sessions are not official documents until approved at the next months [sic] public Board meeting and then signed by a Board officer," I disagree. Previous public access counselors and I have repeatedly held that existing draft and

the minutes until after your request. Nevertheless, Mr. Whitlatch responded to your request with some proposed language that the MCCSC planned to include in the draft that it ultimately released on January 10th. The MCCSC revised that after receiving your feedback and posted a second draft on January 11th prior to the MCCSC's regular meeting that evening. Under such circumstances, it is my opinion that the MCCSC did not violate the APRA or ODL. *See Op. of the Public Access Counselor 06-FC-100* (no violation where school board denied request for minutes that did not yet exist; also no violation where governing body did not create minutes until immediately prior to next meeting, where governing body approved them).

CONCLUSION

For the foregoing reasons, it is my opinion that the MCCSC did not violate the ODL or APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

Cc: Thomas Bunger

unapproved minutes are disclosable public records even if the agency does not view them as "official" records. *See, e.g., Op. of the Public Access Counselor 01-FC--56*. However, according to Mr. Bunger, at the time of your request the minutes did not exist at all. As such, the MCCSC could not yet produce them to you. *Opinion of the Public Access Counselor 10-FC-56* ("Draft minutes that have not yet been approved are different than records that have not yet been created. Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.")