



STATE OF INDIANA

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April 27, 2016

Ms. Mary Smith
Via email

Re: Formal Complaint 16-FC-49; Alleged Violation of the Open Door Law by the Jackson Township Board of Trustees, Hamilton County

Dear Ms. Smith:

This advisory opinion is in response to your formal complaint alleging Jackson Township Board of Trustees, Hamilton County ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 et. seq. and the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. The Board has responded via Ms. Jeanette C. Kassebaum, Esq. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on March 9, 2016.

BACKGROUND

Your complaint dated March 8, 2016 alleges the Jackson Township Board of Trustees, Hamilton County violated the Open Door Law by holding a meeting without public notice. Additionally, you are in receipt of text messages suggesting a board member instructed a colleague to destroy emails which would be considered public records.

You allege you witnessed a meeting on or about February 5, 2016 of two (2) of three (3) members of the Board and the Township Trustee, however, you do not provide any additional details as to that particular meeting. You also allege the same three (3) members met to travel to Franklin, Indiana to meet with a financial advisor to discuss issues related to the withdrawal of funding from a Township Fire Territory. Finally, you assert one (1) of the Board members suggested deleting emails relevant to the issue.

In its response to your complaint, the Board acknowledges the meeting of the Trustee and the two (2) Board members with the financial advisor in Franklin. It argues the meeting was an orientation of one (1) of the members as the financial officer of the Board and therefore exempt from the Open Door Law. The Board did not address the deletion of emails issue.

ANALYSIS

Orientation Meetings

It is the intent of the Open Door Law (“ODL”) 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 Ind. Code § 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 Ind. Code § 5-14-1.5-3(a)*.

An exception to the Open Door Law is an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action. *See Ind. Code § 5-14-1.5-2(c)(6)*. On January 5, 2016, one (1) Board member was designated as a financial officer for the Board to be a liaison between several governing bodies in regard to financial matters. It stands to reason the financial officer would also need to liaise with the Township’s financial advisor and be oriented to his duties and responsibilities as financial officer.

While a gathering with the consultant in Franklin may have been deemed an orientation session after the fact, the legitimacy of this gathering is questionable. As for the timing of this ‘orientation’, it took place in the midst of a controversial measure to withdraw funding from a Fire Territory. Additionally, the financial advisor was the individual preparing budgets and forecasts related to the appropriation. It is unclear why the ‘orientation’ session necessitated three (3) members - 75% of the Board – to orient a single member as to an ancillary duty.

Moreover, the February meeting minutes reflect the Board president stated that the purpose of the meeting was to “obtain information to bring back to the Township Board for discussion.” This indicates more than ‘orientation’ may have occurred during the trip to Franklin. Board members should be mindful that official action on public business (which would trigger the Open Door Law) includes mere discussion and deliberation and even receiving information. Votes or final action are not the threshold. *See Ind. Code § 5-14-1.5-2(d)*.

While this funding withdrawal initiative may have been legal and within the power of the Board, Board members cannot avoid any scrutiny or public confrontation regarding the proposal by holding closed-door meetings. Circumstantially, it appears more likely than not the purpose of the meeting was to discuss the Fire Territory issue.

Deletion of Public Records

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 duties of public officials and employees, whose duty it is to provide the information.” *See Ind.*

Code § 5-14-3-1. The Jackson Township Board of Trustees, Hamilton County is a public agency for the purposes of the APRA. *See Ind. Code § 5-14-3-2(n)(1).* Accordingly, any person has the right to inspect and copy the Board's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Ind. Code § 5-14- 3-3(a).*

You submitted screenshots of text messages from the Trustee's cell phone wherein the Board President suggested deleting emails regarding public business. Emails regarding public business are public records whether they are on a public server or written/received from a private account. *See Opinion of the Public Access Counselor 14-FC-199.*¹ Information provided in the form of cell phone recordings of post-meeting conversations with the Board President confirms the accuracy of these statements². It matters not how these messages were obtained, they exist and appear to be legitimate.

Emails generally have a retention schedule of three (3) years unless otherwise stated by law. *See http://www.in.gov/iara/files/county_general.pdf* for more information on County and Local Retention of Public Records. The knowing or intentional destruction of public records before the retention period has elapsed is a felony pursuant to Ind. Code § 5-15-6-8. It is unclear whether this took place, but at the least the mere suggestion of deleting public records violates the spirit of the law.

CONCLUSION

To avail oneself of employment, appointment or election to public office often comes with the scrutiny of constituents and taxpayers in order to hold the public official accountable. Whether that scrutiny is warranted is irrelevant. It comes with the territory of drawing a salary from public funds or being the custodian of public resources. The stewardship of public records is the foundation of that accountability. To suggest their destruction is to erode the fundamental principle that the government is the servant of the people. The same is true for holding meetings behind closed doors. From the information provided, it appears as if the Jackson Township Board of Trustees, Hamilton County should be much more mindful of these considerations and appreciate the unique privilege of being a public official.

Regards,

¹ When a public official avails himself of any communication medium, whether it is phone, email or text message, he is availing himself of the Indiana access laws *when communicating in his official capacity*. The entire account is not subject to the APRA – some of the communications are private and personal. But those messages containing public business are potentially disclosable. Some may be withheld if they contain confidential or deliberative material, however, the burden is on the individual or the individual's agency to claim an exception to disclosure or assert a privilege.

² While not alleged in your complaint, there are also text messages suggesting a closed-door meeting involving public business at a local restaurant. This would also be a violation of the Open Door Law.

A handwritten signature in black ink, appearing to be 'LHB', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Ms. Jeanette C. Kassebaum, Esq.