



STATE OF INDIANA

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March 12, 2009

Eric Cox
The Banner
24 North Washington Street
Knightstown, Indiana 46148

Re: Formal Complaint 09-FC-52; Alleged Violation of the Access to Public Records Act and Open Door Law by the Knightstown Plan Commission

Dear Mr. Cox:

This advisory opinion is in response to your formal complaint alleging the Knightstown Plan Commission ("Commission") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) and the Access to Public Records Act ("APRA") (Ind. Code 5-14-3). A copy of the Commission's response to the complaint is enclosed for your reference. It is my opinion the Commission has not violated the Open Door Law or the Access to Public Records Act.

BACKGROUND

You filed the present complaint on February 11, 2009, alleging the Commission has violated the APRA and the ODL. You allege that on January 23 you sent by facsimile transmission to the Knightstown Town Hall a request for access to records of the Commission. Among those, you requested copies of minutes or memoranda of the Commission meetings held in 2008. You received a response dated January 27 from the Commission wherein the Commission indicated it would provide the records as soon as possible but also indicated the secretary is in Florida until April.

You further allege that on or about February 5 you received additional correspondence from the Commission. The Commission included minutes from five meetings as well as a memorandum indicating again that the secretary is in Florida and the Commission does not have possession of the minutes of two meetings. The Commission provided you with a brief explanation of what occurred at those two meetings. You contend the Commission has violated both the APRA and the ODL.

The Commission responded to the complaint by letter dated February 26 from Commission President Clyde South. Mr. South contends the formal complaint is

retaliatory in nature and provides a narrative regarding the Banner's coverage of the Town's payment of legal fees associated with past litigation. Mr. South refers to the word "shenanigans" and the handwritten note at the bottom of the page as evidence of the nature of the relationship between the newspaper and Mr. South.

Regarding the substance of the complaint, Mr. South contends the minutes of which he provided copies to you on February 5 are indeed maintained in the Town Hall. Mr. South indicates that if you had asked whether they were maintained in the Town Hall, you would have learned they are kept there. Further, Mr. South contends that he did not intend to indicate that the memoranda of the meetings for which the records were not yet provided would be delayed until April. Mr. South indicates he has sent you the July 29, 2008 minutes and is still searching for the October 13, 2008 memoranda. Finally, Mr. South contends the response was timely under the APRA.

ANALYSIS

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. The Commission is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2(m). Accordingly, any person has the right to inspect and copy the public records of the Commission during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. § 5-14-3-9(b).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. § 5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. § 5-14-3-7(c). Former public access counselors and I have opined that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material are necessary to determine whether the agency has produced records within a reasonable timeframe.

Here, you sent the request to the Commission by facsimile transmission on January 23. Pursuant to I.C. § 5-14-3-9(b), the Commission's January 27 response was timely. Further, the Commission provided minutes of five of the seven meetings on February 5. In my opinion, this time for production of the records was reasonable under

the statute as well, given that Mr. South, a part-time volunteer, was the person responsible for providing the records.

Upon first reading Mr. South's response to the request, it was my impression his indication was that the minutes or memoranda from the remaining two meetings would not be provided until the secretary returned in April. Absent circumstances other than an employee vacation, it would likely be my opinion that would constitute an unreasonable delay in production of records. Mr. South contends, though, that it was not his intent to delay production of the records until the secretary returned. That he has since provided you a copy of the memoranda from the July meeting and is searching for the October meeting memoranda are evidence of his good faith effort to locate the requested records.

Regarding your allegation that the Commission violated the APRA by not keeping its records at the Town Hall, Mr. South contends the records are indeed located at the Town Hall. The APRA does not require records to be maintained at a certain location but does require the records of a public agency be open for inspection and copying. So long as the records of the Commission are available for inspection and copying, and I believe the Commission's production of such demonstrates that they are, the Commission has not violated the APRA. It is my opinion that the Commission should review its record keeping system and process for responding to requests for access to records, especially in the absence of the person who generally responds to such requests. This will help prevent any undue delay in responding to future requests. But after learning that Mr. South is indeed searching for the requested records and not simply awaiting the return of the secretary in April, I cannot find the Commission has violated the APRA.

You also allege the Commission violated the Open Door Law. 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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, 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).

The ODL does not require a governing body to create minutes of its meetings. 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.

Certainly the Commission violated the ODL if it did not keep memoranda of its meetings. Here, though, I understand the Commission routinely keeps memoranda or minutes (the latter of which I believe satisfies this provision so long as the required information is kept in the minutes). The Commission is also required to make the memoranda available within a reasonable period of time after the meeting. If the Commission has not yet made available the memoranda of the meetings held in 2008, it would be my opinion the Commission has violated the ODL. Here again, though, I understand the Commission has created the memoranda but the problem the Commission has had is locating those minutes in the absence of the person responsible for locating them. As I previously indicated, I would suggest the Commission review its procedures, but I do not believe this to be an ODL question or violation.

Ultimately, it is my opinion this matter stems from a misunderstanding regarding Mr. South's response to the request. I trust the Commission will continue to look for the October memoranda and will provide such to you in a reasonable period of time.

CONCLUSION

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

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Clyde South, Knightstown Plan Commission