



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

January 10, 2008

Jerry Bonnet
Office of the Indiana Secretary of State
State House Room 201
Indianapolis, Indiana 46204

*Re: Informal Inquiry 08-INF-44 regarding Indiana Business Law Survey
Commission*

Dear Mr. Bonnet:

This opinion is in response to your informal inquiry dated December 4, 2008. You write on behalf of the Indiana Secretary of State's Office ("SOS") to inquire whether the Indiana Business Law Survey Commission ("Commission") is a public agency for purposes of the Access to Public Records Act ("APRA") (Ind. Code 5-14-3). Pursuant to I.C. § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

The Secretary of State is an ex-officio member of the Commission, which is a fourteen member body appointed by the Governor. You indicate that the Chair of the Commission, who is not an employee of the Office, has been keeping minutes of the Commission's meetings. You indicate the Office does not keep the minutes as an agency record but does have access to copies of the minutes. Recently the Office received a request for copies of minutes of recent Commission meetings. You request my guidance as to whether the Commission is a legislative body not subject to 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. Any person has the right to inspect and copy the public records of a public agency 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).

The enabling statute for the Commission provides the following:

(a) The Indiana business law survey commission is established for the purpose of considering recommendations to the general assembly, from time to time, concerning amendments to this article, IC 23-17, or any other corporation, limited liability company, or partnership laws, or new or additional legislation affecting corporations, limited liability companies, partnerships, or other business entities (domestic or foreign) authorized to do business or doing business in Indiana.

(b) The commission consists of fourteen (14) members, appointed by the governor, who shall serve without compensation and without reimbursement for expenses. The secretary of state also shall serve as an ex officio member.

(c) The commission shall conduct its proceedings and affairs according to such rules as it may prescribe.

(d) The commission may publish official comments.
I.C. § 23-1-54-3.

You have been advised that the Commission is a legislative body and as such is not subjected to the APRA. The term “legislative body” is not defined in the APRA, nor is a “legislative body” specifically exempted from the requirements of the APRA. To the contrary, the definition of “public agency” under the APRA would include any commission exercising any part of the legislative power of the state. See I.C. § 5-14-3-2(m), defining “public agency.” As such, it is my opinion that labeling the Commission a “legislative body” does not remove it from the requirements of the APRA.

The question, then, is whether the Commission exercises any part of the legislative power of the state and as such is a public agency under I.C. § 5-14-3-2(m)(1). Because the Commission has no authority to enact laws or exercise any legislative authority, I cannot find the Commission is a public agency under I.C. § 5-14-3-2(m)(1). Nor is the Commission a public agency under I.C. § 5-14-3-2(m)(2), which applies to agencies that are not state agencies. Further, the Commission is not subject to budget review by the department of local government finance or audit by the state board of accounts, so it is not a public agency under I.C. § 5-14-3-2(m)(3). Neither is I.C. § 5-14-3-2(m)(4) nor I.C. § 5-14-3-2(m)(6) through (10) applicable.

The final question is whether the Commission is a public agency under I.C. § 5-14-3-2(m)(5), which defines as a public agency “[a]ny advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency . . .” The term “advise” is not defined in the APRA. “When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). “Advise” means “to give advice to” or “counsel.” *Merriam-Webster’s Collegiate*

Dictionary, at 18, Tenth Ed., 1993. The Commission “is established for the purpose of considering recommendations to the general assembly.” I.C. § 23-1-54-3(a). In my opinion, considering recommendations is not equal to giving advice. As I read the statute, the Commission may or may not submit recommended legislation to the General Assembly. This is not equal to advising the General Assembly. As such, it is my opinion the Commission is not a public agency for the purposes of the APRA. Since the Commission is not a public agency, the records are not required to be disclosed under the APRA.

I would note, however, that any records pertaining to the Commission which are created, received, retained, maintained or filed by or with the Office are public records subject to disclosure unless an exception to disclosure applies. The Office is clearly a public agency subject to the APRA, and the APRA defines as a public record, “any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency.” I.C. § 5-14-3-2.

So even though the Commission is not subject to the APRA and is not required to respond to a request for access to records nor provide access to its records, a request received by the Office must be considered in light of the records the Office maintains. While the APRA would not require the Office to obtain copies of records from the Commission in order to respond to a request, the Office may not deny access to the records it already maintains on the basis the Commission is not a public agency.

Please do not hesitate to contact our office if we can be of further assistance.

Best regards,



Heather Willis Neal
Public Access Counselor