



STATE OF INDIANA

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April 17, 2012

Paul Ogden
3525 W. 55th Street
Indianapolis, IN 46228

*Re: Informal Inquiry 12-INF-15; Marion County Board of Voter Registration
and Election Board*

Dear Mr. Ogden:

This is in response to your informal inquiry regarding the Marion County Board of Voter Registration ("Voter Registration") and Election Board ("Board") filed with the Public Access Counselor's Office on April 10, 2012. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Myla Eldridge, Director of Elections, and Andrea Brandes Newsom, Chief Deputy Corporation Counsel, responded to your informal inquiry.

BACKGROUND

Your informal inquiry addresses a public records request submitted to Voter Registration on March 22, 2012 by your campaign manager, Adam Lenkowsky. The request was substantially similar to the request submitted by Mr. Bowes that was addressed in 12-INF-11. *See Informal Opinion of the Public Access Counselor 12-INF-11.* You allege that Voter Registration has failed to respond in any fashion to your March 22, 2012 request. Further, you allege that the Board held a meeting on April 9, 2012, where it refused to adopt a policy that would allow for the release of the data that you and others have sought. You believe that the Board conducted an orchestrated campaign to keep helpful voter information from non-slated candidates. You further advise that you had previously been given access to the voter registration data within a few days of the submission of the request. You ask that I reconsider my interpretation of I.C. § 3-7-27-6(c) as provided in 12-INF-11, that I consider your request in light of the Board's conduct on April 9, 2012, and that I take a strong stand against the violations of the ODL by the Board and Voter Registration.

In response to your request for informal opinion, Ms. Eldridge advised that the Board is a separate entity from Voter Registration. Accordingly, the Election Board does not have authority to respond to requests for records maintained by Voter Registration.

The Board held a meeting on April 9, 2012 to consider Mr. Bowe's previous request for records, to which a replay can be found at:

http://indianapolis.granicus.com/MediaPlayer.php?view_id=3&clip_id=7604.

Ms. Brandes-Newsom advised that on March 29, 2012, David J. Lichtenberger, Assistant Corporation Counsel, responded to Mr. Lenkowsky's request on behalf of Voter Registration. The response was timely filed under the APRA, a copy of which has been submitted with Voter Registration's response to your formal complaint.

Mr. Lenkowsky's initial request sought a list of voters in the 2010 GOP primary, including full name, address, phone number, email address, and other information that is available. In response, Voter Registration provided that it did not maintain a list that would be considered responsive to your request and it was not required to create such a list pursuant to I.C. § 5-14-3-3(f). Mr. Lenkowsky's second request dealt with electronic records containing Marion County's voter registration report. As with the response provided by Voter Registration to Mr. Bowe's request, it provided in response to your request that it was required to act in accordance with a "nondiscriminatory uniform policy" adopted by the Board pursuant to I.C. § 3-7-37-6(c). Since the Board has yet to adopt a policy, Voter Registration cannot act on your request. You also sought further voter registration records to which Voter Registration provided that a search had been initiated and that Mr. Ogden would be advised once any necessary redactions had been made.

Voter Registration is obligated to comply with the requirements of I.C. § 3-7-27-6(c) and it feels strongly that it is without authority to act further in providing or denying access to copies of the electronic records that have been sought until such time the Board adopts a nondiscriminatory uniform policy.

ANALYSIS

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* I.C. § 5-14-3-1. The Board and Voter Registration are public agencies for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Board's and Voter Registration's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the

withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. If Voter Registration failed to respond to Mr. Lenkowsky's written request within seven (7) days of its receipt, it violated the APRA by acting contrary to the timelines provided by section 9. However, if Voter Registration responded in writing within seven days (7) days of receipt of Mr. Lenkowsky's written request, it did not violate the APRA.

I addressed a nearly identical issued submitted by Mr. Bowes in an informal opinion issued on March 30, 2012, which I believe addresses the remaining issues you have raised in your request for informal opinion. In 12-INF-11, I provided the following:

As referenced by you and Voter Registration, a similar factual scenario involving the Madison County Election Board and Board of Voter Registration was addressed by the Public Access Counselor in a 2007 advisory opinion ("Madison County"). *See Opinion of the Public Access Counselor 07-FC-284*. Counselor Neal provided the following analysis:

"Here, the Board has indicated the MCEB has not yet adopted a policy either permitting or not permitting a person to duplicate or obtain a duplicate copy of the disk you have requested. While the general presumption of the APRA is that records are disclosable unless an exception to disclosure is applicable (I.C. §5-14-3-3), this more specific statute (I.C. §3-7-27-6(c)) regarding the adoption of a policy applies to the voter registration disk you request. As such, the MCEB would need to adopt a policy regarding a requester's ability to obtain a copy of the disk. It is my opinion that the county election board may not refuse to adopt a policy as a way to avoid addressing a request for a copy of the information. But as I understand it here, the MCEB may not have realized the need to adopt a policy under I.C. §3-7-27-6(c), as the county and all counties in Indiana are still adjusting to the new statewide voter registration system. Further, it is my understanding the Board has now notified the MCEB of the need to adopt a policy so the Board may address your request and other similar requests. Pursuant to I.C. §3-7-27-6(c), the MCEB may adopt a policy granting access to a copy of the disk or

denying access to a copy of the disk.” *See Opinion of the Public Access Counselor 07-FC-284.*

I would agree with Counselor Neal’s analysis, in that the Board would be required to adopt a nondiscriminatory uniform policy pursuant to I.C. § 3-7-27-6(c) prior to Voter Registration being able to fulfill your request. I.C. § 5-14-3-3(h) would provide further support to this position, as it provides to the extent I.C. § 5-14-3 conflicts with I.C. 3-7, the provisions of I.C. 3-7 apply. I.C. § 5-14-3-3(g) provides that, “Except as provided by law, a public agency may not adopt a rule or procedure nor impose costs or liabilities that impede or restrict the reproduction or dissemination of any public record.” I do not believe Voter Registration has adopted any rule or procedure, nor has it imposed costs or liability to impede your access to the records that are sought. Voter Registration is complying with the requirements of the Indiana Code found in I.C. § 3-7-27-6(c) and I.C. § 5-14-3-3(h) in responding to your request. Until the Board takes action in adopting a nondiscriminatory uniform policy pursuant to I.C. § 3-7-27-6(c), Voter Registration is unable to process your request.

I would point out two troubling factual discrepancies with the issues that you have presented as compared to Madison County. In Madison County, there was no indication that the information that was sought was previously disclosed by Voter Registration in response to prior records requests. Here, it has not been disputed that Voter Registration has previously provided this information to you in 2009 and to the *Indianapolis Star*. Voter Registration has provided that it was unaware of its obligation to respond to such requests in accordance with a nondiscriminatory uniform policy adopted by the Board. As I am sure Voter Registration is aware, it needs to be mindful of all applicable statutory requirements of the agency in responding to requests for records pursuant to the APRA.

Second and most troubling, is that the Board has taken no action to address the adoption of a nondiscriminatory uniform policy since at least 2007. Ms. Eldridge stated the following in a March 2, 2012 e-mail:

“I apologize for not responding sooner I was researching an answer for you re: public records request policy. I learned that since before anyone can really even remember – the board has never been able to adopt either policy addressed in the statute. Board members and the parties who appoint them understand that the statute contemplates the adoption of a policy by the Board. However, it is a procedural impossibility. There has never been a motion. Any motion would die for lack of a second. The positions of the political parties and Board members haven’t changed. Nothing staff or counsel can do about it. We don’t have the power to

make a motion or force a vote. We work for the Board. They are the only ones with any authority.”

Counselor Neal provided in Madison County that “It is my opinion that the county election board may not refuse to adopt a policy as a way to avoid addressing a request for a copy of the information.” *See Opinion of the Public Access Counselor 07-FC-284*. From the information that I have before me, I can reach no other conclusion that the Board has refused to adopt a nondiscriminatory uniform policy that is necessary before Voter Registration can produce the records in response to your request. The public access counselor is not a finder of fact. *See Opinion of the Public Access Counselor 11-FC-80*. I do not have the necessary facts before me that would allow me to conclude that the Board has not adopted a nondiscriminatory uniform policy so as to avoid addressing a request for a copy of the voter registration data. I would agree with Ms. Eldridge’s statement that it is the responsibility of the Board, not its employees or attorneys, to ensure such a policy is passed. As the Board is now hopefully aware of the issues presented by its lack of action, I sincerely hope that it will address the issue in the immediate future by passing a nondiscriminatory uniform policy so as to allow requests for records of this nature to be received and processed by Voter Registration. *12-INF-11 Informal Opinion of the Public Access Counselor*.

I would note that I.C. § 3-7-27-6(c) does contemplate that the Board’s uniform nondiscriminatory policy may be to not allow any person to duplicate or obtain a copy of the information. The Board indicated at the April 9, 2012 meeting that it needed time to research and review the applicable laws, in light of the information contained in the records and that it had only recently become aware of the issue. As such, I am unable to opine that the Board has refused to adopt a policy in an effort to avoid addressing a request for records simply by not adopting a policy at its April 9, 2012 meeting.

If I can be of any further assistance, please do not hesitate to contact our office.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Myla Eldridge, Andrea Brandes Newsom