

May 19, 1999

Ms. Charlotte Hammond
1318 S. 1075 E
Akron, Indiana 46910

Re: PAC Opinion 99-2; Meeting Memoranda, Availability of Meeting Minutes in Draft Form, Filing Public Records Requests, Availability of Public Records during the Course of a Public Meeting and the Right to Speak at Public Meetings.

Dear Ms. Hammond:

In a letter dated April 18, 1999, you requested an advisory opinion concerning certain actions of the Town of Akron Advisory Plan Commission (hereinafter "Commission.") You have asked whether these actions are contrary to Indiana's public access laws, the Indiana Open Door Law, Indiana Code 5-14-1.5-1, et seq., and the Access to Public Records Act, Indiana Code 5-14-3-1, et seq. Mr. Robert L. Allen, who serves as president of the Commission, responded in writing to your questions in a letter dated April 30, 1999. A copy of his letter is enclosed for your reference. Specifically, your questions¹ and Mr. Allen's responses follow:

1. *Meeting Memoranda:*

Questions Presented: May the president of the Commission, in response to a request for the meeting memoranda claim "memoranda are not required by law and are not defined in the statutes?" Would the response to this question be different if an entry in the minutes indicates that memoranda were created? May the Commission use a brief form containing only a general sentence or two as memoranda of a meeting when lengthy, detailed notes are being kept but are not being provided to the public upon request?

Mr. Allen's responses: In response to your questions concerning meeting memoranda, Mr. Allen stated that for months, he thought you were asking for the secretary's rough notes that are used to prepare the minutes, and that he did not understand your requests for "memoranda." He also noted that meeting memoranda, as required under Indiana Code 5-14-1.5-4, were not created by the Commission before February, 1999, so he was unsure of your reference to the making of memoranda in meeting minutes as proof that memoranda had been created, but were not being produced upon request. The Commission now uses a form created by their legal counsel that includes the names of members in attendance or absent, the time the meeting was opened, a brief description of the discussion topic and the action taken.

2. *Availability of Meeting Minutes in Draft Form:*

Questions Presented: May members of the Commission refuse public records requests for meeting minutes when they are in draft form and before they have been given final approval?

Mr. Allen's responses: In response to your concerns about the availability of meeting minutes in draft form, Mr. Allen stated that the Commission believes that a document is not legal, and therefore, not disclosable to the public until it has been approved.

3. Filing Public Records Requests:

Questions Presented: May the president of the Commission direct a member of the public to file requests for public records to the town clerk-treasurer's office, instead of to the Commission members directly, as the practice had been in the past? May the president of the Commission direct members of the public to make all future requests for public records "in person" rather than by certified mail to the president or the secretary of the Commission? Would the response to this question change if the Commission never formally adopted a location for its official offices or been provided a designated location by the Town of Akron for keeping its records? Do the public access laws require officers of the Commission to be responsible for and maintain records unless and until an official office is established in accordance with statute?

Mr. Allen's responses: Mr. Allen responded to your concerns about the Commission's procedures for persons making public records requests. According to his letter, the council for the Town of Akron established the Commission's office and Mr. Allen believes that this office has been legally established as it is the place where all of the Commission's files are maintained. He indicates that you should not have been required to make trips to Commission members' homes or pay the expense of registered mail to make your public records requests and that making requests "in person" at the town office or by regular mail would be sufficient.

4. Availability of Public Records During a Commission meeting:

Questions Presented: Does the Commission violate the state's public access laws by refusing to allow the public to inspect documents or memoranda being circulated by its members at their meetings?

Mr. Allen's responses: You have questioned the practice of the Commission to prevent disclosure of public records that are circulated during meetings. Mr. Allen has responded that it is their position this "material" is not "public domain" since it has not been acted upon. He also stated that while it is not "secret" it is also not "official" and therefore, need not be disclosed.

5. Right to Speak at Public Meetings:

Questions Presented: Do the public access laws allow the Commission to preclude any public comment or input at their meetings?

Mr. Allen's responses: Mr. Allen has responded to your concern by noting that any person is permitted to attend and record Commission meetings and make their own notes, but that they limit comments to public hearings. Mr. Allen also indicated that you have spoken at each of two public hearings the Commission has conducted.

ANALYSIS

Meeting Memoranda

Indiana Code 5-14-1.5-4(b) requires the Commission to keep the following memoranda of each meeting:

- (1) The date, time and place of the meeting.
- (2) The members of the governing body records 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.

These memoranda must be available within a reasonable period of time after the meeting for the "purpose of informing the public of the governing body's proceedings." IND. CODE α 5-14-1.5-4 (c).

Under the Open Door Law, the Commission is required to keep memoranda and appears to be doing so now. For the time prior to February, 1999, the Commission did violate the Open Door Law by not creating memoranda of its meetings as required by Indiana Code section 5-14-1.5-4. It is my opinion that so long as the form now used for this purpose includes all of the information required under Indiana Code section 5-14-1.5-4(b); it is acceptable to serve as meeting memoranda. Also, this record must be made available for inspection and copying within a reasonable time after the meeting.

Availability of Meeting Minutes in Draft Form

If a public agency creates minutes of its meetings, these minutes are to be "open for public inspection and copying" under Indiana Code section 5-14-1.5-4 (c). In PAC Opinion 98-8², issued December 16, 1998, this issue was squarely addressed. In that Opinion, the conclusion was reached that, under the Access to Public Records Act, draft or proposed minutes of public meetings created under Indiana Code section 5-14-1.5-4 are disclosable public records.

It is my opinion that draft minutes, once prepared by staff or a Commission member, are public records that are subject to disclosure prior to the final approval of the governing body. It is also my advice that such draft minutes be marked as draft and subject to final approval of the governing body, in this case the Commission, so that there is no confusion on the part of the recipients as to the finality of such minutes.

Filing Public Records Requests:

The Access to Public Records Act requires public records of any public agency to be made available for inspection and copying during the regular business hours of the agency. IND. CODE α 5-14-3-3(a). The Access to Public Records Act allows the public agency discretion to require public records requests be made in writing or on a form created by the agency, which may be required when a person visits a public office or submits a request by mail or facsimile. IND. CODE α 5-14-3-3(a)(2). It is the

responsibility of each public agency to ensure that public records are protected from loss, alteration or destruction, for many reasons, including ensuring that such records are available for inspection and copying. IND. CODE α 5-14-3-7.

There is no specific reference in the Act to the person to whom you must direct a request for public records, only that written denials of access must state the name and title of the person responsible for the denial. IND. CODE α 5-14-3-9(c)(2)(B). There is also no specific reference in the Act requiring a public agency to have an office, but some public agencies may be required to designate an office under some other state statute. In fact, there is a provision in the Local Planning and Zoning Law that requires a municipality to provide suitable offices for the holding of advisory plan commission meetings and storing of documents of the commission. IND. CODE α 36-7-4-305.

It is my opinion that Access to Public Records Act does not require public agencies to designate an office. However, if the Town Council has established the town offices under Indiana Code section 36-7-4-305 as the place where the Commission's official files are maintained, that is the logical place to submit your requests for access to these records. Commission members, as the governing body, are still responsible for ensuring that requests are responded to in a timely manner and for ensuring that public records are available for inspection and copying.

Availability of Public Records during a Commission meeting

Under the Access to Public Records Act, a public record is defined as follows:

Any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, electronically stored data, or any other material, regardless of form or characteristics.

Indiana Code α 5-14-3-2. Public records are to be made available for inspection and copying unless the records are confidential or nondisclosable at the discretion of the public agency under Indiana Code section 5-14-3-4. IND. CODE α 5-14-3-3(a). It is the public agency's burden to prove that nondisclosure is appropriate, not the person requesting access to that record. IND. CODE α 5-14-3-1.

It is my opinion that any records created by or for the purposes of the Commission are public records that are either disclosable under Indiana Code section 5-14-3-3, or confidential or nondisclosable at the discretion of the Commission under Indiana Code section 5-14-3-4. The burden is on the Commission to prove that any public records being circulated during the course of an open, public meeting are not disclosable for any reason under Indiana Code section 5-14-3-4. If the contents of a document are discussed, it is difficult to argue that the public record is confidential or nondisclosable. It is also customary for many public agencies to produce a limited number of additional copies of disclosable materials that will be discussed during the course of a meeting open to the public so that they can follow along with the business of that agency.

Right to Speak at Public Meeting

The Open Door Law provides that, except for executive sessions conducted properly under Indiana Code section 5-14-1.5-6.1, all meetings of 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." IND. CODE α 5-14-1.5-3(a). There is no requirement that attendees at a meeting subject to the Open Door Law be provided with an opportunity to speak at regular, business meetings of public agencies. When a public agency is required to conduct a public hearing under any statute, an opportunity to speak for those limited purposes, however, must be provided. See, for example, Indiana Code 36-7-4-507 (public hearings required when plan commission is considering the adoption of a comprehensive plan.)

It is my opinion that the Commission does not violate the Open Door Law by failing to allow members of the public to speak at regular business meetings and that they must only provide an opportunity to speak at public hearings as may be required by other statutes.

CONCLUSION

It is my opinion that, a form may be used for preparing meeting memoranda so long as it ensures the inclusion of all of the information required under Indiana Code α 5-14-1.5-4(b) and that this public record is made available for inspection and copying within a reasonable time after the meeting. Draft minutes, once prepared by staff or a member of a governing body, are public records that are subject to disclosure prior to the final approval of the governing body. The Access to Public Records Act does not require public agencies to designate an office, but there may be another state statute that permits the establishment of an office for a public agency that provides for the designation of a place where the public agency's official files are maintained. While there is no requirement that public records requests be filed with a particular person, the designated office may be the logical place to submit your requests for access to these records. Ultimately, members of the governing body of a public agency are responsible for ensuring that requests are responded to in a timely manner and for maintaining the integrity of the public records related to their work. Records created by or for the purposes of a public agency are public records that are either disclosable under Indiana Code section 5-14-3-3, or confidential or nondisclosable at the discretion of the Commission under Indiana Code section 5-14-3-4. The burden is on the public agency to prove that any public records being circulated during the course of an open, public meeting are not disclosable for any reason under Indiana Code section 5-14-3-4. Finally, it is my opinion that a public agency does not violate the Open Door Law by failing to allow members of the public to speak at regular business meetings and that they must only provide an opportunity to speak at public hearings as may be required under any other statutes.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: w/o enclosure: Mr. Robert Allen, Akron Advisory Plan Commission

¹When appropriate, related questions have been grouped together. Also, your letter included questions that do not fall within an analysis of the state's public access laws. The following questions will, therefore, not be addressed in this opinion: "May the Commission destroy the memoranda of a meeting? May they destroy the memoranda prior to creating formal minutes? After the creation of formal minutes? Or after a member of the public requests the memoranda, but without ever producing the memoranda?" [These questions would be more appropriately addressed to your local public records commission.] Your question, "Is it a violation for the Commission chair to define the words of a statute to suit his response, or redefine the words of a statute at all?" also falls outside of the public access laws and will not be addressed in this opinion.

²The full text of PAC Opinion 98-8 may be viewed at <http://www.state.in.us/pac/op98-8.html> or a copy may be requested through the Office of the Public Access Counselor.