



STATE OF INDIANA

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October 4, 2012

Larry D. Simpson
Hope Star-Journal
615 Harrison Street
Hope, Indiana 47246

Re: Formal Complaint 12-FC-260; Alleged Violation of the Open Door Law and Access to Public Records Act by the Hope Town Council and Clerk-Treasurer

Dear Mr. Simpson:

This advisory opinion is in response to your formal complaint alleging the Hope Town Council (“Council”) violated the Open Door Law (“ODL”), Ind. Code § 5-14-1.5-1 *et seq.* and the Hope Clerk-Treasurer (“Clerk”) violated the Access to Public Records Act (“APRA”), I.C. § 5-14-3-1 *et seq.* Cynthia A. Boll, Attorney, responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that the Council has failed to provide proper notice for its meetings and executive sessions.¹ For an executive session held by the Council on Thursday, June 28, 2012, the notice failed to cite to the specific statutory exception that would allow the Council to meet in executive session and further was not posted until one day prior to the meeting. For a special meeting called by the Council for Monday, June 18, 2012, notice was not posted under Friday, June 15, 2012. Lastly, for the monthly Council meeting held on Monday, August 20, 2012, notice was not posted until Friday, August 17, 2012.

As to the APRA, you allege that you submitted a request for records to the Clerk on or about July 23, 2012. On July 24, 2012, Ms. Boll responded in writing on behalf of the Clerk and acknowledged your request. As of September 10, 2012, you further provide that you have yet to receive any records in response to your request from the Clerk. You allege that attempts to determine the status of the request have been ignored.

¹ In your complaint you allege that the Clerk has violated the ODL by failing to provide proper notice for meetings of the Council. However, the ODL applies to governing bodies, of which the Council is the body that conducted the meetings in question. Accordingly, the Council would be the appropriate body to which the formal complaint is addressed to in regards to the alleged ODL violation.

In response to your formal complaint, Ms. Boll advised that pursuant to I.C. 5-14-5-7, a person that chooses to file a formal complaint with the counselor must file the complaint not later than thirty (30) days after the denial; or the person filing the complaints receives notice in fact that a meeting has been held by a public agency, if the meeting was conducted secretly or without notice. Your complaint was filed marked on September 10, 2012. As such, Ms. Boll argues that the only alleged notice violation that meets the requirements of I.C. 5-14-5-7 would be the August 20, 2012 meeting. The notice for the August 20, 2012 Council meeting was not posted at the Town Hall. It was provided to you on August 17, 2012 by email. Since the allegation has been brought to Ms. Shirley Robertson's attention, the Hope Town Clerk-Treasurer, she has instituted a process so that all future notices will comply with the APRA. All monthly Council meeting notices are now posted in two places at the Town Hall on the Wednesday preceding the Monday evening meeting and you will receive your notice via e-mail on the same day.

As to your request for records, Ms. Boll advised that the request for email correspondence was broad in scope as it spanned a period of two years and was very unspecific in nature. It is the intent of Ms. Robertson's to completely comply with the APRA in regards to your request. Ms. Robertson is in the process of reviewing thousands of emails to determine which records are responsive to your request. At the current time, Ms. Robertson has invested over fifty (50) hours in this process. The request came at a time when she is extremely busy with her work for the Town, including preparing the Town's budget. Mrs. Robertson does not have a full time assistant to assist with the majority of her duties. In light of I.C. § 5-14-3-7(a), Ms. Robertson acknowledges that her present heavy work load does not exempt her from the APRA, and she is making every effort to comply with the request. Issues have no recently arisen regarding the method of production for the records that have been sought, as documents that have been sent have been inaccessible due to technology issues.

ANALYSIS

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. *See I.C. § 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 I.C. § 5-14-1.5-3(a).*

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the Public Access Counselor must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. Your formal complaint was received by our Office regarding the Council's alleged conduct on September 10, 2012. The three meetings that you allege the Council failed to provide proper notice occurred on June 18, June 27, and August 20, 2012. As such, you would only have standing to file a formal complaint regarding the August 20,

2012 meeting. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your complaint in regards to the Council's meetings that were held in June will be addressed as an informal inquiry. *See I.C. § 5-14-4-10(5).*

A "meeting" is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See I.C. § 5-14-1.5-2(c).* "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See I.C. § 5-14-1.5-2(d).* "Public business" means any function upon which the public agency is empowered or authorized to take official action.

The ODL requires that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See I.C. § 5-14-1.5-5(a).* The notice must be posted at the principal office of the agency, or if no such office exists, at the place where the meeting is held. *See IC § 5-14-1.5-5(b)(1).* While the governing body is required to provide notice to news media who have requested notices, nothing requires the governing body to publish the notice in a newspaper. *See I.C. § 5-14-1.5-5(b)(2).*

Ms. Boll advised that as to the Monday, August 20, 2012 meeting, the notice was not posted at the Town Hall and was not sent to you until Friday, August 17, 2012 via e-mail. As such, it is my opinion that the Council violated the ODL by failing to provide proper notice for the August 20, 2012 meeting. Ms. Robertson has now instituted a process to address this issue and assures that the incident will not be repeated. As to the notice posted for the June 18, 2012 meeting, that is being addressed as an informal inquiry, the notice failed to comply with the requirements of I.C. § 5-14-1.5-5 as again, it was not posted forty-eight hours (excluding weekends) prior to the meeting.

Notice of an executive session must also include a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See I.C. § 5-14-1.5-6.1(d).* This requires that the notice recite the language of the statute and the citation to the specific instance; hence, "To discuss a job performance evaluation of an individual employee pursuant to I.C. § 5-14-1.5-6.1(b)(9)" would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.* Here, the notice provided for the executive session held on June 27, 2012 failed to comply with the requirements of I.C. §§ 5-14-1.5-5 and 5-14-1.5-6.1(d), in that the notice failed to provide the specific statutory exemption allowing an executive session, the language of the statute, and was not posted forty-eight hours prior to the meeting.

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 Clerk is a public agency for the purposes of the APRA. *See I.C. § 5-14-3-2.* Accordingly, any person has the right to inspect and copy the Clerk'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).* A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Here, the Clerk complied with the requirements of section 9 by responding in writing within one day of the receipt of your written request.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See I.C. § 5-14-3-3(b).* The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, 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 is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See I.C. § 5-14-3-6(a).* Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See 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. *See I.C. § 5-14-3-7(c).* The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45.* This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172.* Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

Here, you submitted your request for records to the Clerk on or about July 23, 2012. The Clerk provided in its initial response that it anticipated that all records would be produced by the end of August. While the Clerk not meeting its self imposed deadline does not automatically demonstrate that it acted unreasonably, I would note that if the Clerk had responded to Mr. Simpson's inquiries regarding the status of the request after September 1, 2012, a formal compliant would likely have not been necessary. Regardless, since receiving your request, the Clerk has provided that she has expended over fifty (50) hours in collecting and reviewing records that are responsive to your request. The request for records that was submitted was quite broad, as the Clerk has reviewed records that are maintained over a two-year time period. In addition to

collecting all records that were responsive to the request, the Clerk must also review each record prior to disclosure to ensure that it does not disclose any information that is considered confidential or that allows the agency discretion in providing the record. Lastly, the Clerk has indicated that the office is limited in staff to assist with the majority of the duties of the office and the request was received during a busy period of the year for the Clerk, as the agency was in the process of preparing the Town's budgets. With all these factors in mind and in light of the Clerk is currently attempting to provide eight-hundred records that are responsive to the request, it is my opinion that at this time the Clerk has complied with the requirements of I.C. § 5-14-3-3(b).²

CONCLUSION

Based on the foregoing, it is my opinion that the Council violated the ODL by failing to provide proper notice for the August 20, 2012 Council meeting. Further, it is my opinion that at this time the Clerk has complied with I.C. § 5-14-3-3(b) in response to your request.

Best regards,

A handwritten signature in black ink, appearing to read "Joseph B. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Cynthia A. Boll

² I would note that the Clerk would not be required to provide all records that are responsive to the request to the Public Access Counselor's Office in response to the formal complaint that was filed. The Clerk needs to ensure that the records are submitted to the requestor, in this case Mr. Simpson. The Clerk will need to address with Mr. Simpson any technology issues that have potentially arisen regarding the production of the records and the format to which they will be produced.