



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

May 29, 2013

Mr. Samuel Shaw
627 H Street
Bedford, Indiana 47421

Re: Formal Complaint 13-FC-133; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Bedford Public Library

Dear Mr. Shaw:

This advisory opinion is in response to your formal complaint alleging the Bedford Public Library ("Library") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* and the Open Door Law ("ODL"), I.C. 5-14-1.5 *et seq.*

BACKGROUND

In your formal complaint you provide that on April 17, 2013 you submitted a written request for records to the Library for a copy of the Library Board's March meeting minutes, a copy of the 2012 Annual Financial Report, requested that you be allowed to attend the April 2013 Library Board Meeting, and that you be allowed to observe and record the Bedford City Directory ("Directory"). Ms. Miller responded in writing to your request and provided a copy of the 2012 Annual Financial Disclosure and advised that the March 2013 meeting minutes would not be available until after the April 2013 meeting. Ms. Miller informed you that she would advise at a later date regarding your request to attend the April 2013 Board meeting and that a copy of the Directory is available online for your review. You acknowledge that you have been issued a No Trespass Order that prevents you from being in or on the Library's premises.

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 Library 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 Library'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. Pursuant to section 9 of 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).

As to your request for meeting minutes, the ODL requires that governing bodies keep memoranda for all meetings that are conducted. The ODL does not require that a governing body keep minutes; however if kept, minutes of a meeting must be open for inspection and copying under the APRA. *See* I.C. § 5-14-1.5-4(c). As for memoranda, the ODL specifically provides that the following 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 I.C. § 5-1.5-2-2.4. I.C. § 5-14-1.5-4(b).

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. *See* I.C. § 5-14-1.5-4(c). For executive sessions, the memoranda requirements are modified in that the memoranda "must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given." *See* I.C. § 5-14-1.5-6.1(d). The public agency must also certify in a statement in the memoranda that no subject was discussed other than the subject specified in the public notice. *Id.*

As to "draft" minutes or memoranda, meeting minutes in draft or unapproved form are subject to inspection and copying in response to a request under the APRA. *See Opinion of the Public Access Counselor 98-FC-8* at 1 ("Once created, draft or proposed minutes are public records and nondisclosure must be based upon one of the exceptions outlined in the APRA."); *See also Opinions of the Public Access Counselor 01-FC-65; 05-FC-23; 10-FC-264*. If the governing body is concerned about releasing the minutes in draft form, it could include a disclaimer on any copies noting that the minutes are not yet approved and subject to revision. *See Opinions of the Public Access Counselor 01-FC-65 and 10-FC-264*. It is my opinion that the Library would be required to provide draft copies of its meeting minutes upon their creation in response to your request and may not

wait until the minutes are approved at the subsequent meeting prior to the minutes being disclosed.

As to your request for to inspect the Directory, you were informed that the Directory was available online. In light of the No Trespass Order, the Library would not allow you to enter the premises to inspect the Directory. Generally, an individual has a right to inspect a record. *See Opinions of the Public Access Counselor 04-FC-43 & 04-FC-218*. However, circumstances may make inspection of a record impractical or impossible. *Id.* Counselor Kossack provided a summary of the issues presented here in a 2010 Informal Opinion:

“Previous public access counselors have opined that public agencies do not violate the APRA by denying the right to inspect records under certain circumstances. For example, in 2004, Counselor Hurst noted that “in some instances the option of inspection or copying may not be available.” *See Opinion of the Public Access Counselor 04-FC-43*. “[C]ircumstances may exist where physical inspection of a record is not practical or even possible, and reasonable access can only be accomplished through production of a copy of the record. Such is the case here.” *Id.* In that opinion, Counselor Hurst decided that it was not a violation of the APRA for a public agency to deny an offender’s request to inspect public records because the offender could not physically appear at the public agency during its normal business hours. Consequently, Counselor Hurst opined that the requester’s only option was to receive copies of the records. Counselor Hurst also noted that, in that case, the agency did not have to waive the applicable copy fees for the requester. He wrote, “While I appreciate that you do not want to pay for copies of records that are responsive to your request, the APRA does entitle the [agency] to recoup the cost of providing you with copies of any responsive records, and to receive that fee in advance of production.” *Id.*; *see also Opinion of the Public Access Counselor 06-FC-113* (Counselor Davis; noting that “the APRA does not require the [agency] to transfer records to a more convenient or accessible location in order to provide an opportunity for you to inspect the records.” *See Opinion of the Public Access Counselor 10-INF-40*.

In lieu of providing you with a copy of the Directory, the Library has advised you that the Directory may be inspected online. If you desire a paper copy, the Library would be required under the APRA to provide you with a copy of the record, however as opposed to assessing the record online; the Library could charge you a fee pursuant to section 8 of the APRA for providing a paper copy of the Directory.

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).

You have been issued a No Trespass Order that prevents you from being in or on the Library's premises. The Library Board conducts its public meetings at the Library. Our office has addressed the intersection of the ODL and a Trespass Order that prevents an individual from attending a meeting of the governing body. See *Opinions of the Public Access Counselor 05-FC-24; 09-INF-27; 11-FC-94*. It is not appropriate for our office to opine as to the validity of verbal or written no trespass orders, assuming that those orders are not issued solely to deprive certain individuals from attending otherwise public meetings without a reasonable basis for such deprivation. *Id.* "... the Open Door Law is not at issue here, where your inability to observe the meeting was not due to the meeting being closed to the public or limited in some way so that the public in general could not hear or observe the meeting." See *Opinion of the Public Access Counselor 05-FC-24*. Here, there has been no showing that the No Trespass Order was issued solely to deprive you of your ability to attend the Library Board's public meetings. As such, I would advise you to consult with the Library and/or Town regarding the proper avenue to have the No Trespass Order removed. However, it is my opinion that Library has not violated the ODL as there has been no showing that the No Trespass Order that was issued was done solely to deprive you of your right to attend the Library Board's meetings.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Library would be required to provide draft copies of its meeting minutes upon their creation in response to your request and may not wait until the minutes are approved at the subsequent meeting prior to the record being disclosed. Further, the Library would be required to provide one copy of the Directory in response to your request; however you may be charged a fee pursuant to section 8 of the APRA. As there has been no showing that the No Trespass Order was issued solely to deprive you of your ability to attend the Library Board's meeting, it is my opinion that the Library did not violate the ODL.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Susan Miller