



STATE OF INDIANA

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July 23, 2013

Mr. William Fehribach
104 N. Ferguson Street
Henryville, Indiana 47126

Re: Formal Complaint 13-FC-200/13-INF-45; Alleged Violation of the Open Door Law by the Clark County Board of Zoning Appeals and Alleged Violation of the Access to Public Records Act by the Clark County Planning, Zoning, and Building Commission

Dear Mr. Fehribach:

This advisory opinion is in response to your formal complaint alleging the Clark County Board of Zoning Appeals ("Board") violated the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.*, and the Clark County Planning, Zoning, and Building Commission ("Commission") violated the Access to Public Records Act ("APRA"). David Nachand, Attorney, responded on behalf of the Board and Commission. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that in December 2011, you requested copies of certain permits from the Commission concerning 103 E. Colonial Way, Henryville, Indiana 47126. You allege that you were denied access and escorted out of the building by law enforcement. Thereafter, you allege that your attorney submitted a request for the permits and was informed that the Commission would need to receive a court order prior to disclosure. In February 2012 you again submitted your request via certified mail, but received no response from the Commission. As to the ODL, you provide that the Board prevented you from properly presenting your case at its January 16, 2013 meeting.

In response to your formal complaint, Mr. Nachand advised that the formal complaint is untimely as more than thirty (30) days have elapsed since the Commission allegedly denied your request for records pursuant to the APRA or the Board's alleged violation of the ODL. Regardless, the core issue of your formal complaint stems from your belief that you should have access over a neighbor's land for your ingress and egress to a public highway. You have previously filed civil litigation regarding this matter to which the Clark County Circuit Court entered summary judgment against you. You did

not appeal the Court's decision. You mistakenly believe that the Board, Commission, and/or County can alter the decision of the Court.

As to the alleged APRA denial, you apparently requested copies of permits which would allowed the new owner on the property to change the use of the property from an insurance office to a restaurant. You have previously acknowledged that the owner converted the property without the use of a permit. Therefore, the Commission could not provide copies of a permit that did not exist. Commission staff concluded in 2001 that both uses were permitted by right under the existing zoning classification or were grandfathered in as a legal non-conforming use under a prior ordinance.

As to your ODL complaint, Mr. Nachand advised that the allegation is simply not true. You have continuously contacted Commission staff regarding your allegations. You were informed you had a right to file an appeal to the Board. You filed your petition of appeal on December 19, 2012. You presented your case before the Board on January 16, 2013 for more than fifteen minutes, which is the hearing time allotted any applicant according to the Commission and Board's hearing rules. The Board's Findings of Fact and Decision are enclosed for your review. Upon denying your appeal, you became irate at the Board and law enforcement was summoned because of the disruption that was caused. You had a right to appeal the Board's decision, but failed to do so.

ANALYSIS

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the 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. You have alleged that the Commission failed to properly respond to your request for records that were submitted in 2011 and 2012. The alleged violation of the ODL by the Board occurred on January 16, 2013. Your formal complaint was received by our office on July 10, 2013. Accordingly, you would have standing to file a formal complaint against the Board or Commission. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your formal complaint will therefore be addressed as an informal inquiry. *See* I.C. § 5-14-4-10(5).

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 allege that the Board prevented you from properly presenting your appeal at its January 16, 2013 meeting. You provide no further details regarding how the Board prevented you from making an appropriate presentation. The Board has provided that you were given fifteen minutes to make a presentation pursuant to the Board's meeting

rules. Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. *See Opinion of the Public Access Counselor 08-FC-149, citing Brademas v. South Bend Cmty. Sch. Corp.*, 783 N.E.2d 745, 751 (Ind. Ct. App. 2003), *trans. denied*, 2003; *see also* I.C. § 5-14-1.5-3 (“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.”). “Indiana law does require a governing body to allow public testimony in certain instances (e.g. a hearing on a proposed budget), but as a general rule the ODL does not guarantee the right to speak at a meeting.” *See Opinions of the Public Access Counselor 08-FC-149 and 10-FC-240*. It is my opinion that you have failed to identify any basis in which the Board prevented you from making your presentation. Further, the proper avenue to appeal the Board’s decision would have been to appeal the matter to the local trial court. It is my opinion that the Board did not violate the ODL.

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 Commission 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 Commission’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 orally, the request is deemed denied if the agency fails to respond within twenty-four hours of its receipt. *See* I.C. § 5-14-3-9(a)(2). 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 information regarding how or when the agency intends to comply. Here you provide that the Commission failed to properly respond to your request for records in December 2011, the request submitted by your attorney in 2012, and a request submitted via certified mail in February 2012. In response, the Commission advised even if the Commission received your request, it would not have maintained any record responsive to it as the previous owner failed to use a permit when converting the property.

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*. As such, if the Commission failed to properly acknowledge you and your attorney’s request for records, it acted contrary to section 9 of the APRA. Alternatively, the Commission would not violate the APRA by failing to produce a record that did not exist. *See Opinions of the Public Access Counselor 01-FC-61; 08-FC-113, 10-FC-56*.

Please let me know if I can be of any further assistance.

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 distinct "H".

Joseph B. Hoage
Public Access Counselor

cc: Michael Tackett