

August 4, 2004

Mr. Glenn D. Benninger  
125 Ridge Springs Lane  
Ellettsville, IN 47429

*Re: Consolidated Advisory Opinion 04-FC-110 and 04-FC-111; Alleged Violation of the Open Door Law and Alleged Denial of Access to Public Records by the Ellettsville Plan Commission/ Ellettsville Clerk Treasurer*

Dear Mr. Benninger:

This is in response to your formal complaints, which were received on July 6, 2004. In your first complaint, you allege the Ellettsville Plan Commission (“Commission”) and the Ellettsville Clerk-Treasurer (“Clerk”) violated the Access to Public Records Act (“APRA”), Ind. Code §5-14-3-1, by taking public records out of the public office to prepare copies, and then seeking to collect a fee for those copies. In your second complaint, you allege the Commission violated the Indiana Open Door Law, I.C. §5-14-1.5, by canceling a regularly scheduled meeting, thereby denying you access to that meeting. Mr. Jeffrey York, Commission Administrator, and Ms. Sandra Hash, Clerk-Treasurer, responded in letters dated July 15, 2004 and July 8, 2004, respectively. Copies of their responses are enclosed for your reference. I have consolidated these complaints for purposes of this opinion.

It is my opinion that neither the fee charged for the tapes, nor removing the tapes from the agency’s office constitutes a violation of the Access to Public Records Act. It is also my opinion that canceling the regularly schedule meeting does not constitute a violation of your rights under the Open Door Law.

#### BACKGROUND

In the first of your two complaints, you allege that on June 3, 2004, you requested, in writing, to be allowed to listen to the tapes of the Commission meetings held on May 1, 2003 and June 5, 2003. In the alternative, you requested to be given copies of those tapes. Because the agency’s office did not have the equipment to make the requested copies, the Clerk took the original tapes to her home to prepare copies for you. When she gave the copies of the tapes to you, she charged you \$4.00, \$2.00 for each tape. Rather than pay the \$4.00 charge, you asked to listen to the copies of the tapes

in her office, and she complied. While listening to the tapes, you discovered that one of the copied tapes ended before the meeting was over, leading you to believe that tape had been tampered with. Your conversation with the Clerk confirmed that the original tape also ended before the meeting was over.

In your second complaint, you allege that on May 24, 2004, you approached the Ellettsville Town Council during their regularly scheduled meeting to discuss landscaping and zoning issues. At that time, the Town attorney, Michael Spencer, advised you that the proper time for discussing those issues was during the Commission's meeting. You were then slated to appear before the Commission during the next meeting scheduled for June 3, 2004. On June 3, 2004, the Commission discussed the issues you raised and asked to receive additional information in a special meeting scheduled for June 15, 2004. Although some information regarding the landscaping/zoning issues was discussed during the June 15, 2004 meeting, the matter was not resolved. There is some confusion as to whether further discussion of these matters was on the agenda for the next regularly scheduled Commission meeting on July 1, 2004; your complaint states that you were on the agenda; Mr. York advises us that you were not. On June 28, 2004, Mr. York contacted you to advise you that the July 1, 2004 meeting had been cancelled.

You then filed your complaints with this office. On July 8, 2004, I forwarded a copy of the complaint to Mr. York, to reply to the complaint made against the Commission, and to Ms. Hash, to reply to the complaint made against the Clerk. Mr. York responded that Commission President, Mr. Frank Buczolic, had canceled the meeting because there was nothing scheduled for that meeting on which the Commission had to rule. Ms. Hash responded that the \$2.00 per tape fee is authorized pursuant to Ellettsville Town Code 33.78(3), and that to the best of her knowledge, there is no law preventing her from removing the Commission meeting tapes from the Clerk's Office.

## ANALYSIS

### Record Security

Indiana Code §5-14-3-3 provides that any person has the right to inspect and copy the public records of any public agency. The Commission is a public agency subject to the APRA, and its records are public records. A public record includes tape recordings that are received, maintained, or filed by or with that public agency. I.C. 5-14-3-2. A governing body is not required to make recordings of public meetings; however, if they choose to do so, those recordings become public records subject to disclosure under I.C. 5-14-3-3. A public agency is responsible for protecting those public records from loss, alteration, mutilation, or destruction. I.C. 5-14-3-7.

To the best of our knowledge, there is no law that prohibits the Clerk from removing the original tapes from the agency's office. See *Opinion of the Public Access Counselor 98-FC-4*, which states that storage of public records in a private building is not *per se* a denial of access, so long as access to those records is provided during regular business hours, and the records are safeguarded from loss are required by I.C. 5-14-3-7.

The tapes of the Commission meetings are regularly removed from the office by the Commission secretary to assist in putting together the required memoranda of those meetings, and in this instance, they were removed from the agency to make the copies for you, as the office did not have the appropriate equipment to make the copies.

We note your concern that the Commission's meeting tapes are not being properly safeguarded and your suspicion that the tapes you requested may have been tampered with. You present no evidence that any tampering has occurred, outside of your suspicion. In fact, you acknowledge that the Clerk verified to you that the original tape had also ended prematurely. Therefore, with respect to record security, we decline to find that you have been denied any right conferred to you by I.C. 5-14-3, and as such, are unable to find that a violation has occurred.

### Fees

Under the APRA, any person may inspect and copy the public records of a public agency during the regular business hours of the agency, except as provided in I.C. 5-14-3-4. I.C. §5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right to inspect and copy public records, and shall either provide the requested copies or allow the person requesting the records to make their own copies. I.C. 5-14-3-3(b).

While an agency may not charge a fee for inspecting or reviewing a record, they may charge a fee for a reproduction of a record. I.C. 5-14-3-8(b). Indiana Code 5-14-3-8(d) permits local public agencies to charge a fee for copies of public records, and to set that fee in a fee schedule adopted by the fiscal body or by the public agency's governing body. The fee may not include labor or overhead, and may not exceed the actual cost of the copy. I.C. 5-14-3-8(d).

Your request for access indicated to the Clerk that either receiving a copy of the tape or being allowed to listen to it in her office would be acceptable. Pursuant to your request, the Clerk prepared a copy of two separate tapes for you at \$2.00 each, the cost prescribed by Ellettsville Town Code 33.78(3). You acknowledge that when you refused to pay the \$4.00 fee to obtain the copies of the tapes, the Clerk provided you access to those tapes by allowing you to listen to each in her office without requiring payment. As such, it is my opinion that there was no violation of the fee provisions of the APRA.

### Denial of Access to Meeting

The intent and purpose of the Indiana Open Door Law is 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.” I.C. §5-14-1.5-1. Indiana Code §5-14-1.5-3(a) provides, in pertinent part, that 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.

A meeting is defined as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. §5-14-

1.5-2(c). The Commission is a governing body of a public agency, and any gatherings of a majority of its members would constitute a meeting subject to the requirements of the Open Door Law. I.C. §§5-14-1.5-2(a) and (b).

You have a right to attend all public meetings, held by the majority of the governing body of a public agency; however, your right to access to these meetings assumes that a public meeting is taking place. If there is no meeting, there can be no denial of access to a meeting. In your complaint, you admit that the meeting scheduled for July 1, 2004 was cancelled. In fact, Mr. York contacted you himself to tell you the meeting had been cancelled. Because no meeting took place, it cannot be said that your right to access to that meeting was denied, regardless of the reason that meeting was cancelled. In essence, the Open Door Law does not require a governing body to hold a meeting, only that meetings that are held be open to the public.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Ellettsville Plan Commission and the Ellettsville Clerk-Treasurer did not violate the Open Door Law or the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Mr. Jeffrey York, w/out enclosures  
Ms. Sandra Hash, w/out enclosures