

April 17, 2006

*Sent Via Facsimile*

Robert L. Bauman  
10 North 4<sup>th</sup> Street  
Lafayette, IN 47901

*Re: Formal Complaint 06-FC-53; Alleged Violation of the Access to Public Records Act by the West Lafayette Clerk-Treasurer's Office*

Dear Mr. Bauman:

This is in response to your formal complaint alleging that the Clerk-Treasurer's Office of West Lafayette ("Clerk") violated the Access to Public Records Act by destroying ballots of the Police Merit Commission of West Lafayette.

#### BACKGROUND

You filed your formal complaint on March 15, 2006. You allege that the Clerk-Treasurer's Office violated the Access to Public Records Act when an administrative assistant employed in the Clerk-Treasurer's Office, Gail Thayer-Copeland, shredded ballots from a February 13 meeting of the West Lafayette Police Merit Commission ("Commission"). You allege that during the course of the meeting, the Commission elected officers by secret ballot vote. On February 14, you requested a copy of the ballots from Clerk Judith Rhodes. She responded by letter on February 15 that no ballots were on file in her office. When you renewed your request on February 16, Clerk Rhodes responded that "the ballots were not filed in my office, and I surmise at this point that they were destroyed."

On March 3, the Commission held a special meeting. A Commissioner reported during the meeting that the ballots were given to administrative assistant Gail Thayer-Copeland to shred. Ms. Thayer-Copeland and Clerk Rhodes were present at the meeting and did not dispute this assertion, you allege. You claim that this silence contradicted the denials that you received from Clerk Rhodes in February. You also stated that it had been and was the practice of the Commission to have the Clerk-Treasurer's office record meetings and prepare draft minutes, as well as serve as a repository for all of the Commission's records.

I sent a copy of your complaint to Clerk Rhodes. She responded in detailed fashion, providing documentation and a summary of her position. The Clerk-Treasurer's complaint response may be summarized as follows:

- You are the City Attorney for the City of West Lafayette, although Ms. Rhodes was told that you filed the complaint as an interested citizen, not in your capacity as City Attorney.
- By Police Merit Commission Rules and Regulations, the Commission is responsible for all record keeping functions, assigning those functions to the Secretary of the Commission. The Commission's Rules and Regulations also state that it may delegate duties of an administrative nature to other persons, without "abandonment of its authority."
- The Commission has designated the Clerk-Treasurer's Office to be a depository for Commission records.
- The Clerk-Treasurer is not by statute the Clerk of all City Boards or Commissions, and does not function as such in the City of West Lafayette.
- The Commission does not provide all records of Commissioners to the Clerk-Treasurer.
- The Commission utilizes Ms. Thayer-Copeland as the Commission's clerical assistant. She performs these duties separately from her duties to the Clerk-Treasurer, and receives separate payment for these duties.
- According to the Commission members involved and according to Ms. Thayer-Copeland, Commissioner Leverenz asked Ms. Thayer-Copeland to shred some papers within minutes of the end of the February 13 meeting. Those papers included the ballots that had been used at the meeting to elect the Commission's officers. According to Commissioner Leverenz, he did not tell Ms. Thayer-Copeland the nature of the papers.
- At the March 3 special meeting of the Commission, the Commissioners set aside the election held on February 13, and held a new election of officers by voice vote.
- The Clerk-Treasurer timely and properly responded to the public records requests of February 14 and 16. The Clerk did not maintain the ballots. The requested documents were unintentionally and accidentally destroyed by an individual acting in the capacity of an employee of the Commission while performing clerical tasks at the direction of the Commission. The Commissioners have publicly acknowledged their error in not maintaining the documents, and have held a new election. Any complaint concerning the destruction of records should be addressed to the Commission.

## ANALYSIS

Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of the Access to Public Records Act. Ind. Code 5-14-3-3(a). A public agency shall protect public records from loss, alteration, mutilation, or destruction. IC 5-14-3-7(a). Notwithstanding IC 5-14-3-7, public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention

schedules under Indiana Code 5-15. IC 5-14-3-4(e). Public Records not subject to Indiana Code 5-15 may be destroyed in the ordinary course of business. IC 5-14-3-4(e).

Under IC 5-15, "record," in relevant part, means all documentation of the informational, communicative or decisionmaking processes of state government, its agencies and subdivisions made or received by any agency of state government or its employees in connection with the transaction of public business or government functions, which documentation is created, received, retained, maintained, or filed by that agency or its successors as evidence of its activities or because of the informational value of the data in the documentation. IC 5-15-5.1-1 (defining "record"). This definition is made applicable to records of local governments, including cities, pursuant to IC 5-15-6-1.5.

"Public record," in relevant part, means any "writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency..." IC 5-14-3-2(m).

Based on the foregoing authorities, if the ballots from the Commission's February 13 meeting are records that are "created, received, retained, maintained, or filed by or with" the Clerk, then they are public records of the Clerk (as public agency, not individual). In that event, the records were required to be available for inspection and copying by the Clerk, and the Clerk was required to protect those records from loss, mutilation or destruction, and to destroy the records only in accordance with record retention schedules. *See* IC 5-14-3-7(a); IC 5-14-3-4(e).

Your complaint against the Clerk, in my view, is not sustained by the facts. Although it appears that the Clerk may have undertaken by delegation of the Commission the obligation to store Commission records, nothing in the Clerk's statute requires that the Clerk maintain the records of all City departments. *See* IC 36-4-10-4. Moreover, the Clerk did not actually maintain the records, as they were not filed by the Commission with the Clerk. The only custody or control over the ballots was exercised by the Commission. The direction to destroy the ballots was provided by one of the Commissioners directly to the Commission's clerical assistant, a person who was not acting as an employee of the Clerk.

Although not part of your complaint, I note that the Commission violated the Open Door Law when it held a secret ballot vote to elect its officers on February 13. A secret ballot vote may not be taken at a meeting. IC 5-14-1.5-3(b). Moreover, the Commission was required to protect the ballots, which were public records of the Commission upon their creation. IC 5-14-3-7(a). The Commission violated the Access to Public Records Act and IC 5-15-6 when the Commissioner directed the Commission's clerical assistant to destroy the ballots.

## CONCLUSION

For the foregoing reasons, it is my opinion that the West Lafayette Clerk-Treasurer did not violate the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Judith Rhodes