



STATE OF INDIANA

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May 19, 2010

Mr. Seth E. Anderson
126 Lamont Road
Huntington, IN 46750

Re: Formal Complaint 10-FC-100; Alleged Violation of the Access to Public Records Act by the Huntington County Election Board

Dear Mr. Anderson:

This advisory opinion is in response to your formal complaint alleging the Huntington County Election Board ("Board") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, and the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* A copy of the Board's response is enclosed for your reference.

BACKGROUND

According to your complaint, on April 16, 2010, the Board held a public meeting. At that meeting, Board member Fran Felts announced that there was a sign-in sheet and everyone attending the meeting was required to sign the sheet. You state that you have never heard that signing in was required for attendance at a public meeting and that you have only had to sign in at other public meetings when you wished to speak during the public comment period. You also allege that the Board violated the APRA when Board member Carmen Oswalt "announced that no working lists of candidates who have filed [to run for office] will be released from the clerk's office." You claim that one candidate's name was missing from a working list that was released at approximately 12:30 p.m. on February 19th, but the name appeared later that day in a working list that was released at approximately 4:30 p.m. That candidate's filing form also had a modified stamp, which showed that it was stamped on February 20th at 7:35 a.m. You believe that the candidate's form was filed fraudulently after the deadline. Finally, you allege the clerk raised copy prices to \$.25 per copy in violation of the APRA.

My office forwarded a copy of your complaints to the Board. Both the Board itself and Huntington County Attorney Robert S. Garrett responded. The Board claims that it did not require anyone sign in to the April 16th meeting and that the clerk informed you of that when you questioned the process. With regard to working copies of records, the Board argues that "there is no law that states we have to provide anyone copies of

forms created by the Clerk's office strictly for in-house use." As far as the allegedly excessive copy fee, the Board notes that previously, the clerk charged one dollar (\$1.00) for a single copy of a document, but the Board has since lowered that fee to twenty-five cents (\$.25) to comply with section 8 of the APRA. The Board also notes that it does charge the one dollar (\$1.00) fee for copies of certified documents.

In his response, Mr. Garrett states that he has informed the Board that "working drafts" or draft documents are open for public disclosure and would be released as available. Mr. Garrett believes the Board did not violate the APRA in this instance because "the 'working' list was released on February 19, 2010, around 12:30 P.M. I believe this was actually released without a request." Mr. Garrett maintains that the Board has not otherwise violated the law.

ANALYSIS

It is the intent of the ODL that public agencies conduct business and take official action openly unless otherwise provided by statute in order that the people may be fully informed. I.C. § 5-14-1.5-1. 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. I.C. § 5-14-1.5-3(a).

In 2007, Counselor Davis opined that a member of the public cannot be denied access to a public meeting due to that person's refusal to fill out or sign a sign-in sheet. *See Opinion of the Public Access Counselor 07-FC-09*. However, Counselor Davis also noted that a governing body's use of a sign-in sheet is not a violation of the ODL if attendees fill out the sheet voluntarily. *Id.* Here, there appears to be a dispute regarding whether or not attendees were required to sign the sheet. Because I am not a finder of fact, I make no determination on that issue. However, if the Board refused entry to any member of the public until that person signed the sign-in sheet, in my opinion that was a violation of the ODL.

As to the issue of "working documents," it appears from Mr. Garrett's response that the Board has changed its original position and is now willing to disclose such records upon request. Previous opinions from this office have viewed draft or incomplete records as disclosable public records under the APRA. *See Opinion of the Public Access Counselor 08-FC-54; 06-FC-124; 05-FC-142; 98-FC-4*. In one such case, Counselor Neal reasoned:

Here the Auditor may sustain the denial by providing the statutory authority exempting the record from disclosure. The record is not exempted from disclosure merely by the fact that it is a draft or incomplete record. The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request.

Opinion of the Public Access Counselor 08-FC-54. Counselor Neal concluded that an auditor could not deny access to a deed simply because the deed had not yet been

recorded; the deed existed and was maintained by a public agency, so it should have been disclosed unless an exception to the APRA permitted or required the auditor to withhold it. *Id.*; *c.f. Opinion of the Public Access Counselor 10-FC-56* (“Draft minutes that have not yet been approved are different than records that have not yet been created. Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”) Thus, if the “working” document was already created and in existence at the time you made your request, the Board violated the APRA by refusing to disclose the record at that time. I trust the Board’s willingness to provide such records in response to future requests resolves that aspect of your complaint.

As to the issue of copy fees, the APRA permits a public agency to charge a fee for copying a record, but sets certain limits on the amount of the copying fee depending upon the type of public agency. *See* I.C. § 5-14-3-8. Normally, a charge of twenty-five cents (\$.25) per page for black and white copies would be excessive for a public agency to charge an individual when the cost of copying cannot exceed the “actual cost of copying.” *Id.* However, here the Board maintains that it is only charging the actual cost of copies by assessing fees in that amount. If the Board’s actual cost for each page of black and white copies is indeed twenty-five cents (\$.25), the Board has not violated the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Board required you to sign a sign-in sheet as a prerequisite to allowing you to enter the April 16th meeting, the Board violated the ODL. Moreover, the Board should have allowed you to access to the “working” document upon request. Finally, if the Board assessed a copy fee that does not exceed its actual per-page cost for producing copies, it did not violate the APRA.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Robert S. Garrett