



# STATE OF INDIANA

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June 18, 2010

Ms. Judith Lewis  
c/o Michael Gillenwater, Esq.  
411 Watt St.  
Jeffersonville, IN 47130

*Re: Formal Complaint 10-FC-134; Alleged Violation of the Access to Public Records Act and Open Door Law by the Muddy Fork of Silver Creek Watershed Conservancy District*

Dear Mr. Gillenwater:

This advisory opinion is in response to your formal complaint alleging the Muddy Fork of Silver Creek Watershed Conservancy District (the "District") 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.* The District's response to your complaint is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that the District's board (the "Board") held an election for two vacant positions in January of 2010. Judith Lewis, on whose behalf you filed this complaint, was a candidate in that election. After "reported irregularities in the process," Ms. Lewis filed two written requests to view the ballots cast in the election. The response to the first request was a denial from the District. In its second response, the District communicated that it is willing to provide redacted copies of the ballots.

You also allege that the District violated the ODL because it never met in an advertised meeting to establish the form of ballot to be used in the election as required by Ind. Code § 14-33-5-5.

In response to your complaint, the District's attorney, John W. Mead, states that he has served as the Board's attorney for nearly 30 years. In the past, the Board has directed Mr. Mead to make all preparations for its elections. In this situation, once it became necessary to hold an election, Mr. Mead consulted individually with each board member to determine if they wished to call a special meeting or if he was to proceed on

his own with preparations for the elections. Mr. Mead claims that no board member requested a special meeting and each requested that he make his own preparations.

## 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.” I.C. § 5-14-3-1. The DOR does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the DOR’s public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The APRA provides that an agency may not disclose any record declared confidential by state statute unless disclosure is required by statute or an order of court. I.C. § 5-14-3-4(a)(1). The District contends that Ind. Code § 3-14-4-7 is a state statute which requires the requested records be kept confidential. Ind. Code § 3-14-4-7 provides the following:

I.C. § 3-14-4-7. Revealing individual's vote -- Discussion of ballot's appearance.

A member of a precinct election board or a person otherwise entitled to the inspection of the ballots who knowingly:

- (1) Reveals to another person how a voter has voted; or
- (2) Gives information concerning the appearance of any ballot voted; commits a Class D felony.

The question, then, is whether the State’s election laws contained within Title 3 apply to the District’s election. The applicable language in Title 3 provides: “This title applies to each election at which the electorate of the state or a political subdivision: (1) Nominates or chooses by ballot public officials; or (2) Decides a public question lawfully submitted to the electorate.” I.C. § 3-5-1-1. Mr. Mead claims that the District is a “special taxing district” under Indiana law, which is defined as follows:

I.C. § 36-1-2-18

“Special taxing district”

Sec. 18. “Special taxing district” means a geographic area within which a special tax may be levied and collected on an ad valorem basis on property for the purpose of financing local public improvements that are:

- (1) not political or governmental in nature; and
- (2) of special benefit to the residents and property of the area.

And if the District is indeed a special taxing district, it is also a “political subdivision” as defined in Title 3:

I.C. § 3-5-2-38. Political subdivision.

“Political subdivision” means a county, city, town, township, school

corporation, public library, local housing authority, fire protection district, public transportation corporation, local building authority, local hospital authority or corporation, local airport authority, special service district, special taxing district, or other type of local governmental corporate entity.

Thus, it appears that Title 3 applies to the District's elections. In that case, Ind. Code § 3-14-4-7 prohibits the District from releasing the names of voters who cast ballots in the election. Consequently, it is my opinion that the District did not violate the APRA by refusing to provide you with unredacted versions of the ballots.

You also allege that the Board took action outside of a public meeting because no meeting was held to determine the form of the ballots used in the election. Under the ODL, a "meeting" means a gathering of the 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). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. I.C. § 5-14-1.5-2(d). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. I.C. § 5-14-1.5-2(g). The ODL explicitly requires that a final action be taken at a meeting open to the public. I.C. § 5-14-1.5-6.1(c).

It is important to note that the ODL does not require a governing body to hold a public meeting every time its members engage in some sort of official action. Public meetings are only necessary if the governing body engages in official action while in a meeting, which is a "gathering of the majority of the governing body." I.C. § 5-14-1.5-2(c). Thus, even if the Board received information, deliberated, made recommendations, established policy, or made decisions, it did not violate the ODL unless it did so during a gathering of a majority of its respective members. Here, you have not alleged that there was a gathering of members at all because previous public access counselors have opined that a "gathering" under the ODL generally does not include telephone conversations. *See Opinion of the Public Access Counselor 08-FC-208*. Moreover, there are no facts alleging that anyone other than one member of the Board and Mr. Mead were on the telephone at the same time, so I have no reason to believe the ODL's section prohibiting serial meetings was violated.

You claim that Ind. Code § 14-33-5-5 requires the Board to hold a meeting concerning the form of the ballots. That section provides:

Ballots; certification

Sec. 5. (a) Before the annual meeting, the board shall prepare the ballots and a list of the freeholders of the district, which must be certified by the county auditor and placed in the district's files. A deficiency in this process or an omission of the names of any freeholders does not void action taken at an annual meeting.

(b) A freeholder as prescribed by IC 14-33-2-3 is entitled to only one

(1) vote per freeholder.

I do not see anything in this language that requires the Board to hold an open meeting concerning the elections. Moreover, it is not within the purview of this office to address

the legality of election procedures. *See* I.C. § 5-14-4-10. As Mr. Mead notes, Ind. Code § 3-12-8 *et seq.* provides procedures for contesting an election. If you believe the election was conducted improperly, I encourage you to exercise your rights under that statutory framework.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the District violated neither the ODL nor the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack  
Public Access Counselor

Cc: John W. Mead