



# STATE OF INDIANA

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July 14, 2010

Mr. Delbert F. Hershberger  
436 Cherrywood Ct.  
Valparaiso, IN 46385

*Re: Formal Complaint 10-FC-146; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Porter County Animal Shelter and Porter County Commissioners*

Dear Mr. Hershberger:

This advisory opinion is in response to your formal complaint alleging the Tipton County Extension Education Center (the "Center") and the Porter County Commissioners (the "Commissioners") 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 Shelter's response to your complaint is enclosed.

## BACKGROUND

In your complaint, you allege that on April 9, 2010, you requested information from the Shelter. You claim that the Shelter's response to your request is "incomplete or is being totally refused." Specifically, you allege that the Shelter refused to provide you with the names of shelters or rescues where Porter County receives or transports animals from. The Shelter informed you that it receives animals from outside of Porter County, so you requested dates, times, names, and information regarding whether county equipment was used for the transfers. You also sought a list of animals received in date, time, and number which were received from outside of Porter County. Moreover, you sought information regarding whether the animals from outside of Porter County received medical treatment. The Shelter responded in the negative, but you state that you "find it hard to believe that these animals brought in from another county would require NO medical treatment." Further, you sought information related to a "Christmas Dinner" held in 2008 and 2009, information related to employee terminations from January 1st of 2008 through April 1st of 2010, copies of job openings at the Shelter, the "Porter County Animal Shelter Operations Handbook," and "a copy of the rules that the Porter County Commissioners are required to follow when they conduct their meeting." With regard to

the ODL, you allege that you have “requested to be put on the Porter County Commissioners Meeting,” but the Commissioners have not responded to your request.

In response to your complaint, Gwenn Rinckenberger, attorney for Porter County, denies that the Shelter or the county violated the APRA or ODL. Ms. Rinckenberger states that the Shelter and county has provided you with all of the records in the Shelter’s and county’s possession that are responsive to your requests. Moreover, the county “has gone above and beyond the requirements of the Indiana Public Access Laws by answering questions posed . . . in interrogatory form to provide information” for which no public records existed. Ms. Rinckenberger further claims that she has confirmed with officials at both the Shelter and the county that you have received all of the requested records that are in the possession of those agencies. Finally, Ms. Rinckenberger states that you are free to attend the Commissioners’ public meetings, but she does not believe the law requires the Commissioners to modify their agenda or “disrupt . . . normal business process” to accommodate you.

## ANALYSIS

Here, Ms. Rinckenberger claims that the Shelter and county have provided you with all responsive records in their possession. If that is true, the agencies have complied with the APRA. While you may believe the agencies’ responses are insufficient, the law does not require them to produce records that they do not have. The public access counselor has repeatedly stated that “the APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”).

Moreover, nothing in the APRA requires an agency to *create* records in response to a request. See *Opinion of the Public Access Counselor 10-FC-56* (“Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”) Similarly, the agencies have not violated the law by failing to provide you with information (or answers to generalized questions) if such information not contained in the records of either the Shelter or the county. Counselor Davis noted in 2005 that “[a] public agency is not required to compile records to respond to a request for information. If the public agency does not have a record or records that are responsive to a request for a record or for information, the agency may respond by stating that it does not maintain such a record.” *Opinion of the Public Access Counselor 05-FC-66*.

With regard to your complaint about the Commissioners’ failure to add you to the agenda of one of their meetings, nothing in the ODL requires the Commissioners to do so. As Counselor Neal noted in her response to *Formal Complaint 08-FC-149*, 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.” *Opinion of the Public Access Counselor 08-FC-149*.

## CONCLUSION

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

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial "A".

Andrew J. Kossack  
Public Access Counselor

Cc: Gwenn R. Rinckenberger