



STATE OF INDIANA

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August 23, 2010

Ms. Sherri J. VanHook
1032 East Bonebrake Road
Veedersburg, IN 47987

Re: Formal Complaint 10-FC-166; Alleged Violation of the Access to Public Records Act by the Fountain County Election Board

Dear Ms. VanHook:

This advisory opinion is in response to your formal complaint¹ alleging the Fountain County Election Board (the "Board") violated the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.* The Board's response to your complaint is enclosed for your review.

BACKGROUND

In your complaint, you allege that the Board held a meeting on July 27, 2010. The subject of that meeting was your eligibility as a candidate for public office. After the meeting was convened, you requested a copy of the meeting's minutes. In response, you claim that the Board's chairman, Dudley Cruea, informed you that you "could not have a copy of the [minutes] and that . . . the election board would have to have a meeting to determine if [you were] eligible to receive a copy of the [minutes]."

In response to your complaint, Mr. Cruea claims that he "never made the statement" that you included in your complaint. Rather, he states that when you asked for a copy of the minutes, he responded that he did not know if the minutes could be handed out until they had been approved. He alleges that he told you that the Board would need to "see if the minutes could be handed out before they are approved as correct." He further claims that there "was no statement that the Election Board would have to meet and determine if [you were] eligible to receive a copy." He acknowledges that anyone is entitled to a copy of the minutes from a public board, but again states that he is unsure about whether a person is entitled to a copy of minutes that have not yet been approved.

¹ I note that some of the allegations in your complaint are untimely. Formal complaints alleging violations of the APRA must be filed within 30 days of the denial. I.C. § 5-14-5-7. Consequently, this advisory opinion is limited to denials that occurred within 30 days of July 27, 2010.

ANALYSIS

The public policy of the APRA states, “[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 Board does not contest that it is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Board’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Regarding minutes and memoranda, the Open Door Law provides the following:

- (b) As the meeting progresses, the following memoranda shall be kept:
 - (1) The date, time, and place of the meeting.
 - (2) The members of the governing body recorded as either present or absent.
 - (3) The general substance of all matters proposed, discussed, or decided.
 - (4) A record of all votes taken, by individual members if there is a roll call.
 - (5) Any additional information required under IC 5-1.5-2-2.5.
- (c) The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body’s proceedings. The minutes, if any, are to be open for public inspection and copying.

I.C. § 5-14-1.5-4 (emphasis added). Previous public access counselors have opined that minutes in draft or unapproved form should be made available for inspection and copying upon request. *See, e.g., Opinion of the Public Access Counselor 98-FC-8* at 1 (“Once created, draft or proposed minutes are public records and nondisclosure must be based upon one of the exceptions outlined in the APRA.”). With that said, if the minutes are not even recorded yet, the public agency does not violate the APRA by failing to produce the minutes until they are actually created. *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.”).

Here, there is some dispute about the nature of Mr. Cruea’s response to the request for minutes. Mr. Cruea states that he did not produce the minutes immediately because he was unsure about whether or not draft minutes are records that are subject to disclosure. It is not a violation of the APRA to delay a response to a public records request until a determination can be made about whether or not requested records are disclosable or nondisclosable. There are no prescribed timeframes when the records must be produced by a public agency. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. However, once the determination is made that the records are disclosable, they should be made available to the requester. Here, it is unclear whether or not the

minutes were ever released at all. Consequently, it is my opinion that the Board has failed to show that it produced the records within a reasonable period of time.

CONCLUSION

For the foregoing reasons, it is my opinion that draft minutes are disclosable public records and the Board has failed to show that it produced the requested records within a reasonable period of time.

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: Dudley Cruea