



STATE OF INDIANA

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January 20, 2011

Ms. Angel M. McGlennen
204 Herendeen St.
Silver Lake, IN 46982

Re: Formal Complaint 10-FC-323; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Town of Silver Lake

Dear Ms. McGlennen:

This advisory opinion is in response to your formal complaint alleging the Town of Silver Lake ("Town") 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 Town's response to your complaint is enclosed for your reference.

BACKGROUND

According to your complaint, the Town violated the ODL when it held an emergency meeting on December 9, 2010, "to decide on the position of receptionist or deputy clerk." You state that the former Town receptionist resigned on October 27th. You argue that an emergency meeting was inappropriate given that the position had been unfilled for six weeks, and you believe that the meeting should have been properly noticed instead of being held as an emergency meeting.

With regard to the alleged APRA violation, you claim that on November 12, 2010, you requested a copy of a letter that Silver Lake Town Council ("Council") member Gale Owens read aloud during the Council's November 11th public meeting. On December 9th, you still had not received that record or information about when you could expect it. When you called the Town office and spoke with Clerk-Treasurer Angie Glass, she stated that she was not responsible and that "it was in the hands of Linda Baker town board president [sic]." You telephoned Ms. Baker and left a message for her asking her to return your call, but you had not heard back as of the date of your complaint.

In response to your complaint, Ms. Glass maintains the Town's view that the emergency meeting was appropriate. She cites to the fact that the receptionist/billing clerk vacancy prevented penalties from being distributed by the Town for two months, that there were accounts that should have been shut off that had not been shut off due to

the fact that nobody in the Town government was in the office to send out notices, and that the water and sewage bills were due to go out on the first of December. She informed the Council members of these facts on December 3rd, and they decided to hold a meeting on December 6th at 7:00 p.m. Ms. Glass posted notice and sent a notice to the local paper. She states that members of the public attended the meeting and that she does not understand why you felt that you were deprived of your right to attend the meeting.

With regard to the APRA violations, Ms. Glass states that your request for the letter went through the Town's email account, and only Ms. Baker has access to those emails. After you contacted Ms. Glass, she referred you to Ms. Baker because Ms. Glass does not maintain the record you requested. After you filed your complaint, Ms. Glass permitted you to listen to the tape of the meeting and make your own recording of that audio, which contained Ms. Baker's reading of the letter.

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. Any person has the right to inspect and copy the public records of a public agency during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a). The Town is clearly 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 Town's public records during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is made orally or in person at the office of the agency and the agency does not respond to the request within 24 hours of receipt, the request is deemed denied. I.C. §5-14-3-9(a). If the request is delivered by mail, facsimile, or email and the agency does not respond to the request within seven days of receipt, the request is deemed denied. I.C. §5-14-3-9(b). A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Thus, if you sent your request for the letter via email to the Town's email account, the Town should have responded to that request within seven days.

I understand that the Town ultimately provided you with the opportunity to review the content of the letter in audio format. If that was acceptable to you, the Town has not otherwise violated the APRA. If, however, you maintain your request to inspect or copy a hard copy of the letter, the Town should either release it to you or cite a legal basis for withholding it. Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the

denial. I.C. § 5-14-3-9(c). A public agency that withholds a public record bears the burden of proof to show that the record is exempt. I.C. §§ 5-14-3-1, 5-14-3-9(f) and (g).

With regard to your allegations that the Town's emergency meeting violated the ODL, the ODL requires that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. I.C. § 5-14-1.5-5(a).

Here, the Town argues that its emergency meeting was necessary to deal with the vacant receptionist/billing clerk position. The legislature has provided an exception to the 48 hour notice requirement in the event that an emergency meeting is warranted. If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice do not apply. However, news media that have requested notice of meetings must be given the same notice as is given to members of the governing body, and the public must be notified by posting a copy of the notice according to section 5. I.C. § 5-14-1.5-5(d). Counselor Davis analyzed the meaning of this provision in a 2006 opinion:

Since there is no case law interpreting Indiana Code 5-14-1.5-5(d), I must rely on the rules of statutory construction to interpret this statute. When construing a statute, the interpreting body attempts to give words their plain and ordinary meaning. *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99, 103 (Ind. 1998). "Emergency" is defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Merriam-Webster On-Line Dictionary (2007). The term "disruption" is defined as "to throw into disorder" or "to interrupt the normal course or unity of" and "event" means "something that happens."

Op. of the Public Access Counselor 06-FC-223. Here, the fact that the receptionist/billing clerk position was vacant from October 27th to December 3rd suggests that the issue did not "call[] for immediate action." *Id.* I see no reason why the Town could not have given 48 hour notice, especially because the Town scheduled the meeting on December 3rd for December 6th. Consequently, in my opinion the December 6th meeting was not appropriately held as an emergency meeting. As such, the Town's failure to published notices of the meeting 48 hours in advance did not comply with section 5 of the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that the Town failed to comply with section 9 of the APRA when it did not respond to your emailed request within seven days, and failed to comply with the ODL by not posting notice of its December 6th meeting at least 48 hours in advance of the meeting. Further, it is my opinion that the December 6th meeting was not an "emergency meeting" within the meaning of 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: Angie Glass