



STATE OF INDIANA

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January 24, 2013

Mr. Benjamin W. Conner
302 S. Sycamore Street
Odon, Indiana 47562

Re: Formal Complaint 12-FC-368; Alleged Violation of the Open Door Law and the Access to Public Records Act by the Odon Town Council

Dear Mr. Conner:

This advisory opinion is in response to your formal complaint alleging the Odon Town Council ("Council") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* and the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.* Rita J. Baldwin, Attorney, responded on behalf of the Council. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that the Council violated the ODL by failing to post the agendas for its public meetings and by not posting notice of an executive session less than forty-eight hours prior to the start of the executive session.

As to the APRA, you provide that on or about November 27, 2012, you submitted a request to the Clerk for copies of certain meeting minutes, in draft and final form, and for copies of the Request for Quotes ("RFQ"), in rough draft and final form, issued by the Council. You provide that while the Council had submitted to the newspaper an advertisement for bids regarding trash pickup; the RFQ was not made available in response to your request. You also sought copies of all records related to requests for pricing and costs that were received by the Council in order to determine the costs associated with curbside trash pickup. On December 24, 2012, you were informed that all records would be provided on January 3, 2012.

On December 17, 2012, you submitted a written request to the Clerk for Council meeting minutes for all public meetings and executive sessions held by the Council from August 2012 through December 2012. You further sought again a copy of the rough draft RFQ that was read during the November 2012 Council meeting. Beth Haseman, Odon Town Clerk-Treasurer, thereafter contacted you by telephone and provided that all information would be provided on January 3, 2012.

In response to your formal complaint, Ms. Baldwin advised that Council utilizes an abbreviated agenda for its monthly meetings. Prior to the start of the meeting, multiple copies of the agenda are placed on the counter in the meeting area for attendees to review and keep. In addition, the Clerk has been posting copies of the agenda on the front door of the Town Hall since November 2012. The Council may re-visit the issue of utilization of an agenda in the future; however, until then, it will continue to post the meeting agenda on the front door of the hall or an adjacent, public accessible area just outside of the hall, no later than the close of business or 4 p.m., prior to a scheduled meeting to ameliorate any concerns in this regard.

As to the denied access to the RFP, the Town undertook to publish a RFP in early December 2012. Changes were agreed upon at a public meeting and were to be made mechanically by a Board member and submitted to the Town's counsel for review. The RFP notice was not intended to be published prior to that review; however, due to a misunderstanding with the publisher of the newspaper, the notice was published. Thus, when the Council initially received your request for a "rough draft" of the RFP, the Town advised that its attorney was still reviewing the record and it had yet to be released to any other vendor. Ms. Baldwin was concerned that providing the RFP would give an unfair advantage prior to its release to all other interested parties. You were informed that a copy of the RFP would be provided on January 3, 2013, a reasonable time for the Clerk to prepare the response in light of the holiday season, shortened office hours, and the Clerk and her Deputy being relatively new to local government. A copy of the RFP was produced to you on January 3, 2013. When provided with the record, you verbally requested the final version of the RFP and it was immediately produced to you. Given the time frames of your request, Ms. Baldwin maintains that all records were provided in a reasonable period of time. Regardless, the Town has now agreed to republish the RFP notice in order to make the process completely fair to all, without any hint of inequality.

As to the failure to provide proper notice for the Council's executive sessions, Ms. Baldwin is unclear as to what you are referring to as "executive meeting postings" and has never received a written request from you for said records. The Town utilizes a form for its public record requests, a fact that you are aware of. All requests are responded to in a reasonable period of time. Further, the Town has not heretofore retained copies of the notices utilized for its regular meetings and executive sessions. The Town has now determined to undertake that practice and retain the postings on an on-going basis.

As to your request for all executive session minutes, copies of such have been produced to you. The Town does not believe that you have requested the session's agenda or postings; rather you have sought minutes from both the public meetings and executive sessions. The Town does not accept verbal requests and you have been informed as such on multiple occasions.¹

¹ Ms. Baldwin thereafter provided a response for the Town to your informal inquiry that was submitted on January 17, 2013. I will address the Town's response and issues raised in the inquiry under 13-INF-03.

ANALYSIS

As an initial matter, I.C. § 5-14-4-10 provides that the public access counselor has the authority to issue advisory opinions to interpret the public access laws upon the request of a person or public agency. A person denied the right to inspect or copy records or any right conferred under the ODL may file a formal complaint with the Public Access Counselor's Office. *See* I.C. § 5-14-5-6. Issues that you have raised in your formal complaint regarding the authority of the Council to disperse funds prior to approval of meeting minutes and the legality of procedures taken by the Council in relation to the RFQ/RFP are outside the purview of this office. As such, I will only address those issues raised in your formal complaint that allege violation of either the APRA or the ODL. Further, the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.*

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, 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. *See* I.C. § 5-14-1.5-3(a).

A governing body of a public agency is not required to use an agenda, but if it chooses to utilize one, the agency must post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. *See* I.C. § 5-14-1.5-4(a). If a public agency utilizes an agenda, the ODL does not prohibit it from changing or adding to the agenda during the meeting. *See Opinion of the Public Access Counselor 04-FC-166; 09-FC-40; and 12-FC-43.* The ODL provides no guidelines for the content or structure of a meeting agenda, and this office has indicated that an agenda can take essentially any form. *Opinion of the Public Access Counselor 04-FC-02 and 08-FC-17.* Ms. Baldwin has advised that multiple copies of the agenda are placed on the counter in the meeting area for attendees to review prior to the start of each meeting and the Clerk has been posting copies of the agenda on the front door of the Town Hall since November 2012. It is my opinion that if the Council is providing copies of the meeting agenda on a counter inside the meeting room prior to the meeting's commencement and the agenda is posted in a designated area in the Town Hall, the Council would not be in violation of section 4(a) of the ODL.

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). Notice of an executive session must be given 48 hours in advance of every session, excluding holidays

and weekends, and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, “To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.* The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

I have interpreted your complaint to be that you allege that the Council failed to provide adequate notice for its executive session held on December 17, 2012. Specifically, that notice of the executive sessions was not being posted forty-eight hours, minus holidays and weekends, prior to the commencement of the executive session. As such, if the notice for the executive session held by the Town on Monday, December 17, 2012 was posted by Thursday, December 13, 2012, it is my opinion that the Council complied with the notice requirements for executive session found under section 5 and 6.1 of the ODL.

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.” *See* I.C. § 5-14-3-1. The Council and Town are public agencies for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Council’s or Town’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. 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 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. *See* I.C. § 5-14-3-9(c).

At the agency’s discretion, a request to inspect and copy may be in writing or on a form provided by the agency. *See* I.C. § 5-14-3-3(a)(2). The Council has provided that you have been informed on numerous occasions that you need to submit your request for records on a form that is readily provided. Accordingly, it is my opinion that the Council

and Town would not violate the APRA by requiring that your request for records be made in writing on a form provided by the agency.

Meeting minutes in draft or unapproved form are subject to inspection and copying in response to a request under the APRA. *See 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.”); *See also Opinions of the Public Access Counselor 01-FC-65; 05-FC-23; 10-FC-264*. If the minutes are yet to be recorded, 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.”). If the governing body is concerned about releasing the minutes in draft form, it could include a disclaimer on any copies noting that the minutes are not yet approved and subject to revision. *See Opinions of the Public Access Counselor 01-FC-65 and 10-FC-264*. As applicable here, once created, the Council cannot deny your request for draft meeting minutes on the basis that the minutes have yet to be approved by the Council.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See I.C. § 5-14-3-3(b)*. The public access counselor has stated that factors to be considered in determining if the requirements of section 3(a) under the APRA have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See I.C. § 5-14-3-6(a)*. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See I.C. § 5-14-3-7(a)*. However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See I.C. § 5-14-3-7(c)*. The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency’s failure to provide “instant access” to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

Here, the Clerk provided all records that were responsive to your request on January 3, 2013. Ms. Baldwin advised that in light of the holiday season, shortened office hours of the agency, the fact that the Clerk and her Deputy are new to working in local government, and the responsibility of the Clerk to maintain the normal duties of the agency; all records were provided to you in a reasonable period of time. As noted *supra*,

a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. In light of the factors highlighted by Ms. Baldwin, the vast nature of your requests, and that all records have now been provided in response to your request, it is my opinion that the Town complied with the requirements of section 3(b) of the APRA in providing all records to you in a reasonable period of time.

CONCLUSION

Based on the foregoing, it is my opinion if the Council is providing copies of the meeting agenda on a counter inside the meeting room prior to the commencement of the meeting and is posting a copy of the agenda in a designated area in the Town Hall, the Council would not be in violation of section 4(a) of the ODL. If the notice for the executive session held by the Council on Monday, December 17, 2012 was posted by Thursday, December 13, 2012, it is my opinion that the Council complied with the notice requirements for executive session found under section 5 and 6.1 of the ODL. It is my opinion that the Council would not violate the APRA by requiring that your request for records be made in writing on a form provided by the agency. Further, it is my opinion that the Council may not deny your request for draft minutes on the basis that the minutes have yet to be approved by the Council. Lastly, it is my opinion that the Council complied with the requirements of section 3(b) of the APRA in providing all records responsive to your request in a reasonable period of time.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a stylized "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Beth Haseman