



STATE OF INDIANA

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January 24, 2013

Ms. Olga Soto
1808 136th Street
East Chicago, Indiana 46312

*Re: Formal Complaint 13-FC-08; Alleged Violation of the Open Door Law and
the Access to Public Records Act by the East Chicago Redevelopment
Commission*

Dear Ms. Soto:

This advisory opinion is in response to your formal complaint alleging the East Chicago Redevelopment Commission ("Commission") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.* and the Access to Public Records Act ("APRA"), I.C. § 5-14-3 *et. seq.* Trent McCain, Attorney, responded on behalf of the Commission. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that the Commission met on December 7, 2012 to approve a resolution to acquire an elementary school. You allege that the Commission failed to post proper notice for the meeting and a copy of the minutes from the meeting was denied as the minutes needed to be amended prior to release.

In response to your formal complaint, Mr. McCain advised that the Commission posted notice for its meeting held on December 7, 2012 on December 5, 2012. The notice was posted by the Commission's secretary, Jacqui Simpson, outside the City Council Chambers and at the Redevelopment Office at least 48 hours prior to the meeting. Prior to January 1, 2012, the Commission failed to receive notice from any news media requesting notice to be provided for the Commission's meetings held during 2012. Regardless, the Commission voluntarily provided notice to the news media during 2012, including for the meeting held on December 7, 2012. Mr. McCain further advised that the Commission has no record of receiving either an oral or written request from you for minutes from the December 7, 2012 meeting.

ANALYSIS

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 “meeting” is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. *See* 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. *See* I.C. § 5-14-1.5-2(d). “Public business” means to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. 5-14-3-2(e).

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. *See* I.C. § 5-14-1.5-5(a). 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). In addition, the ODL provides that notice has not been given in accordance with section 5 of the ODL if a governing body convenes a meeting that is so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe and record. *See* I.C. § 5-14-1.5-5(h).

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*. You have allege that the Commission failed to provide proper notice to the meeting held on December 7, 2012, to which the Commission has stated that notice was posted in complete compliance with all requirements of the ODL. As such, if the Commission posted notice of its meeting held on December 7, 2012 on December 5, 2012 at the agency’s principal office more than forty-eight hours prior to the commencement of the meeting, it is my opinion that it did not violate the ODL.

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. *See* I.C. § 5-14-1.5-4.

Memoranda are to be made available within a "reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings." *See* I.C. § 5-14-1.5-4(c). Meeting minutes are not required under the ODL, but if created, must be available for public inspection and copying. *Id.*

Previous public access counselors have opined that meeting minutes in draft or unapproved form should be made available for inspection and copying upon request. *See Opinion of the Public Access Counselor 98-FC-8, 01-FC-65; 05-FC-23; 10-FC-26; and 12-FC-80.* However, 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. *See Opinion of the Public Access Counselor 10-FC-56.* If an agency is concerned about releasing the minutes in draft form, it should include a disclaimer 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, the Commission maintains that it did not receive a request from you for the meeting minutes from the December 7, 2012 meeting. As provided *supra*, the Public Access Counselor is not a finder of fact. Consequently, I express no opinion as to whether or not Commission received your request. Under the APRA, if a request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). A public agency may deny a request if: (1) the denial is in writing or by facsimile; and (2) the denial includes: (A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (B) the name and the title or position of the person responsible for the denial. *See* I.C. §5-14-3-9(c). If the Commission received your request and did not respond to it within these timeframes, the Commission acted contrary to the APRA. However, if the Commission did not receive your request, it was not obligated to respond to it.

CONCLUSION

Based on the foregoing, if the Commission posted notice of its December 7, 2012 meeting on December 5, 2012 at the agency's principal office more than forty-eight hours prior to the commencement of the meeting, it is my opinion that the Commission did not violate the ODL. Further, although a request for "draft" minutes may not be denied on the basis that the minutes had yet to be properly approved or amended, if the Commission did not receive your request for records, it was not obligated to respond to it.

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: Trent A. McCain