



# STATE OF INDIANA

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June 26, 2013

Mr. Samuel Shaw  
627 H Street  
Bedford, Indiana 47421

*Re: Formal Complaint 13-FC-167; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Bedford Public Library*

Dear Mr. Shaw:

This advisory opinion is in response to your formal complaint alleging the Bedford Public Library ("Library") 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 *et seq.* Susan Miller, Director, responded in writing to your formal complaint. Her response is enclosed for your reference.

## BACKGROUND

In your formal complaint you allege that the Library failed to provide all records responsive to your request regarding those persons who have been issued No Trespass Orders from the Library and that the Library has failed to provide you with corrected minutes from its March 2013 meeting.

In response to your formal complaint, Ms. Miller advised that you have been sent a corrected draft copy of the minutes from the March 2013 Library Board meeting. The Library did not charge you a fee for producing the corrected draft minutes. Ms. Miller advised that it will produce all records responsive to your request for any current Trespass Orders upon receipt of the respective fees, to which you were advised of on May 2, 2013. Ms. Miller provided that despite the current No Trespass Order that prohibits you from being on Library grounds, you will be allowed to attend the May 2013 Library Board meeting. Any person that wishes to address the Library Board at its public meetings is limited to a five-minute presentation. Lastly, your request for a copy of the May 29, 2013 Board meeting minutes was provided on June 10, 2013.

## ANALYSIS

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 Library is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Library’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 in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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 include information regarding how or when the agency intends to comply. Pursuant to section 9 of 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).

As to your request for meeting minutes, the ODL requires that governing bodies keep memoranda for all meetings that are conducted. The ODL does not require that a governing body keep minutes; however if kept, minutes of a meeting must be open for inspection and copying under the APRA. *See* I.C. § 5-14-1.5-4(c). As for memoranda, the ODL specifically provides that the following 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 I.C. § 5-1.5-2-2.4. I.C. § 5-14-1.5-4(b).

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. *See* I.C. § 5-14-1.5-4(c). As to “draft” minutes or memoranda, 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 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*. It is my opinion that the Library would be required to provide draft copies of its meeting minutes upon their creation in response to your

request and may not wait until the minutes are approved at the subsequent meeting prior to the minutes being disclosed. Here, the Library has provided a draft copy, at no charge, of its March 2013 amended meeting minutes. Further, in response to your request for the Library Board's May 2013 meeting minutes, that you submitted on May 29, 2013, a copy of the minutes was provided upon receipt of the respective fees on June 10, 2013. As such, it is my opinion that the Library has complied with the requirements of the APRA in response to your request for copies and draft copies of the Library Board's meeting minutes.

“[T]he 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, the APRA does not require a public agency to create a new record in order to satisfy a public records request. The Library would not violate the APRA by failing to provide a record that it is not otherwise legally required to maintain.

For public agencies that are not state agencies, the fiscal body of the public agency, or the governing body, if there is no fiscal body, shall establish a fee schedule for the certification or copying of documents. See I.C. § 5-14-3-8(d). The fee for copying documents may not exceed the greater of ten cents (\$0.10) per page for copies that are not color copies or twenty-five cents (\$0.25) for color copies or the actual cost of to the agency of copying the document. See I.C. § 5-14-3-8(d). Actual cost means the cost of paper and the per-page cost for use of copying or facsimile equipment and does not include labor costs or overhead costs. *Id.* A fee established under this subsection must be uniform throughout the public agency and uniform to all purchasers. *Id.* A public agency may require that payment for copying costs be made in advance. The Library would not violate the APRA by requiring the receipt of fees prior to making a disclosure of records in response to your request.

As addressed in your previous formal complaint against the Library, you have been issued a No Trespass Order that prevents you from being on the Library's premises. See *Opinion of the Public Access Counselor 13-FC-133*. The Library Board conducts its public meetings at the Library. Our office has addressed the intersection of the ODL and a Trespass Order that prevents an individual from attending a meeting of the governing body. See *Opinions of the Public Access Counselor 05-FC-24; 09-INF-27; 11-FC-94*. It is not appropriate for our office to opine as to the validity of verbal or written no trespass orders, assuming that those orders are not issued solely to deprive certain individuals from attending otherwise public meetings without a reasonable basis for such deprivation. *Id.* “. . . the Open Door Law is not at issue here, where your inability to observe the meeting was not due to the meeting being closed to the public or limited in some way so that the public in general could not hear or observe the meeting.” See *Opinion of the Public Access Counselor 05-FC-24*. Here, the Library has advised that it would allow you to attend the May 2013 Library Board meeting, despite the presence of the No Trespass Order. The Library further informed you of its policy in regards to the receipt

of public comment at its Board meetings. The policy provides that individual public comment is limited to five minutes. 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.” *See Opinions of the Public Access Counselor 08-FC-149 and 10-FC-240*. It is my opinion that the Library has not violated the ODL.

### CONCLUSION

Based on the foregoing reasons, it is my opinion that the Library has not violated the APRA in response to your request for minutes, draft minutes, or records related to any No Trespass Orders that would prohibit an individual from being on the Library’s premises. Further, it is my opinion that the Library would not violate the APRA by requiring that all copy fees be paid prior to the disclosure of records responsive to your request. Lastly, it is my opinion that the Library Board has not violated the ODL in regards to the receipt of public comment at its meetings.

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 long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: Susan Miller