



STATE OF INDIANA

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February 19, 2013

Ms. Jane M. Harper
285 W. 100 North
Tipton, IN 46072

Re: Formal Complaint 13-FC-17; Alleged Violation of the Access to Public Records Act by the Tipton County Auditor's Office

Dear Ms. Harper:

This advisory opinion is in response to your formal complaint alleging the Tipton County Auditor ("Auditor") violated the Open Door Law ("ODL") and the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* John H. Brooke, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you allege that the Auditor verbally promised to provide copies of the minutes from the Board of Commissioners ("Board") meetings held on November 5, 2012, November 19, 2012, and executive session memoranda from December 6, 2012, December 11, 2012, and December 13, 2012. Further, you requested from the Auditor that the County Council ("Council") meeting minutes from May 31, 2011 be completed. Lastly, you have requested the complete 2012 financial ledger on numerous occasions. As of January 23, 2013, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive any records from the Auditor.

In response to your formal complaint, Mr. Brooke advised that from January 1, 2009 to December 31, 2012, you served on the Board. Therefore, many of the records that you have requested during your term as Commissioner were records used by the Board in its normal operations. Mr. Brooke noted that your formal complaint was filed after your term of office had concluded. Mr. Brooke's first involvement with your request occurred after receiving your email dated January 11, 2013.

Upon receiving your January 11, 2013 correspondence, Mr. Brooke responded on behalf of the Auditor and acknowledged the receipt of your request. As of February 14, 2013, the minutes of the November 5, 2012 and November 19, 2012 Board meetings had

not been completed. Once they are completed, a copy will be provided to you. With regard to your request for a copy of the Council's meeting minutes from May 31, 2011, this request predates Mr. Townsend's tenure as Auditor for Tipton County. The May 31, 2011 meeting minutes were not completed by Mr. Townsend's predecessor; nor was Mr. Townsend employed by the Auditor at that time; nor does he have any knowledge of the activities that occurred at the Council's May 31, 2011 meeting. Mr. Townsend has advised that a current member of the Council, who was in office in May 2011, has volunteered to create the minutes for the Council's approval. As of February 14, 2012, the minutes from the May 31, 2011 Council has yet to be approved. Once they are approved, a copy will be provided to you. A copy of the 2012 Financial Ledger and executive session accounts for the meetings requested was provided on January 31, 2013.

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).

Under the ODL, governing bodies that conduct meetings are required to keep memoranda. 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). For the purposes of this opinion, I am assuming when the parties refer to the term "meeting minutes", they are referring to the memorandum that is required to be kept under section 4 of the ODL. 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). In the case of executive sessions, the memoranda requirements are modified in that the memoranda "must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given." *See* I.C. § 5-14-1.5-6.1(d). The public agency must also certify in a statement in the

memoranda that no subject was discussed other than the subject specified in the public notice. *Id.*

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*.

As to your request for the Board’s memoranda from November 5, 2012 and November 9, 2012, Mr. Brooke has advised that the memoranda have yet to have been completed as of February 14, 2013. As the ODL requires that the memoranda be made available within a reasonable period of time after the meeting has occurred in order to inform the public, it is my opinion that the Auditor acted contrary to the requirements of section 4(c) of the ODL by failing to prepare the memoranda over three months after the meetings of the Board took place. As to your request for the meeting memoranda from May 31, 2011 Council meeting, while I do acknowledge that the current auditor of Tipton County, Mr. Townsend, was not in office at that time, it is my opinion that the Auditor has again failed to comply with the requirements of section 4(c) of the ODL by failing to prepare the memoranda in a reasonable period of time. Both the Auditor and Mr. Brooke are aware of the issue regarding the memoranda in question and have provided that the records will be provided to you once completed.

As to you request for memoranda from the Board’s executive sessions that occurred on December 6, 2012, December 11, 2012, and December 13, 2012; copies of the memoranda were provided to you on January 31, 2013. From your records, it would appear that your earliest request for the memoranda occurred during the December 17, 2012 Board meeting. Although it is not clear when the memoranda for the executive sessions were actually created, in light of the limited information that is typically found in executive session memoranda and the ODL’s requirement that the memoranda be created within a reasonable period of time, it is my opinion that the Auditor failed to comply with section 4(c) of the ODL as to your request for the Board’s executive session memoranda.

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 Auditor 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 Auditor’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).

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*.

As to your request for the 2012 financial ledger, you provide that you have submitted a request for the record on numerous occasions prior to filing your formal complaint. In a January 11, 2013 correspondence, you advised Mr. Brooke that the last financial ledger you received was prior to the December 17, 2012 meeting. Mr. Brooke in a January 31, 2013 correspondence provided you with a copy of the complete record in electronic format. Based on the variety of requests that you have submitted to the Auditor and that a copy of the financial ledger was provided in mid-December 2012 and again in January 2013, it is my opinion that the Auditor complied with section 3(b) of the APRA in response to your request.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Auditor acted contrary to the requirements of section 4(c) of the ODL as to your request for the memoranda for the Board's meetings held on November 5, 2012 and November 19, 2012; its executive sessions held on December 6, 2012, December 11, 2012, and December 13, 2012; and the Council meeting held on May 31, 2011. It is my opinion that the Auditor complied with the requirements of section 3(b) of the APRA in providing the 2012 financial ledger to you 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 long horizontal stroke.

Joseph B. Hoage
Public Access Counselor

cc: John H. Brooke