



STATE OF INDIANA

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February 21, 2013

Ms. Penny S. Rose
P.O. Box 334
13 N. Second Street
Kingman, Indiana 47952

Re: Formal Complaint 13-FC-19; Alleged Violation of the Open Door Law and the Access to Public Records Act by the Kingman Town Board

Dear Ms. Rose:

This advisory opinion is in response to your formal complaint alleging the Kingman Town Board ("Board") 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.* Our office forwarded a copy of your formal complaint to the Board on January 24, 2012. The Board's response was due no later than February 18, 2013. As of today's date, we have yet to receive a response from the Board.

BACKGROUND

In your formal complaint you provide that on December 3, 2012 and January 7, 2013, you verbally requested copies of the memoranda from the Board's executive sessions that took place on November 20, 2012 and January 4, 2013. You were denied on both occasions by Ms. Beth Hodge. On January 22, 2013, you renewed your request in writing and were verbally denied again by all three Board members. You asked that you be provided with a written denial, to which the Board refused. Further, you provide that the notice posted by the Board for its January 4, 2013 executive session did not comply with the ODL. You provide that the Board failed to post notice for its January 22, 2013 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).

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 provided by the Board for its January 4, 2013 executive session provided:

“Notice of Executive Session

The town board will meet in executive session on Friday, January 4, 2013 at 5:00 p.m. at the town hall to discuss personnel issues in accordance with IC 5-14-1.5-5b5, 6A”

The notice provided by the Board failed to recite the language of the statute that would allow it to meet in executive session and further I.C. § 5-14-1.5-5b5 is not an accurate citation to the Indiana Code. Without the benefit of a response from the Board, I assume that the Board met in executive session to receive information about and interview prospective employees and with respect to an individual over whom the Board has jurisdiction, to receive information regarding the individual’s alleged misconduct. Thus, a proper notice would have provided:

Notice of Executive Session

The town board will meet in executive session on Friday, January 4, 2013 at 5:00 p.m. at the town hall to receive information about and interview prospective employees pursuant to I.C. § 5-14-1.5-6.1(b)(5) and with respect to an individual over whom the Board has jurisdiction, to receive information concerning the individual’s alleged misconduct pursuant to I.C. § 5-14-1.5-6.1(b)(6)(A).

Thus, it is my opinion that the Board violated section 5 and 6.1 of the ODL by failing to provide proper notice for the executive session held on January 4, 2013.

You further allege that the Board failed to post notice for its meeting held on January 22, 2013 at 11:30 a.m. 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). Without the benefit of a response from the Board, it is my opinion that it violated section 5 of the ODL by failing to post notice of its meeting held on January 22, 2013.

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 IPRS 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 IPRS’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, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (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 title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c).

The ODL provides that all meetings of a governing body of a public agency require that memoranda be kept. *See* I.C. § 5-14-1.5-4. Specifically, the following shall be recorded in the memorandum:

- (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. I.C. § 5-14-1.5-4(b).

For 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.

Here, you provided that you verbally requested a copy of memoranda for the Board's executive sessions held on November 20, 2012 and January 4, 2013. You provide that Beth Hodge verbally denied your requests. It is my opinion that the Board would not have violated the APRA by orally denying your oral request on the date of its receipt. Thereafter, you renewed your request for the memoranda in writing. You provide that the Board again orally denied your written request and refused to deny your request in writing. It is my opinion that the Board violated section 9(c) of the APRA by failing to deny your written request in writing and by not citing to the specific statutory exception that would authorize it to withhold the records that had been sought. As noted *supra*, a governing body is required to keep memoranda of all meetings, including executive sessions. The Board would be required under the ODL and APRA to provide copies of its executive session memoranda in response to a request.

CONCLUSION

Based on the foregoing, it is my opinion that the Board violated section 5 and 6.1 of the ODL by failing to provide proper notice for the executive session held on January 4, 2013. It is my opinion that it violated section 5 of the ODL by failing to post notice of its meeting held on January 22, 2013. It is my opinion that the Board did not violate the APRA by orally denying your oral request on the date of its receipt; however, it did act contrary to the requirements of section 4 of the ODL and section 9(c) of the APRA in failing to deny your written request in writing and in not producing copies of its memoranda for the executive sessions that were requested.

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 "H".

Joseph B. Hoage
Public Access Counselor

cc: Kingman Town Board