



# STATE OF INDIANA

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June 10, 2014

Ms. Denise L. Freitag Burdette  
126 W. High St.  
P.O. Box 4128  
Lawrenceburg, IN 47025

*Re: Formal Complaint 14-FC-105 (consolidated); Alleged Violation of the Access to Public Records Act and the Open Door Law by the Dearborn County Redevelopment Commission*

Dear Ms. Freitag Burdette,

This advisory opinion is in response to your formal complaint alleging the Dearborn County Redevelopment Commission ("Commission") and violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. and the Open Door Law ("ODL") Ind. Code § 5-14-3-1 et. seq. The Commission provided a response to your complaint via Dearborn County Administrator, Terri Randall. The Commission's response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on May 12, 2014.

## **BACKGROUND**

Your complaints dated May 12, 2014 alleges the Dearborn County Redevelopment Commission violated the Open Door Law by failing to keep memoranda of executive sessions and by holding discussions during executive sessions which were not advertised by proper notice. Additionally, you allege the Commission violated the Access to Public Records Act by not maintaining executive session memoranda.

Your first complaint alleges two violations. The first is in relation to a September 12, 2013 executive session ,in which timely notice was given that the Commission would be discussing subject matter authorized by Ind. Code § 5-14-1.5-6.1(b)(2)(D) – strategy with respect to purchasing real property. A public meeting was subsequently held during which minutes were taken and ultimately ratified. The minutes indicate two discussion items took place during the executive session which may not have related to the advertised subject matter as being strategy with respect to purchasing real property. A similar scenario occurred on November 21, 2013 when the Commission again met in

executive session to discuss strategy with respect to purchasing real property. Again, the public meeting minutes from later that day indicate different subject matter. Similarly, you allege a discussion for application of grant monies may have taken place in a forum outside a public meeting with no notice.

Your following complaint alleges multiple violations of the Open Door Law and the Access to Public Records Act alleging the Commission did not have the required memoranda pursuant to Ind. Code § 5-14-1.5-6.1 for their executive session for several meetings in 2013. You also contend the absence of these records is a violation of the Access to Public Records Act as the Commission has been unable to fully satisfy your public records request.

The Commission has responded arguing your first formal complaint was untimely as the executive session discussions took place well outside the timeframe for filing with the Public Access Office as set forth in Ind. Code § 5-14-5-7 *et. seq.* The Commission reasons the minutes of the public meetings were approved and made available in the fall of 2013, well before the filing of your formal complaint. It argues you would have had notice of the executive session subject matter as they regularly provide notice to you as a member of the media. It also states the Commission is in technical compliance with the Open Door Law and it has made a good faith effort to comply albeit some minor discrepancies.

### **TIMELINESS**

Speaking to the timeliness of your complaints, Ind. Code § 5-14-5-7 (a) states:

A person or a public agency that chooses to file a formal complaint with the counselor must file the complaint not later than thirty (30) days after:

- (1) the denial; or
- (2) the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice.

You contend your complaints are timely because you only recently learned of the alleged violations subsequent to an Access to Public Records Act made on April 7, 2014 and (partially) satisfied on April 28, 2014. You state your notice in fact was triggered on April 28; therefore the filing of your complaint to this Office on May 12, 2013 is timely.

In regard to the first two violations, the timeliness of the complaint rests solely on a factual determination. If you were present at the public meetings subsequent to the executive session or had access to the minutes of those meetings (i.e. they were conspicuously posted online or distributed to you), then you would have been put on notice of the violation. I have since confirmed with you that you may have been at those meetings. Therefore, the discussions below addressing the subject matter of executive sessions are for educational purposes only. This only applies to September and November 2013 meetings. The purpose of the grant monies obliquely referenced in the December 2013 was only discovered pursuant to your April 2014 APRA request.

Although the missing memoranda were to be prepared pursuant to executive sessions held in 2013, you only recently discovered their non-existence in April 2014. Your Access to Public Records Act request was a condition precedent to your awareness of their absence. Therefore your formal complaint as to these violations is timely as well.

## **DISCUSSION**

It is the intent of the Open Door Law (ODL) 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 Ind. Code § 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 Ind. Code § 5-14-1.5-3(a).

Ind. Code § 5-14-1.5-6.1(d) states public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. All of the subject matters intended to be discussed fall under the permissible discussion topics for a closed door executive session under the ODL.

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 Ind. Code § 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 Ind. Code § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice.

The Commission does not dispute the executive session discussion topics fell outside the noticed subject matter. Strategy with respect to purchasing real property does not include funding to extend waterlines, property improvement, or grant money pass-through. These matters should either be discussed in public or placed on an executive session notice, if applicable. The Commission should be particularly mindful of the added scrutiny which comes with closed door meetings and make every effort to be as transparent as the law requires, if not more so.

Turning to the executive session memoranda, or absence thereof, the purpose of the requirement is to verify no other non-permissible subject matter is discussed behind closed doors. The Indiana General Assembly has made this clear in Ind. Code § 5-14-1.5-6.1(d):

[executive session] memoranda and minutes must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall

certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

The Commission concedes the memoranda are absent, but argues it was an inadvertent mistake. While I appreciate the acknowledgment and candor in its concession, a public agency cannot be ignorant of the laws protecting public access. In fact, access is one of the essential responsibilities of government as they are the stewards of the citizenry's resources. I trust that pursuant to these recommendations, the Commission will comply with the Open Door Law in the future. While good faith efforts may be acceptable in the private sector, public servants are held to a higher standard when it comes to transparency and access.

You also allege the Commission has violated the APRA by not creating and thus producing the memoranda. While the failure to create memoranda is a violation of the Open Door Law, the Access to Public Records Act does not require a public agency to create or generate records pursuant to a records request. The APRA defines a public record as something already in existence when a request is made. See Ind. Code § 5-14-3-2(o)

### **CONCLUSION**

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the Dearborn County Redevelopment Commission has violated the Open Door Law, but not the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a large, sweeping flourish underneath.

Luke H. Britt  
Public Access Counselor

Cc: Terri Randall