



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 26, 2009

Linda Karn
The Speedway Navigator
2953 North Lawndale Avenue
Speedway, Indiana 46224

Re: Formal Complaint 09-FC-141; Alleged Violation of the Access to Public Records Act and Open Door Law by the Speedway Redevelopment Commission

Dear Ms. Karn:

This advisory opinion is in response to your formal complaints alleging the Speedway Redevelopment Commission ("Commission") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) and the Access to Public Records Act ("APRA") (Ind. Code 5-14-3). Because you filed two complaints against the same agency, my office has consolidated the complaints. I issue this opinion in response to both complaints. A copy of the Commission's response to the complaints is enclosed for your reference. It is my opinion the Commission has technically violated but substantially complied with the ODL. Further, it is my opinion the Commission has not violated the APRA.

BACKGROUND

In Part I of your complaint, you allege the Commission violated the ODL by failing to open bids at a public meeting. You contend that I.C. § 36-1-12-4.7 requires the bids to be open during a meeting open to the public. You allege you learned at the Commission's May 18, 2009 meeting that the bids were not open during a public meeting.

In Part II of your complaint, you allege that on May 28 and June 5 you requested from the Commission the purchase price for the purchase of International Village Apartments. You allege the Commission denied your request in violation of the APRA. You requested priority status for your complaints but did not allege any of the reasons for priority status listed in 62 IAC 1-1-3, so priority status was not granted.

The Commission responded to the complaints by letter dated June 24 from attorney James Gutting. Regarding Part I of your complaint, the Commission indicates

that a third party contractor is managing the project at issue in your complaint. The Commission contends that through an inadvertent error, the Commission did not realize the requirement in I.C. § 36-1-12-4.7 that bids and quotes be opened in a public meeting applies to a situation in which a third party contractor is managing the project. The Commission contends that it abided by all other requirements of the ODL. The Commission further contends that while it violated a technical requirement of the ODL in failing to open the quotes at a public meeting, the outcome reached is the same it would have been had the quotes been opened at a public meeting.

Regarding Part II of your complaint, the Commission contends negotiations concerning the International Village Apartments (“IVA”) property are ongoing, and as such the information you have requested is excepted from disclosure under I.C. § 5-14-3-4(b)(5)(A). The Commission provides a detailed account of the negotiations involved with the IVA property.

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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, 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. I.C. § 5-14-1.5-3(a). The Commission is a governing body for the purposes of the ODL. I.C. § 5-14-1.5-2.

Regarding notice, the ODL provides, in part, the following:

(a) 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 (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. This requirement does not apply to reconvened meetings (not including executive sessions) where announcement of the date, time, and place of the reconvened meeting is made at the original meeting and recorded in the memoranda and minutes thereof, and there is no change in the agenda.

(b) Public notice shall be given by the governing body of a public agency by:

(1) posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and

(2) delivering notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency. . .

I.C. § 5-14-1.5-5.

Further, the Indiana Code provides that, for estimated contract amounts between \$25,000 and \$100,000, “[a]ll quotes received shall be opened publicly and read aloud at the time and place designated and not before.” I.C. § 36-1-12-4.7.

The Commission acknowledges that the quotes for the project at issue should have been opened at a meeting open to the public. The Commission contends that the quotes were not opened at a public meeting because of an inadvertent error related to the Commission’s misunderstanding of the application of I.C. § 36-1-12-4.7 to a situation in which a third party contractor was managing the project. I agree the Commission violated public access laws (namely, I.C. § 36-1-12-4.7 and the ODL) by failing to provide notice for and open the quotes at a public meeting.

The Commission contends it followed all other requirements of the ODL. Further, the Commission contends the same outcome was reached as would have been reached if the quotes were opened at a public meeting. Where a public agency has technically violated but substantially complied with the ODL, the Indiana Court of Appeals has routinely declined to overturn or void an agency’s actions. *See Thornberry v. City of Hobart*, 887 N.E.2d 110, 118 (Ind. Ct. App. 2008) (“voiding the final action would only serve to impose a punishment at the public’s expense for a technical violation of the Open Door Law”); *See also Guzik v. Town of St. John*, 875 N.E.2d 258 (Ind. Ct. App. 2007) and *Riggin v. Bd. of Trustees of Ball State Univ.*, 489 N.E.2d 616 (Ind. Ct. App. 1986). In my opinion, the Commission technically violated the ODL but substantially complied with the ODL, given that the Commission met the other requirements of the ODL, including awarding the contract at a May 18 meeting open to the public.

In Part II of your complaint, you allege that on May 28 and June 5 you requested from the Commission the purchase price for the purchase of the IVA property. The Commission denied you access to the information on the basis of I.C. § 5-14-3-4(b)(5)(A), which excepts from disclosure “[r]ecords relating to negotiations between . . . a local economic development organization (as defined in IC 5-28-11-2(3)), or a governing body of a political subdivision with industrial, research, or commercial prospects, if the records are created while negotiations are in progress.”

The Commission, a governing body of a political subdivision, explains why it contends that negotiations with IVA are still in progress. The Commission explains that the process for redeveloping the property is a complex, two-step transaction. The Commission explains that while step one of the process has ceased, step two is contingent upon step one, and step two is currently in progress. As I read it, I.C. § 5-14-3-4(b)(5)(A) does not define negotiations as just one step of a multi-step process. The Commission has demonstrated that the two steps in this process are inter-related. In my opinion, the information you have requested is contained in records *relating to negotiations* between the Commission and industrial, research or commercial prospects, and as such the Commission has not violated the APRA by denying you access to the records while the negotiations are still in progress.

CONCLUSION

For the foregoing reasons, it is my opinion the Commission has technically violated but substantially complied with the ODL. Further, it is my opinion the Commission has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: James M. Gutting, Barnes & Thornburg LLP
Vince Noblet, Speedway Redevelopment Commission