

STATE OF INDIANA)	CLAY CIRCUIT/SUPERIOR COURT
)	
COUNTY OF CLAY)	BRAZIL, INDIANA
MARIPOSA LEGAL,)	
Plaintiff)	
)	
v.)	No. _____
)	
CLAY COUNTY COMMISSIONERS;)	
CLAY COUNTY COUNCIL;)	
CLAY COUNTY SHERIFFS' DEPARTMENT;)	
Defendants)	

COMPLAINT

Plaintiff Mariposa Legal hereby petitions this Court to (1) declare void the September 16, 2021 Agreement for Services (“BOT Agreement/MOU”) entered into by Defendant Commissioners, which was subsequently invalidated, and then reinstated on or about November 12, 2021; and (2) enjoin Defendant Commissioners from signing a final agreement with developers to expand the Clay County Justice Center in Brazil, Indiana, until “substantial reconsideration” has been given at a meeting compliant with the Indiana Open Door Law (“ODL”) under I.C. § 5-14-1.5.7(e). Plaintiff also requests that this Court compel Defendants to produce records requested under the Indiana Access to Public Records Act (“APRA”). *See* I.C. § 5-14-3-9. This action should be expedited pursuant to I.C. §§ 5-14-1.5-7(h), 5-14-3-9(l) to ensure that (further) violations of the ODL and APRA do not occur. In support of this complaint, plaintiff alleges the following:

PARTIES

1. Plaintiff Mariposa Legal, program of COMMON Foundation, a 501(c)(3) nonprofit, is an immigration legal services provider providing holistic detained removal defense. Mariposa Legal was founded in January 2020 as a part of COMMON Foundation’s nonprofit incubator and under the Foundation’s fiscal sponsorship until Mariposa Legal obtains

501(c)(3) tax exempt status. Mariposa Legal's principal place of business is at 8520 Allison Pointe Blvd, Ste 223, PMB 20826, Indianapolis, IN 46250-4299. Plaintiff is a member of Communities Not Cages Indiana ("CNC IN Coalition"). The CNC IN Coalition is an unincorporated group of Indiana groups, faith-based congregations, concerned Indiana residents and other allies which formed informally in June 2021. The CNC IN Coalition is led by the statewide immigrant rights group, Cosecha Indiana, and in addition to Plaintiff, includes the Greater Lafayette Immigrant Allies as well as regional organizations such as the National Immigrant Justice Center ("NIJC"), Interfaith Community for Detained Immigrants, and the Illinois Coalition for Immigrant and Refugee Rights.

2. Defendant Clay County Commissioners is a "public agency" as defined under I.C. § 5-14-3-2(q)(1), (2) as a commission and county entity exercising the executive and administrative power of the state. The current three elected Commissioners are Bryan Allender, Marty Heffner, and Paul Sinderson. The Clay County Commissioners hold monthly "regular" meetings on the first Monday of each month at 9:00am in the morning. The Clay County Commissioners also hold "special meetings," which occur outside of their regularly-scheduled, noticed meetings. The Commissioners have predominantly communicated with the CNC IN Coalition through Clay County Auditor Jennifer Flater and Clay County Attorney Eric Somheil.
3. Defendant Clay County Council is a "public agency" as defined under I.C. § 5-14-3-2(q)(2) as a county entity exercising the executive and administrative power of the state. The current seven councilors are Jackie Mitchell, Jason Britton, Jason Thomas, Larry J. Moss, John Nicosan, Dave Amerman, and Patricia Heffner. Councilman Larry Moss is Council

President, a member of the “Clay County Jail Committee;” he also appears to be a board member of the Clay County Community Corrections.

4. Defendant Clay County Sheriff’s Department is a “public agency” as a law enforcement agency, an agency whose budget is under county review, and additionally an entity that seeks bonds for the purpose of constructing public facilities (or Defendant Commissioners seek bonds on behalf of the Sheriff’s Department for the purpose of constructing public facilities). The Sheriff’s Department is located at 611 E. Jackson St, Brazil, IN 47834. The current occupant of the Sheriff’s Office is Sheriff Paul Harden.
5. Clay County Jail Partners, LLC¹, is a limited liability company composed of BW Development as the developer, Garmon as the construction manager/design-builder, RQAW as the architectural designer, and GM Development as the financier. Clay County Jail Partners, LLC appears to have been formed as a public-private partnership to develop the proposal and scope of the potential \$20 million project to expand the Clay County Jail. As will be discussed in the allegations below, Clay County Jail Partners, LLC is a signatory to an agreement for services with Clay County Commissioners that was signed on September 16, 2021; an individual named Brad Battin signed the agreement on behalf of Clay County Jail Partners, LLC. *See* M-1 at 63.
6. The “Clay County Jail Committee” is a non-public, inter-county governmental entity that appears -- based on limited documents released in response to the Coalition’s APRA requests filed with the Clay County Sheriff -- to have at least three members and officers who are public officials, Sheriff Harden, County Commissioner Heffner, and County

¹ Because of lack of available documentation about Clay County Jail Partners, LLC, it is unclear to Plaintiff whether this entity is indeed a public-private partnership and whether it could qualify as a “public agency” under either the IN Open Door Law or the Access to Public Records Act. Plaintiff preserves this issue at this time.

Council President Moss. Minutes from this Committee indicate that staff from BW Development and RQAW have also attended as well as other members of the Defendant Commissioners and County Staff, such as Attorney Somheil. *See* D-3 & D-4. The full scope and parameters of this committee and its membership are not known.

FACTUAL ALLEGATIONS

7. Clay County's local county incarceration facility is the Clay County Justice Center, referred to informally as the "Clay County Jail" as it shall be called hereafter in this complaint. The current facility was built in 2006, has a capacity of 176 beds, and is located at 611 E. Jackson St, Brazil, IN 47834. Also in 2006, Clay County entered into a federal contract with the U.S. Marshals Service ("USMS") to hold individuals detained in federal custody in Clay County custody. Pursuant to a 2013 amendment to the 2006 contract with USMS (further modified in 2015), Clay County Jail has held individuals in the custody of Immigration and Customs Enforcement ("ICE") routinely.
8. In May and June 2021, staff from the Clay County Sheriff's office and Clay County Commissioners were quoted in local and regional newspaper articles regarding a proposal to expand the Clay County Jail facility. *See e.g.* Exh. A, "Proactive commissioners eyeing expansion of justice center," by Ivy Jacobs, *Brazil Times*, dated June 1, 2021; *see also* Exh. B, "A new addition is on the way to the Clay County Jail – here's what it will bring," by Brianna Shackelford, *WTHI TV*, dated June 10, 2021. Clay County officials who were quoted in these stories mentioned that the facility expansion was to increase ICE bed capacity at the facility.
9. After this proposed expansion of the jail became public, the CNC IN Coalition formed and began filing Access to Public Records Act ("APRA") requests with the Defendants through

Coalition member, NIJC. *See* Exhs. C, E, G, J, L, N, Q. The responses to these requests have been limited or nonexistent, despite repeated and thorough follow-up request with each of the Defendants independently. These requests and the Defendants untimely responses gives rise to the alleged APRA violations documented below in ¶¶21-56.

10. However, through the limited responses to the APRA requests from Defendants, CNC IN Coalition became aware of a pattern of decision-making by Defendant Commissioners related to the proposed Clay County Jail expansion that is in direct contradiction to the statutory purpose of the Indiana Open Door Law pursuant to § 5-14-1.5-1. *See Appendix.* The specific bases for these ODL violations are delineated below in ¶¶ 12-20.
11. This matter is of vital local importance due not only to the high projected cost of over 20 million dollars that would be a liability to Clay County taxpayers but also the nature of the decision by county officials to hold foreign nationals in federal custody, many of whom are long-term residents of Indiana, in local custody. Beyond this local county purview, this matter also carries profound state-wide, regional, and even national implications.

A. Allegations Against Defendant Commissioners under I.C. § 5-14-1.5-1 (“ODL”)

12. On April 13, 2021, the Commissioners released a Request for Proposals (“RFP”) for a multi-million dollar project to expand the county jail. *See* Exh. K-2 at 33. The RFP deadline was May 3, 2021, only 15 business days later. *Id.* Only one proposal was submitted.
13. The sole submitted proposal was for Clay County Jail Partners, LLC, composed of BW Development as the developer, Garmong as the construction manager/design-builder, RQAW as the architectural designer, and GM Development as the financier (according to the proposal). *See* Exh. M-1 at 58.

14. During and after this RFP process, all substantial action regarding the Clay County Jail expansion took place in either “closed-door” private meetings of the “Clay County Jail Committee,” via internal email communications between the Clay County officials and companies involved in the expansion proposal, or in “special meetings” outside of their regularly-scheduled, noticed meetings that are accessible to the public. *See Appendix.*
15. Specifically, the timeline of substantial action on the Clay County Jail Expansion is as follows, based on the limited responses Plaintiff has received to APRA requests:
- a. The first private meeting of the Clay County Jail Committee met at the Sheriff’s Office on May 3, 2021, to discuss the jail expansion proposal. Present were County Commissioner Heffner, Sheriff Paul Harden, and County Councilman Moss by telephone; [*See Exh. D-2*]
 - b. At a May 24, 2021 “special meeting,” the Commissioners discussed the RFPs; [*See Exh. K-1 at 32*]
 - c. On June 9, 2021, the Clay County Jail Committee, including Councilman Larry Moss, Sheriff Paul Harden, Commissioner Marty Heffner, met privately with representatives of the Clay County Jail Partners, LLC; [*See Exh. D-3 at 12*]
 - d. On July 6, 2021, the Clay County Jail Committee met to discuss the memorandum of understanding (MOU) from RQAW. In attendance were Councilman President Moss, Sheriff Harden, Commissioner Heffner, as well as Commissioner Allender, Commissioner Sindors, and County Attorney Somheil; [*See Exh. D-4 at 14*]
 - e. At the September 16, 2021 “special meeting,” the Commissioners signed the document called the “BOT Agreement” which is an Agreement for Services or memorandum of understanding between the County and the Clay County Jail

Partners, LLC [hereinafter “BOT Agreement/MOU”]. *See* M-1. This document set out a 60-day minimum scoping period which was set to expire on November 15, 2021; [*Id.* at 58]

- f. At the October 14, 2021 “special meeting,” the Commissioners signed “Resolution 10-202” in support of the “BOT Agreement/MOU;” [*See* Exh. O-1 at 69]
 - g. No action was taken on November 15, 2021 however members of the CNC IN Coalition were physically present at that special meeting because volunteers from the Coalition called the Clay County Auditor multiple times per week after the regular monthly meeting on November 1, 2021 in order to find out the date and time of the November “special meeting” once it was scheduled;
 - h. Lastly, on or around November 12, 2021 “BOT Agreement/MOU” was reinstated per an email sent by Attorney Somheil in response to a APRA request for records relating to the agreement. *See* Exh. X. It remains unclear to the Coalition what the full effect of this reinstatement has been, specifically whether the 60-day minimum scoping period has been deemed satisfied or whether it re-started on November 12. When CNC IN Coalition members attended the December 6, 2021 regular meeting, the Commissioners and Attorney Somheil responded to all questions posed by Coalition members during the public comment period with “No Comment.”
16. Prior to learning of the reinstatement of the September 16, 2021 BOT Agreement/MOU, the CNC IN Coalition – specifically Mariposa Legal and NIJC as two of the legal organizations who are members of the coalition – filed three complaints with the Indiana Public Access Counselor (“PAC”) on November 11, 2021. *See* Exhs. S - U. The complaint against Defendant Commissioners alleged violations of the ODL at I.C. § 5-14-1.5-1.

17. The PAC responded that their Office had “not identified a specific instance of a potential violation that would trigger [the Office’s] involvement.” *See* Exh. V at 105. In effect, the PAC refused to process or “accept” the complaints from Plaintiff.
18. Plaintiff exchanged electronic communication with the PAC on November 12, 2021 and November 19, 2021. *See* Exh. V at 101-103. The CNC IN Coalition clarified legal arguments via email and re-submitted alternative electronic forms of the APRA requests submitted to Defendants (described below). *Id.*
19. On December 6, 2021, Plaintiff had a recorded telephonic conversation with PAC Luke Britt in which he agreed to communicate with Defendants and issue an advisory opinion regarding the possible violations of the ODL and APRA. *See also Email Memorializing The Conversation* at Exh. W at 108.
20. Plaintiff now files this complaint within the requisite 30-day period after the actions taken by Defendant Commissioners which Plaintiff argues *infra* give rise to violations under I.C. § 5-14-1.5-3.1. Specifically, within 30 days after the December 3, 2021 communication from Attorney Somheil in which he communicated that the BOT Agreement/MOU had been reinstated on or about November 12, 2021. As Plaintiff will argue below, there is sufficient evidence that this reinstatement of the BOT Agreement/MOU could have occurred if at least two “gatherings” took place within seven consecutive days of one another and were attended by at least two of the Commissioners and/or members of the intergovernmental Clay County Jail Committee. This series of gatherings occurred in violation of the Open Door Law.

B. Allegations Against Defendants under the I.C. § 5-14-3-9 (“APRA”)

Allegations Relating to Defendant Clay County Sheriff’s Department under the APRA

21. On June 18, 2021, CNC IN Coalition member NIJC filed a written APRA request with the

Clay County Sheriff which requested access to the following public records:

1. Communications, including electronic communications, attached documents, and meeting minutes, relating to the proposed expansion of the Clay County Jail for the purposes of holding more people in U.S. Immigration and Customs Enforcement custody.
2. The most recent contract, including any amendments and modifications, between Clay County and the United States Marshals Services (USMS) for the purpose of allowing U.S. Immigration and Customs Enforcement to utilize additional bed space in Clay County Jail.
3. Billings, invoices, and records of payment made pursuant to the Inter-Governmental Agreement between the Clay County Jail and the United States Marshals Service, since March 29, 2021.
4. Records on the average daily population and average length of detention (by month) of federal detainees held in Clay County Jail.
5. Complaints or grievances filed by people detained in the Clay County Jail under ICE custody. *See* Exh. C.

22. On July 21, 2021, the Sheriff’s Department responded by email with 5 attachments, including a 7-page document that includes emails and minutes from the “Clay County Jail Committee’s” non-public meetings held on May 3, 2021; June 9, 2021; and July 6, 2021, which described the Committee’s membership including Sheriff Harden, County Commissioner Heffner, and County Councilman Moss. *See* Exh. D. As delineated above, these records show that the County officials also met with Dustin Frye, BW Development, Pete Peterson, RQAW, Mike Gunn, RQAW, as well as other Commissioners in their meetings. *See* Exh. D-3 & D-4.

23. NIJC filed an *additional* written request on September 9, 2021, requesting the following:

1. Communications and documents, including electronic communications, meeting minutes, and attached documents, relating to the “Clay County Jail Expansion Project.”

2. Communications and documents, including electronic communications, meeting minutes, and attached documents, relating to or developed by the Clay County Jail Committee.
3. Any proposed or final Memorandum of Understanding (MOU) between Clay County officials and the company RQAW, or other private contracts regarding the proposed expansion of the Clay County Jail. *See* Exh. E.

24. Sheriff Harden responded to the September 9 request on September 13, 2021, indicating that he would gather the documents and return them to NIJC, however neither NIJC nor any other CNC IN Coalition member received any documents. *See* Exh. F. NIJC followed up on September 20, 2021 and October 19, 2021, requesting status updates.

25. Having received no reply, NIJC filed another written request on October 26, requesting:

Communications, including electronic communications, attached documents, and meeting minutes, relating to the stakeholder committee to determine the scope and maximum project budget as described in Exhibit A (Description of the Services) of the Agreement for Services, signed September 16, 2021 between the Commissioners of Clay County, Indiana, and Clay County Jail Partners, LLC. *See* Exh. G.

26. Sheriff Harden responded on October 26, 2021, with 56 pages of emails which provided communications between Clay County public officials including Sheriff Paul Harden and Deputy Sheriff Josh Clarke with the individuals making up the Clay County Jail Partners, LLC. *See* Exh H. These are the same representatives who also participated in the private Clay County Jail Committee meetings to discuss the proposed expansion project. *See* Exh. D-3 & D-4.

27. These October 26, 2021 responsive documents included evidence that, according to the Clay County Sheriff Harden, Clay County officials had been in direct communication with officials from Immigration and Customs Enforcement (“ICE”) regarding the proposed expansion, the need for “beds” in the Midwest region and the effect of the forced

termination of contracts with ICE at three county facilities in Illinois will have on ICE by December 31, 2021. *See* H-1.

28. In addition to these documents, Sheriff Harden included in his October 26, 2021 email response that he did not have “minutes of any meeting that I attended.” *See* Exh. H at 21. He then incorrectly noted that the Clay County Jail Committee had only met “twice” and that he had provided the meeting minutes with the prior documents. *Id.* He directed NIJC to Defendant Commissioners for information related to the MOU and RQAW. *Id.*

29. NIJC responded by email on November 4, 2021, asking for clarity as to whether the October 26, 2021 response was the completion of the processing of the request, or if there were other communications relating to the jail expansion planning. NIJC pointed out that the communications with ICE that were referenced, specifically communications with ICE Facility Compliance Officer Tilman, would fall under the scope of the request. *See* Exh. I, *referencing* Exh. H-1.

30. No party within the CNC IN Coalition have received further responses from the Sheriff.

Allegations Against Defendant Clay County Commissioners under the APRA

31. On June 18, 2021, NIJC filed the first written APRA request with the Defendant Commissioners on behalf of the CNC IN Coalition requesting:

1. Communications and documents, including electronic communications, meeting minutes, and attached documents, relating to the proposed expansion of the Clay County Jail for the purpose of allowing more space for people detained under U.S. Immigration and Customs Enforcement (ICE) custody.
2. Complaints or grievances filed by people detained in the Clay County Jail under ICE. *See* Exh. J.

32. In response to this initial request on June 18, 2021, the Clay County Auditor Flater, responded via email on June 29, 2021 and provided the RFP for the Jail expansion and the

meeting minutes from the Commissioners’ “special meeting” held on May 24, 2021. *See* Exhs. K, K-1, & K-2.

33. Plaintiff reviewed the documents which showed that the RFP was issued on Tuesday, April 13, 2021 and that proposals were due just 15 business days later. *See* K-2. The RFP describes the initial estimate for the expansion as 20 million dollars. *Id.* at 36.

34. NIJC did not receive any further documents pursuant to the June 18, 2021 APRA requests. Specifically, the CNC IN Coalition never received any copies of any complaints or grievances from the Defendant Commissioners filed by individuals detained at Clay County Jail under ICE nor received any written documentation from the Defendant Commissioners claiming any exemptions under the APRA.

35. NIJC filed an additional written request on September 9, 2021 on behalf of the CNC IN Coalition with more targeted requests, specifically requesting documents related to the “Clay County Jail Committee” and any proposed memorandum of understanding.

1. Communications and documents, including electronic communications, meeting minutes, and attached documents, relating to the Clay County Jail Expansion Project.
2. Communications and documents, including electronic communications, meeting minutes, and attached documents, relating to or developed by the Clay County Jail Committee.
3. Any proposed or final Memorandum of Understanding (MOU) between Clay County officials and the company RQAW, or other private contracts regarding the proposed expansion of the Clay County Jail. *See* Exh. L.

36. In response to the September 9, 2021 APRA request, Auditor Flater responded via email with one document entitled “BOT Agreement” that had been approved by the Defendant Commissioners during a “special meeting” on September 16, 2021, *outside* of their regularly scheduled monthly meeting which had taken place on September 6, 2021. *See* Exh. M & M-1.

37. This “BOT Agreement” is an agreement for services, or memorandum of understanding (“MOU”) between Clay County and Clay County Jail Partners, LLC [hereinafter referred to as “BOT Agreement/MOU”]. *See* M-1. This BOT Agreement/MOU outlines a projected expansion for up to 265 beds and construction to commence in March 2022 with an anticipated completion date of August 2023. *Id.*
38. The BOT Agreement/MOU set out a “minimum scoping period” of 60 days. *Id.* The terms of the agreement state that if the County and Clay County Jail Partners, LLC, were unable to agree on an acceptable scope and budget the Agreement would be terminated. *Id.*
39. Neither Plaintiff nor Coalition partners received any other further documentation from the Defendant Commissioners in response to the September 9, 2021 request.
40. On October 13, 2021, NIJC filed another written APRA request but voluntarily narrowed the scope of the request to try to focus the Commissioners on producing the specific records that had not been produced from the first two requests:
- “Communications, including electronic communications, attached documents, and meeting minutes, relating to the stakeholder committee to determine the scope and maximum project budget as described in Exhibit A (Description of the Services) of the “BOT Agreement” signed September 16, 2021 between the Commissioners of Clay County, Indiana, and Clay County Jail Partners, LLC.” *See* Exh. N.
41. County Auditor Flater responded via an informal email communication on October 14, 2021 and provided one document entitled “Resolution 10-202” which was signed the same day, on October 14, 2021, at another “special meeting” *outside* Defendant Commissioners’ regular monthly meeting, which took place on October 4, 2021. *See* Exhs. O & O-1.
42. NIJC followed up on this written APRA request multiple times and County Attorney Somheil responded on October 20, 2021 and referred back to the “Clay County Jail Partners, LLC (BW Development) Request for Proposals/Qualifications dated May 3,

2021,” but provided no further documentation. *See* Exh. P. Amidst these communications, on October 26, 2021, NIJC clarified on behalf of the CNC IN Coalition that the APRA request sought *all* communications, including email communications related to the “stakeholder committee to determine the scope and maximum project budget.” *Id.* NIJC also requested that Defendant Commissioners provide an official letter explaining the basis for the denial, including the specific exemption claimed to authorize, for the *de facto* denial of the three requests pursuant to *See* § 5-14-3-9(d). *See* Exh. P at 71.

43. On October 29, 2021, County Attorney Somheil responded via email and stated that

“That document of 9-16-21 was premature and was not signed by the Clay County Jail Partners. No other documents exist as to the scope and maximum project budget” (emphasis added).

NIJC responded that day with attempts to clarify since the BOT Agreement/MOU, dated September 16, 2021, had, in fact, been signed by an individual named Brian Battin, on behalf of the Clay County Jail Partners, LLC. *See* M-1 at 63.

44. NIJC sent another email on October 29, 2021, again requesting an official letter response claiming any exemptions. On November 1, 2021, Mr. Somheil responded that “While I am further investigating, my position and last response to your request has not changed.”

45. On December 3, 2021, County Attorney Somheil re-initiated communication with the Coalition and stated in an additional informal email communication:

As a follow up to my November 1, 2021 email to you, I have attached the signed Agreement for Services dated 9-16-21. At that time, after the Commissioners signed such document, the attorneys determined that the document was pre-mature and the document was determined to have no effect until it was determined that all procedures were followed. That was done and the attorneys now consider such document to be in effect. The Commissioners have been so notified.

46. NIJC sent a reply on December 3, 2021, seeking to clarify the significance of the September 16 BOT Agreement and specifically (a) the final date of the Agreement and (b) whether the County was interpreting the Agreement’s original “minimum scoping period” to be re-started as of the new date of the agreement or satisfied based on the original contract.
47. Coalition members attended the Defendant Commissioners’ regularly scheduled monthly meeting on Monday, December 6, 2021, seeking the same two points of clarification listed above during the public comment period since the jail expansion was not covered during the main agenda. The Defendant Commissioners and County Attorney Somheil’s response was “no comment.”²
48. Subsequent to Plaintiff’s meeting with the PAC, County Attorney Somheil confirmed that the date of the reinstatement of the BOT Agreement/MOU was on or about November 12, 2021. *See* Exh. X. The CNC IN Coalition has still not been able to obtain clarification as to whether the minimum scoping period that was originally included in the agreement language when the BOT Agreement/MOU was signed on September 16, 2021 has been deemed satisfied or whether the 60-day “minimum-scoping” period has been renewed.

Allegations Against Defendant Clay County Council under the APRA

49. On October 13, 2021, NIJC filed the first written APRA request to the Defendant Clay County Council again via County Auditor Flater and requested:
1. Communications, including electronic communications, attached documents, and meeting minutes, relating to the proposed expansion of the Clay County Jail (developed by members of the Clay County Jail Committee, relating to the Jail Expansion Project);
 2. Communications, including electronic communications, attached documents, and meeting minutes, relating to the stakeholder committee created to determine the scope and maximum project budget as described in Exhibit A (Description of the Services) of the Agreement for Services,

² This meeting was recorded but Plaintiff is not able to locate an accessible version of the recording.

signed between the Commissioners of Clay County, Indiana, and Clay County Jail Partners, LLC, signed September 16, 2021.

3. Communications, including electronic communications, attached documents, and meeting minutes, relating to the contract between Clay County and the United States Marshals Services (USMS) for the purpose of allowing U.S. Immigration and Customs Enforcement to utilize additional bed space in Clay County Jail. *See* Exh. Q at 80.

50. County Auditor Flater responded and copied Defendant Council's President Larry J Moss, who is also the chairman of the Clay County Jail Committee and indicated that Moss would be the official responding to the APRA request. *Id.*

51. NIJC followed up with Auditor Flater on November 4, 2021. Auditor Flater responded and said that the only information she possessed for the County Council consisted of the meeting minutes, which were allegedly available at the time on the Defendant Council's website at www.claycountyin.gov.³ *Id.* at 79. Meeting minutes for October, November and December have not been posted online and remain unavailable to the public.

52. On November 9, 2021, attorney Louis F. Britton, who identified himself as representing Clay County Council, sent a response to the APRA request acknowledging receipt of the request and indicated that they were conducting a search for records. There has been no further communication between the CNC IN Coalition and Mr. Britton. *See* Exh. R.

53. As of the date of this filing – more than two months after the original APRA request was made – Plaintiff's Coalition has not received responsive records of any kind from Defendant Council President Moss or any County employee on their behalf.

³ Plaintiff's Coalition does not believe that the Defendant Council's minutes were available to the public on the website at that time. However, by at least December 6, 2021, Plaintiff discovered that all of the Defendant Council's meeting minutes were by then accessible to the public on the website. Even if the minutes were publicly available prior to this, the Defendant Council has still not provided a timely response to requests for all other records included in the October 13, 2021 APRA request which the County received via email more than two months ago.

Plaintiff Filed Public Access Counselor Complaints Re APRA Violations by All 3 Defendants

54. As listed *supra* at ¶¶ 24 – 27, the CNC IN Coalition filed three complaints with the PAC on November 11, 2021. In addition to setting forth the Coalition’s allegations regarding a violation of the ODL, the complaints also alleged that all three Defendants violated the APRA by (A) failing to respond in a timely manner to the above-described requests or (B) failing to provide any formal written responses claiming any exemptions for their failure to produce records falling within the parameters described by Plaintiff’s APRA requests.
55. These complaints to the PAC were filed within the requisite statutory period of 30 days of the Defendants’ failure to respond in a timely manner to the CNC IN Coalition’s APRA requests. Specifically, these complaints were filed within thirty days of the APRA follow-up request to the Clay County Commissioners, dated October 13, 2021; the APRA request to the Clay County Council also dated October 13, 2021; and the APRA request to the Clay County Sheriff’s Department, dated October 26, 2021. *See* Exhs. G, N, & Q.
56. As stated *supra*, the PAC refused to process these complaints under the APRA on November 12, 2021; November 15, 2021; and November 22, 2021 but on December 6, the PAC agreed to reach out to the Clay County entities and issue a written advisory opinion. On that date, Plaintiff memorialized the specific request to the PAC in writing that the PAC request that the County Commissioners provide (1) complete meeting minutes from October 2021⁴ and November 2021 including any administrative function meetings held during this period; (2) all meeting minutes of the Clay County Jail Committee;⁵ (3) the

⁴ After making this request, Plaintiff found that the October meeting partial minutes were later posted to the Commissioners website but are out of sequential date order, which is why Plaintiff’s Coalition did not access them.

⁵ Additionally, after re-reviewing Sheriff Hardin’s initial response to our APRA request from July 2021, we amend this request to minutes of any meetings of the Clay County Jail Committee that have taken place *since* July 2021.

report from Clay County Jail’s ICE Inspection from September 2021;⁶ and (4) for the PAC to seek clarification regarding the reinstatement of the BOT Agreement/MOU, originally signed on September 16, 2021. *See* Exh. W.

LEGAL ALLEGATIONS

I. COUNT ONE: Plaintiff Has Alleged Facts Demonstrating ODL Violations

A. Statutory Legal Standards

57. The statutory intent of Indiana’s Open Door Law pursuant to IN § 5-14-1.5-1 is 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.” To meet this statutory goal, Indiana requires that 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” and secret ballots are prohibited. § 5-14-1.5-3.

58. A party may file a complaint in order to enjoin continuing, threatened, or future violations of the ODL as well as declare any final action void where a public agency has held an executive session in violation of § 5-14-1.5-3; provided improper noticed under § 5-14-1.5-5, or held a series of gatherings in violation of § 5-14-1.5-3.1. *See* Ind. Code § 5-14-1.5-7(2), (3). A plaintiff need not allege or prove special damage different from that suffered by the public at large. *Id.*

59. A plaintiff must comply with the ODL’s statute of limitations requiring that a plaintiff commence an action within 30 days of the date of a public agency’s action or failure to act

⁶ Clay County Jail received a rating of “does not meet standards” for its ICE inspection carried out in May 2021. ICE then carried out a “TAR” technical assistance review in September 2021, and is conducting another inspection in December 2021, but has not made the results of either of these reviews public. *See* Tab Y. Under federal law, ICE cannot detain people at facilities that are found to be “deficient” on two consecutive inspections. *See* “Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009.” 110th Congress, (H.R. 2638), P.L. 110-329, <https://www.congress.gov/110/plaws/publ329/PLAW-110publ329.pdf>.

or the date that the plaintiff knew or should have known that the act or failure to act occurred. *See* I.C. § 5-14-1.5-7(b).

60. A court determining whether to declare any policy, decision, or final action void, a court may consider the following factors:

- a. The extent to which the violation affected the substance of the policy, decision, or final action; denied or impaired access to any meetings that the public had a right to observe and record; and prevented or impaired public knowledge or understanding of the public's business; *see* § 5-14-1.5-7(d)(1)(A)-(C)
- b. Whether voiding the policy, decision, or final action is a necessary prerequisite to a substantial reconsideration of the subject matter; *see* § 5-14-1.5-7(d)(2)
- c. Whether the public interest will be served by voiding the policy, decision, or final action by determining whether the remedial benefits gained by effecting Indiana public policy will prejudice the persons which have relied on the validity of the challenged action and the effect declaring the challenged action void would have on them; *see* § 5-14-1.5-7(d)(3)
- d. Whether the defendant(s) acted in compliance with an informal inquiry response or advisory opinion by the PAC concerning the violation. *see* § 5-14-1.5-7(d)(4).

61. If a policy, decision, or final action is declared void, the court “may enjoin the governing body from subsequently acting upon the subject matter of the voided act until the subject matter has been given substantial reconsideration” in compliance with § 5-14-1.5-7(e).

62. In any action filed under § 5-14-1.5-7, a court may award reasonable attorney's fees, court costs, and other reasonable expenses of litigation to the prevailing party if the plaintiff prevails, and that plaintiff first sought an advisory opinion from the Public Access Counselor (“PAC”) or the defendant(s) prevail but only if the court finds that the action is frivolous and vexatious. *See* § 5-14-1.5-7(f). If a plaintiff has sought an advisory opinion with the PAC, the Court may also impose a civil penalty on defendant(s) where a court finds that an individual acted with specific intent to violate the law and fails to perform a duty on behalf of a public agency . *Id.* at § 5-14-1.5-7(g).

63. A court may expedite the hearing of this action pursuant to IN § 5-14-1.5-7(h).

B. Plaintiff's Alleged Facts Satisfy the Requisite ODL Statute of Limitations

64. Plaintiff hereby incorporates and adopts each and every paragraph in the foregoing factual allegations of this complaint in ¶¶ 1 – 56.
65. The CNC IN Coalition is filing this complaint within the requisite 30-day period under the statute of limitations because the alleged gatherings which violate the ODL would have had to take place in the seven consecutive days before or after the decision to reinstate the “BOT Agreement/MOU” was made on or about November 12, 2021. *See* Exh. X. However, County Attorney Somheil only communicated to the CNC IN Coalition on December 3, 2021 that the November 12, 2021 decision took place. Therefore, December 3, 2021 is the earliest date that the CNC IN Coalition “knew or should have known that the act” forming the basis of the ODL violation occurred. *See* I.C. § 5-14-1.5-7(b).

C. Plaintiff's Alleged Facts Demonstrate that Defendant Commissioners Have Violated the Indiana Open Door Law Because Of A Series of Improper Gatherings Likely Held in November 2021

66. Under I.C. § 5-14-1.5-3.1, a public agency is prohibited from having two or more gatherings of members of a “public agency” if during those gatherings they
- a. lack quorum;
 - b. the sum of the number of different members of the government body attending any of the gatherings at least equals a quorum of the governing body;
 - c. all the gatherings concern the same subject matter and are held within seven consecutive days; and
 - d. the gatherings are held to take official action on public business.
67. According to County Attorney Somheil, sufficient “procedures” were carried out in order for the Commissioners to reinstate the BOT Agreement/MOU on or about November 12, 2021 despite the fact that the jail expansion was not discussed by the Commissioners

(outside of the public comment part of the meeting) at their regular meeting on November 1, 2021 or their “special meeting” on November 15, 2021.

68. The scope of what these “procedures” referred to by Attorney Somheil are unclear to Plaintiff and the public.

69. This Court may properly infer that the “procedures” necessary to take place to change the status of the “BOT Agreement/MOU” from “premature” and invalid to “effective” would have required a *gathering* that constitutes *official business* took place on November 12, 2021, or the seven days immediately preceding or following November 12. Such an inference that *gatherings on official action on public business* took place on the *same subject matter* is proper for two reasons:

- a. As a practical matter, “procedures” related to verifying contractual terms under an agreement for services in a public-private partnership on behalf of a county government are innately “official business” under the meaning of the ODL.
- b. Given the procedural history of this proposed expansion described at length *supra*, it is highly likely that there has been a formal or informal private meeting of the Clay County Jail Committee in November 2021. Plaintiff has not received any minutes of meetings of the Clay County Jail Committee since Sheriff Harden’s responsive documents to NIJC’s APRA request providing minutes from the meetings on May 3, 2021; June 9, 2021; and July 6, 2021. *See* Exhs D-2, D-3, & D-4. However, Defendant Sheriff’s Department has provided responsive requests that refer to additional meetings of the Clay County Jail Committee being scheduled for at least August 2021. *See* Exh. H-2. Additionally, given that the minutes of the Clay County Jail Committee and email communications among the members of

that committee and the Clay County Partners, LLC refer to the parties' interest in "moving full speed ahead on the project," it is actually counterintuitive that this Committee would not have met in the ensuing months since July 2021. *See e.g.* Exh. H-4 at 26.

70. When alleging that a public agency has violated the ODL because of a series of improper gatherings, the ODL requires that at least the sum of the number of different members of the government body attending any of the gatherings at least equals a quorum of the governing body. While this language is convoluted, in the instant case, the mathematics are straightforward; there are only three Clay County Commissioners and Indiana law provides that one-third of a board must be present for quorum. *See* I.C. § 23-17-5-5. In the case of boards made up of less than four individuals like the Commissioners, *at least two individuals must be present for quorum. Id.*

71. In this matter, therefore if only *two* of the members of the Clay County Jail Committee gathered twice in the days between November 7, 2021 and November 12, 2021 *or* between November 12, 2021 and November 17, 2021, they would have satisfied the requirement for the number of Clay County Jail Committee members to be involved.

72. Additionally, if only *two* of the members of the Clay County Jail Committee gathered during the requisite time period, they also likely lacked quorum. Plaintiff acknowledges that because the only documentation about the makeup of the Clay County Jail Committee that are known to Plaintiff are the relatively informal meeting minutes for May through July of 2021, it is difficult to know what the total official membership and voting powers of the Committee are in fact. The May 3, 2021 Committee minutes make clear that at least Commissioner Heffner, Sheriff Harden, and Councilman Moss are members as the three

of them voted to elect officers on that date; Councilman Moss was voted in as “Chairman” and Sheriff Harden was voted in as “Secretary.” *See* Exh. D-2. However, it is unclear from the other minutes provided pursuant to the CNC IN Coalition’s APRA requests whether the other attendees at the meetings in June and July are “members” of the Committee who hold voting powers or not. The fact that this is a non-standard intergovernmental entity with membership across three county entities muddies the water further.

73. Nonetheless, for the purposes of this complaint, the Court should find that Plaintiff has alleged sufficient facts for the Court to find a violation of section 5-14-1.5-3.1.

D. Plaintiff’s Alleged Facts Demonstrate that Defendant Commissioners *and* Defendant Council Both Violated the ODL Pursuant To I.C. § 5-14-1.5-4

74. The ODL directs public agencies to comply with the statute in the recording and publishing of agency meeting minutes. Two of these directives are relevant in this matter. First, agencies must include the “general substance of all matters proposed, discussed, or decided” in the minutes published by the agency. I.C. § 5-14-1.5-4(b) Second, such minutes must be available “within a reasonable 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).

i. Defendant Commissioners Have Violated Both ODL Directives

75. Defendant Commissioners have violated both of the ODL’s directives. First, the Defendant Commissioners’ meeting minutes for their regular monthly meetings have not properly included the “general substance of all matters...discussed” since Plaintiff’s Coalition members began attending Commissioners’ regular monthly meetings in August 2021. Specifically, their minutes lack coverage of the substance of all matters discussed before their agency during the public comment periods of the Commissioners’ regularly noticed

meetings on August 2, 2021; September 7, 2021; and October 4, 2021. The Commissioners have not yet made the minutes from their November 2021 meetings or their December 6, 2021 meeting public nor available to the CNC IN Coalition.

76. Notably, on October 4, 2021 five members of Plaintiff's Coalition gave informal testimony against the proposed jail expansion during the public comment period of Defendant Commissioners' meeting and at least three local Clay County residents questioned Commissioners regarding the expansion. The entire discussion of the Clay County Jail expansion took at least 45 minutes. The contents of this discussion and the questions posed by the Commissioners' own constituents are not reflected in the minutes from the meeting.
77. The CNC IN Coalition is aware that due to Defendant Commissioners actions, this 20-million-dollar jail expansion proposal has not been well-publicized among local Clay County residents. Had it been and a proactive Clay County resident tried to go to the Clay County Commissioners website to locate the minutes or read them in search of information about the jail expansion, local constituents would not have been able to glean from the October 4, 2021 minutes that other concerned citizens had raised questions.
78. The absence of the "general substance of all matters...discussed" in the Defendant Commissioners' meetings is especially concerning given that during these meetings, particularly in September, October, and November, local residents and Plaintiff's coalition members have raised questions and concerns about:
 - a. the legality and ethics of the May 2021 "RFP" process for the proposed expansion;
 - b. the short-term and long-term costs to Clay County residents if this expansion is undertaken and particularly if Immigration and Customs Enforcement ("ICE") decide unilaterally to stop using bedspace at the facility due to a second failed inspection or policy changes, as has been the case in facilities located in rural communities around the midwest;

- c. the use of funds for a jail expansion rather than combatting the Clay County methamphetamine addiction crisis through allocation of resources dedicated to recovery and prevention of substance abuse in the community;
- d. the necessity of the jail's expansion since the jail facility is less than 20 years old and the questionable lip-service made by the Defendant Commissioners and Defendant Councilman President Moss to Indiana Department of Corrections numerical criteria for expansion when officials have stated that the purpose of the expansion is to increase the number of beds available to ICE;
- e. concerns about the facility's history of providing inadequate medical attention and violating the legal rights of immigrants held in immigration detention at the facility;⁷
- f. concerns about the ability of the facility to adequately and safely provide a sufficient number of staff for an expanded facility, especially an adequate number of *trained* staff with sufficient training in mental health, suicide prevention, sexual assault prevention, and emergency crisis response including cardiopulmonary resuscitation ("CPR") particularly given that the facility's failure to meet basic ICE standards in the May 2021 inspection; *see* Tab Y.
- g. the policy and human rights concerns surrounding assertions by Defendant Council's President Moss that the County is only charging a low rate per immigrant detained in ICE custody in order to allow ICE to make a profit when evidence from the May 2021 failed inspection demonstrates that the Clay County Jail has been providing a standard of care *below* the basic level required by ICE. *See* Tab Y. Council President Moss made these recorded statements during the public comment period during the December 3, 2021 monthly regular noticed council meeting. Yet, documents from the ICE inspection demonstrate that the Clay County Jail was unable to meet basic standards because of inadequate and missing training and that there was no nurse regularly present at the jail on the weekends. *Id.*
- h. the ethical and moral concerns about a local county government partnering with a *federal* law enforcement agency when detaining individuals for *civil* violations (as opposed to criminal offenses), in many cases after immigrant individuals are only charged, not convicted of, low level criminal conduct such as driving without a license;⁸

⁷ There was press coverage of a complaint filed with the Department of Homeland Security Office of Civil Rights and Civil Liberties on behalf of immigrants held in the custody of Clay County Jail in the *Indianapolis Star* in May 2021. Available at: <https://www.indystar.com/story/news/local/indianapolis/2021/06/08/indiana-covid-ice-detention-center-immigrants-seek-civil-rights-investigation-coronavirus/5289388001/>
See also <https://immigrantjustice.org/press-releases/immigrant-women-ice-custody-file-civil-rights-complaint-requesting-investigation> and [https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2021-06/CRCL%20Complaint%20NIJC detention%20conditions-Clay%20County_May%2028_2021.pdf](https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2021-06/CRCL%20Complaint%20NIJC%20detention%20conditions-Clay%20County_May%2028_2021.pdf)

⁸ According to attorneys who are members of Plaintiff's Coalition Mariposa Legal, the National Immigrant Justice Center, as well as attorney Emma Mahern of Munoz Legal, a lawfirm in Indianapolis IN, Operating a Motor Vehicle

- i. the ethical and moral concerns surrounding partnering specifically with Immigration and Customs Enforcement, which holds immigrant residents of the state of Indiana as well as asylum-seekers who have lawfully sought asylum at airports or one of the borders of the United States. Being held in immigration detention at Clay County Jail directly contributes to the separation of mixed-status and immigrant families, the fracturing of immigrant communities across the state and region, and surveillance of Indiana immigrant communities across the state (but with especially high numbers of detentions from Marion County). Individuals held in immigration detention are significantly more likely to lose employment, leading to further labor shortages of workers identified during the COVID-19 pandemic as “essential workers” in Indiana. Individuals detained in ICE custody are also more likely to contract COVID-19.⁹ Additionally, individuals detained in ICE custody, particularly at Clay County, face significant hurdles to obtaining legal counsel, making them more vulnerable to deportation, which the U.S. Supreme Court has recognized as a “severe” civil penalty that “may be of greater concern to a convicted [immigrant] than ‘any potential jail sentence.’” *See Sessions v. Demaya*, 138 S.Ct. 1204 (2018), *quoting Padilla v. Kentucky*, 559 U.S. 356, 368 (2010).

79. Additionally, Defendant Commissioners have violated § 5-14-1.5-4 by failing to post their meeting minutes within a reasonable time after the meetings, which at a minimum, should be defined as no more than one month after the meeting took place.

80. To date, the Defendant Commissioners remain in violation of this statute, even after PAC Britt indicated that he would contact County officials about the CNC IN Coalitions’ allegations of ODL and APRA violations.

ii. Defendant Council Violated ODL Directive To Timely Post Minutes

81. Defendant Council has also violated § 5-14-1.5-4 by failing to post their meeting minutes for many months of this year. While they have, in the last month, rectified that by posting their minutes in mass, they should still be held to have committed this violation and be

without a License is a frequent charge that have resulted in the arrest of immigrant individuals and then subjected them to a county detainer and resulted in being held in ICE detention at Clay County Jail. Ms. Mahern and undersigned counsel spoke to Commissioners directly about this at the Defendant Commissioner’s meeting on September 6, 2021 during the public comment period. None of these concerns are reflected in the minutes.

⁹ ICE has repeatedly been identified as a “superspreader” of COVID-19 since the onset of the pandemic in 2020.

See “ICE is the superspreader agency,” *The Washington Post*, dated May 1, 2021, *available at*:

https://www.washingtonpost.com/opinions/ice-is-the-superspreader-agency/2021/05/01/eb079944-a9f2-11eb-8c1a-56f0cb4ff3b5_story.html

cause for concern and further scrutiny by this Court and be enjoined to post their minutes within a specific time period -- Plaintiff suggests within one week of their meetings -- in order to ensure the public policy behind the ODL is effectuated.

E. Defendant Commissioners also violated the ODL under § 5-14-1.5-5(a)

82. Under 5-14-1.5-5(a), public notice of a public agency's meetings is required within 48 hours and is effectuated by posting a copy of the notice at the principal office of the principal office of the public agency holding the meeting and giving notice to all news media which deliver an annual request for notices by December 31 of the prior year.¹⁰

83. Plaintiff does not have sufficient evidence to determine whether Defendant Commissioners are in violation of § 5-14-1.5-5(a) because Plaintiff cannot have knowledge of which news media organizations made requests to be notified prior to December 31, 2020 of any regular or special meetings held by the Commissioners in the year 2021. Plaintiff notes that it appears that the only publication that Defendant Commissioners post notice of regular and "special" meetings is the *Brazil Times*.¹¹

¹⁰ Plaintiff acknowledges that the notice provision of Indiana's ODL is a very low bar for public agencies to meet. Recent litigation under a similar statute called the Sunshine Act in Pennsylvania was found to require county commissioners in Clearfield County, Pennsylvania to provide public notice of the commissioners' agenda in advance of their meeting. After litigation filed by the American Civil Liberties Union of Pennsylvania ("ACLU-PA") on October 28, 2021, on behalf of communities groups in Pennsylvania, the commissioners in Clearfield County were enjoined from making a final decision on signing a contract for a new facility with ICE without holding a meeting that the public could attend in which the contract was on the advance noticed agenda. *See Smith et al., v. Clearfield County Board of Commissioners*, No. 2021-1459-CD, (Court of Common Pleas of Clearfield County, Pennsylvania, 2021). *See e.g.* www.aclupa.org/en/press-releases/aclu-clearfield-county-violated-state-law-vote-immigration-detention-contracts

¹¹ Plaintiff again acknowledges that the notice provision is exceptionally generous to public agencies by putting the onus on the news media rather than the public agencies themselves to provide any measure of notice to the public, which means that hypothetically if one of Indiana's 92 counties has no news organizations or no news organizations that request notice, then there is no required notice provided to that county's constituents of their government's meetings under the ODL. Similarly, in a county, like Clay County, where there is a local newspaper but one with limited subscribership and limited publication times. For example, the *Brazil Times* Public Meetings scheduled was not updated throughout all of November. It is possible that a regional newspaper may have a larger subscribership in Clay county in which case, current notice may be insufficient.

84. As a practical matter, given the pattern of “special meetings” held by the Commissioners in 2021 in all months other than the summer, the CNC Coalition calls County Auditor multiple times per month to determine whether a “special meeting” has been scheduled in order to be present for official action by the Commissioners. While this may not give rise to an actionable violation of the ODL’s notice requirements in and of itself – given the low bar set out for public agencies by the statute – it is noteworthy that CNC IN Coalition members collectively have contributed volunteer hours equivalent to one individual’s part-time job since at least September 2021 each month just trying to just determine whether elected public officials will be holding a meeting. This impractical result contradicts the very public policy goals embedded in the ODL, which should be considered by this Court in determining whether Defendants should have to provide evidence upon discovery showing that they have satisfied the bare minimum notice requirements under the ODL.

F. Upon a Balancing of the Factors, There Is Sufficient Evidence for This Court To Find That These Violations of the ODL by Defendants Warrant Remedial Relief, Specifically the Voiding of the Reinstated BOT Agreement/MOU

85. The describes four factors for the Court to consider in determining whether an ODL violation(s) warrants the voiding of a public agency action. By its very structure, the ODL sets out a high standard for what constitutes a statutory violation which is then coupled with a strict 30-day statute of limitations which by its nature dissuades this type of complaint. Therefore, deference to public agency action is already built into the Court’s analysis. Plaintiff thus requests that the following factors be viewed in the light most favorable to Plaintiff at this stage in the litigation, particularly given Defendants’ unwillingness to comply with the APRA as delineated in the following section.

86. *Defendant Commissioners and County Council's Actions Violated the Rights of the Public and Actively Prevented and Impaired Public Knowledge About A Multi-Million Dollar Proposal That is a Taxpayer Liability:*

The Commissioners pattern of taking all official action in “special meetings” or during private meetings of the Clay County Jail Committee and in particular re-validating the BOT Agreement/MOU outside of a public meeting and then refusing to answer questions about that decision in the regular scheduled meeting immediately following, prevented the public from knowing the scope of this proposed expansion in terms of its cost, timeline, and the process undertaken by county officials in bargaining with developers. Additionally, these decisions and pattern of decision making have impaired the ability of concerned community members to obtain reliable information about the proposed expansion, disseminate it in the Clay County community, and turn out individuals to County Commissioner or County Council meetings. The fact that meeting minutes have not been posted on the Defendants’ websites and have not fully complied with the ODL has further impaired the public’s ability to obtain knowledge about this proposal. *See* I.C. § 5-14-1.5-7(d)(1)(A)-(C).

87. *Voiding this policy is a necessary prerequisite to a substantial reconsideration of this matter by Defendants*

Voiding the Clay County Commissioners’ decision to re-validate the BOT Agreement/MOU is necessary to a substantial reconsideration of this matter because it prevents the Commissioners from moving forward with signing a final agreement with the developers that make up the Clay County Jail Partners, LLC.

88. *The Public Interest Will be Served By the Voiding of The BOT Agreement/MOU*

The remedial benefits gained by the public by effecting Indiana public policy will not unduly prejudice the County if this Court takes quick action because as of the date of this

filing, the County has not yet relied on the validity of the Agreement to Plaintiff's knowledge. Additionally, the Defendants had themselves invalidated the MOU between November 1 and December 3, 2021, therefore an additional delay for a long-term project will not prejudice Defendants. *See* I.C. § 5-14-1.5-7(d)(3)

89. Due to concerns about further violations of the ODL occurring and because of significant violations of APRA as described below, Plaintiff is filing this complaint prior to written action being taken by the PAC. Therefore, the Court cannot yet consider whether Defendants have complied with PAC written advice. *See* § 5-14-1.5-7(d)(4).

90. As all three relevant statutory factors weigh in Plaintiff's favor, Plaintiff requests that if the Court should recognize a violation under the ODL, that the Court void the reinstated BOT Agreement/MOU as a part of the remedial injunctive relief to Plaintiff.

II. COUNT TWO: Plaintiff Has Facts Demonstrating APRA Violations

A. Legal Standards under the APRA

91. The preamble of the APRA under Ind. Code § 5-14-3-1 provides that:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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.

92. Significantly, this remedial statute requires that courts "liberally construe" the statute when implementing the policy and prohibits a public agency from "deny[ing] or interfer[ing] with the exercise of the right stated in the preamble. *Id*; I.C. § 5-14-3-3(b). APRA places

the “burden of proof for the nondisclosure of a public record *on the public agency*” (emphasis added) *not* the party requesting the record(s). § 5-14-3-1. However, a requestor does have the burden to make a record request under the state with “reasonable particularity” either orally or in writing. I.C. § 5-14-3-3(a)(1).

93. If a public agency receives a request for records that the agency “considers to be excepted” under the exemptions delineated by the APRA under section 4(b)(1) or 4(b)(25) the public agency may deny disclosure of the record or part of a record. *See* § 5-14-3-4.4(a). If a public record contains disclosable and nondisclosable information, the public agency shall separate the material that may be disclosed and make it available for inspection or copying. § 5-14-3-4.6(a).

94. A public agency must respond to a written APRA request sent by mail or fax within seven days or the request of the record(s) is deemed denied. *See* § 5-14-3-9(c).

95. If a request has initially been made in writing, a public agency may deny the request if the request is (1) in writing and (2) the denial includes a statement of the specific exemptions authorizing the withholding of all or part of the public record and (3) the writing contains the name, title, and position of the person responsible for the denial. *See* § 5-14-3-9(d).

96. A party who has been denied the right to inspect a public record may file an action in circuit or superior court of the county in which the denial occurred to compel the production of the record(s). § 5-14-3-9(e). A reviewing court will determine *de novo* if the public agency meets its burden of proof to sustain its actual or presumed denial. § 5-14-3-9(f). A court shall award reasonable attorney’s fees, court costs, and other reasonable expenses of litigation to the prevailing party if the plaintiff substantially prevails and previously sought

a written opinion from the PAC or the defendant substantially prevails and the court finds the action was frivolous or vexatious. § 5-14-3-9(i).

B. Plaintiff's Alleged Facts Demonstrate that Defendant Commissioners Have Violated the Indiana Access to Public Records Act

97. A court may compel production of records if a public agency has not met its burden of proof for denying a record request or, as is in this case, if the public agency has not responded to the requests after more than seven days and a record request is deemed denied *de facto*. See I.C. §§ 5-14-3-9(c), (e).

98. Here, all three Defendants have failed to meet the requirements to timely respond to requests filed by CNC IN Coalition member NIJC¹² under this statute within seven days of the request's filing to varying degrees. See *Appendix*; see also Exhs. C – R.

99. Most egregiously, the Defendant County Council has not responded to the multiple APRA requests with any responsive documents at all.

100. Defendant Clay County Commissioners have responded with a total of four documents only: the Request for Proposals; the single proposal submitted by BW

¹² Plaintiff recognizes that under a plain text reading of I.C. § 5-14-3-9(e), it is the “party” who has been denied the right to inspect a record that has the right to bring the action to compel production of the records. Here, CNC IN Coalition member, NIJC filed the initial APRA requests on behalf of the Coalition. NIJC is not a plaintiff in this action. However, Plaintiff respectfully requests that this Court permit Plaintiff to bring this second count against defendants either as a party substitution or under an agency theory.

With regard to the former, a Court may recognize a transfer of interest and permit substitution of parties under Rule 25(C) of the Indiana Rules of Court, Rules of Trial Procedure (as of July 25, 2021).

Alternatively, this Court may properly find that NIJC submitted the APRA requests as an agent of the CNC IN Coalition as its principal. See *Restatement of the Law, Third on Agency* (2006). Elsewhere in the code, Indiana recognizes a party may not only include an incorporated organization but also an incorporation organization or association, or “a group of such persons acting in concert.” I.C. § 4-6-3-1. The CNC IN Coalition plainly falls under all three of the latter categories and under agency theory, the CNC IN Coalition is the principal that holds the right to bring this action to compel production of the records under I.C. § 5-14-3-9(e).

Regardless under which theory, it is within the spirit of APRA that Plaintiff be permitted to bring this action not only behalf of the CNC IN Coalition but on behalf of the public. See I.C. § 5-14-3-1.

Development; the September 16, 2021 BOT Agreement/MOU; and the Resolution 10-202 alongside periodic updates related to the BOT Agreement/MOU this fall. The Commissioners have not produced any email communications or meeting minutes of the Clay County Jail Committee, despite all three Commissioners, Heffner, Sinderson, and Allender being copied on emails and Mr. Heffner participated in meetings according to minutes that were turned over to Petitioner by Sheriff Harden. This is indicative of Defendant Commissioners not conducting *any* search, or at least not a reasonable search for records that would be responsive to the APRA requests filed.

101. While more responsive than the other two county entities, Defendant Sheriff's Department halted providing responsive responses on October 26, 2021 in Sheriff Harden's last email exchange with NIJC.

102. Significantly, Sheriff Harden did not turn over further minutes of the Clay County Jail Committee despite evidence in his own responsive records that the Committee continued to meet past July 2021. *See* Exh. H-2 at 23.

103. Additionally, none of the Defendants have responded *sufficiently* to Petitioner's APRA requests because none of the Defendants have provided a denial of any request in full or in part with a statement of the specific statutory exemptions that allow them to withhold certain records. *See e.g. Opinion of the Public Access Counselor*, 18-FC-63 at 6 (finding that under the APRA, a public agency cannot "deny a public records request on the pretext that the records are deliberative or otherwise nondisclosable if the search has not yet occurred or yielded any material for review). This is not only not a best practice for county government entities but eliminates the affirmative defense that would have been

available to the Defendants to exempt records from disclosure under the statute in the event of the instant litigation. § 5-14-3-9(f).

104. For all of these reasons, Plaintiff requests that the Court find that the Defendants' violations of the APRA either all or in part are contrary to the express purpose of the APRA and compel disclosure of the requested records to the CNC IN Coalition.

PRAYER FOR RELIEF

Both the Indiana Open Door Law and the Indiana Access to Public Records Act are remedial statutes designed to increase government transparency and protect Indiana communities from secret government actions by public agency officials. Moreover, both statutes explicitly provide an avenue for injunctive relief if statutory violations by public agencies prevent them from actively participating in their local government processes.

WHEREFORE Plaintiffs respectfully request that this Court:

- (a) expedite this case pursuant to I.C. §§ 5-14-1.5-7(h), 5-14-3-9(l);
- (b) declare that one or more forms of the conduct delineated above by either Defendant Commissioners or Defendant County Council violates the Indiana Open Door Law; and
- (c) enjoin the Defendant Commissioners from signing a final agreement with developers to proceed with the expansion of the Clay County Jail without "substantial reconsideration," at a public meeting that has been properly noticed under the ODL;
- (d) declare that all three Defendants failed to respond to Plaintiff's requests in a timely manner under APRA section 5-14-3-9(c);

- (f) declare that all of the Defendants failed to properly issue written denials of Plaintiff's APRA requests in compliance with I.C. § 5-14-3-9(f);
- (g) compel all Defendants to produce the requested records to Plaintiff, in an electronic format, preferably in a portable document format ("PDF"), within a reasonable timeframe;
- (h) order Defendants to pay attorney's fees pursuant to I.C. §§ 5-14-1.5-7(f); 5-14-3-9(i);
- (i) grant Plaintiff any and all other appropriate relief as the Court may deem necessary or appropriate to fully vindicate the governmental transparency policies as expressly stated in the preambles of the ODL and APRA.

Respectfully Submitted,

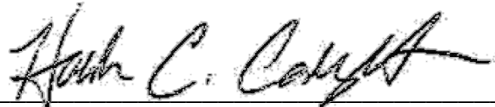


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Date: December 15, 2021

VERIFICATION

I affirm under penalties of perjury that the foregoing representations are true and correct to the best of my knowledge and belief.



Hannah Cartwright, Attorney for Plaintiff
Indiana Attorney No. 36644-49

Date: December 15, 2021

APPENDIX: TIMELINE OF DEFENDANTS' MEETINGS & ACTIONS IN 2021

Month	<u>Defendant Clay County Commissioners Meetings & Known Actions Taken</u>	<i>APRA Complaints Filed by Communities Against Cages Indiana with Defendant Clay County Entities</i>	<u>Defendant Clay County Commissioners Responses to APRA Requests</u>	<u>Defendant Clay County Sheriffs Department Responses to APRA Requests</u>	<u>Defendant Clay County Council Meetings & Responses to APRA Requests</u> <i>*Note: events with an asterisk indicate that the information came from Defendant Council's meeting minutes.</i>
February 2021	February 1, 2021 County Commissioners form Clay County Jail Committee. Approved advertising RFP. <i>[Plaintiff does not know whether Commissioners held a "special meeting" in February 2021]</i>				*February 1, 2021 County Council approved moving forward with refinancing jail bond.
March 2021	March 1, 2021 Regular Meeting Commissioners approved Resolution 2-2021 to refinance Jail Bond. March 11, 2021, Special Meeting March 17, 2021 Special Meeting <ul style="list-style-type: none"> BOT proposal submitted by RQAW taken into advisement. *prior to the official release of the RFP* 				*March 1, 2021 approved Resolution 4-2021 to refinance Jail Bond.

April 2021	<p>April 5, 2021 Regular Meeting</p> <ul style="list-style-type: none"> Approved Resolution 4-2021. <p>April 13, 2021 County Commissioners release Request for Proposals (RFP), <i>See</i> K-2</p>				*March 5, 2021, approved appropriations for Jail vehicles and improved benefits for recruiting officers.
May 2021	<p>May 3, 2021: Request for Proposals (“RFP”) for Clay County Jail Expansion Development are Due</p> <p>May 3, 2021 Regular Monthly Commissioners Meeting: *RQAW only bid received by the deadline. To be discussed at a special meeting.*</p> <p>May 3, 2021 Meeting of “Clay County Jail Committee” *Not Public” [<i>See</i> Exh. D-2]</p> <p>May 24, 2021 “Special Meeting”</p> <ul style="list-style-type: none"> Public hearing unattended. RFP for Clay County Jail Expansion discussed. Approved partnership with BW development. <p><i>See</i> Exh. K-1</p>			<p>*NOTE* ICE Facility inspection occurred of the Clay County Justice center between May 18, 2021 – May 20, 2021. The jail was found to “not meet standards” <i>See</i> Exh. Y.</p>	*May 3, 2021, approved amendment to Sheriff retirement plan.

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June 2021	<p>June 7, 2021 Regular Meeting</p> <p>June 9, 2021 Meeting of “Clay County Jail Committee” *Not Public* [See Exh. D-3]</p> <p><i>[Plaintiff does not know whether Commissioners held a “special meeting” as no minutes are publicly available for any “special meeting” occurring in June 2021]</i></p>	<p>June 18, 2021 APRA #1 request, filed by NIJC to Clay County Sheriff’s Department <i>See Exh. C.</i></p> <p>June 18, 2021 APRA #1 request, filed by NIJC to Clay County Commissioners <i>See Exh. J.</i></p>	<p>June 29, 2021 Response from Auditor Flater with Copy of Expansion Request for Proposal and meeting minutes for May 24, 2021 “special meeting <i>See Tab K.</i></p>	<p>Sheriff Harden releases communications with “Clay County Jail Committee” meeting minutes from May 3, 2021, June 9, 2021, and July 6, 2021 and email communications between County officials and developers RQAW and BW Construction <i>See Tab D.</i></p>	<p>*June 7, 2021 Council Meeting took place</p>
July 2021	<p>July 6, 2021 Regular Meeting</p> <p>July 9, 2021 Meeting of “Clay County Jail Committee” *Not Public* <i>See Exh. D-4</i></p> <p><i>[Plaintiff does not know whether Commissioners held a “special meeting” as no minutes are publicly available for any “special meeting” occurring in July 2021]</i></p>				<p>*July 6, 2021 Council Meeting took place</p>
August 2021	<p>August 2, 2021 Regular Meeting</p> <ul style="list-style-type: none"> Jail expansion was not included on agenda but raised in public comment by local Clay County residents and Plaintiff’s Coalition member <p><i>[Plaintiff does not know whether Commissioners held a “special meeting” as no minutes are publicly</i></p>				<p>*August 2, 2021 Council Meeting took place</p>

	<i>available for any “special meeting” occurring in August 2021]</i>				
September 2021	<p>September 7, 2021 Regular Meeting</p> <ul style="list-style-type: none"> Jail expansion was not included on agenda but raised in public comment by local Clay County residents and Plaintiff's Coalition members <p>Sept. 16, 2021 “Special Meeting”</p> <ul style="list-style-type: none"> “BOT Agreement [Memorandum of Understanding “MOU”] signed between Clay County and “Clay County Jail Partners, LLC” (Brian Battin on behalf of Clay County Jail Partners, LLC) See Exh. M-1 <p>Sept. 27, 2021 “special meeting”</p>	<p>September 9, 2021 APRA #2 request, filed by NIJC to County Commissioners. See Exh. L.</p> <p>September 9, 2021 APRA #2 request, filed by NIJC to Clay County Sheriff's Department. See Exh. E</p> <p>September 20, 2021 NIJC follow-up request to Sheriff's Department.</p>	<p>September 17, 2021 Auditor Flater response providing BOT Agreement/MOU via email to NIJC. See Exh. M.</p>	<p>September 13, 2021 Sheriff Harden responded that he would gather documents. See Exh. F.</p>	<p>September 7, 2021, Regular Meeting, Sheriff Harden attended Council meeting to request appropriations for new jail vans and to pay remaining cost of deputy vehicles purchased. Commissioner Sinderson attended Council meeting to request appropriations for Roads & Streets ordinance.</p>
October 2021	<p>October 4, 2021 Regular Meeting</p> <ul style="list-style-type: none"> Jail expansion was not included on agenda but raised in public comment by Plaintiff's Coalition members Meeting minutes do not reflect extent of concerns raised in public comment. 	<p>October 13, 2021 APRA request #1 filed by NIJC to Clay County Council See Exh. Q.</p>			<p>*October 4, 2021, approved purchase of a parcel on Alabama street related to the proposed jail expansion.</p>

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	<p>October 13, 2021 APRA #3 request, filed by NIJC to Clay County Commissioners <i>See</i> Exh. N</p> <p>Week of October 14, 2021, CNC IN Coalition repeated telephone calls to find out whether jail expansion was on agenda for “Special Meeting”</p> <p>October 19, 2021 NIJC follow-up re status of October 13, 2021 request to Sheriffs Department</p> <p>October 26, 2021 APRA clarification, filed to Clay County Commissioners with specific request for written letter with basis for denial</p>	<p>October 14, 2021 Email from Auditor Flater providing Resolution 2021-10. <i>See</i> Exh. O</p> <p>October 14, 2021 Email from Auditor Flater indicating that she forwarded APRA request for Clay County Council to Council President Larry Moss. <i>See</i> Exh. Q.</p> <p>October 20, 2021 Email from Attorney Somheil directing NIJC to BOT Agreement/MOU. <i>See</i> Exh. P.</p>		
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November 2021	<p>November 1, 2021 Commissioners’ Monthly Meeting *Meeting minutes not available on Website*</p> <ul style="list-style-type: none"> Attorney Somheil confirmed orally that the BOT Agreement/MOU was invalidated 	<p>November 4, 2021 NIJC sends follow-up email to Sheriff’s Dept. <i>See</i> Exh. I.</p> <p>November 4, 2021 NIJC sends follow-up email to Auditor Flater for status update on County Council APRA request from 10/13</p> <p>Week of Nov. 8, CNC IN Coalition telephone calls to Auditor Flater to confirm whether a Nov. “special meeting” has been scheduled</p>	<p>November 1, 2021 Email from Attorney Somheil indicating he is investigating but “last response to your request has not changed.”</p>		<p>*November 1, 2021 --Meeting minutes not available on the website</p> <p>November 5, 2021 Auditor Flater responds to NIJC follow-up indicating she does not have information re County Council except that meeting minutes are on County website (they were not in fact on the website at that time).</p>

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	<p>November 15, 2021 “Special Meeting” *Meeting minutes not available on Website*</p> <ul style="list-style-type: none"> Plaintiff’s Coalition members were physically present; jail expansion was not discussed <p><u>[Unknown Date] prior to or on December 3, 2021</u></p> <ul style="list-style-type: none"> <u>Re-validation of BOT Agreement/MOU</u> 	<p>November 11, 2021 CNC IN Coalition attempt to file Public Access Counselor complaints. <i>See Exhs. S-V</i></p>			<p>November 9, 2021 attorney on behalf of Council indicates that the request was received and is searching for responsive records. <i>See Exh. R.</i></p> <p><i>[At some point prior to or on December 6, 2021, County Council meeting minutes became available on County website]</i></p>
December 2021	<p>December 6, 2021 Regular Meeting *Meeting minutes not available on Website*</p> <p>**Meeting was recorded but then taken down off website</p>	<p>December 3, 2021 Email to Attorney Somheil attempting to clarify regarding alleged re-validation of BOT Agreement/MOU re (a) date of agreement and (b) status of “minimum scoping period”</p> <p>CNC IN Coalition members and local constituents in attendance of December 6, 2021 regular Commissioners meeting ask for verbal clarification re (a) and (b) and Commissioners</p>			<p>*December 6, 2021, Meeting minutes recorded</p> <p>During public comment period, Councilman President Moss stated that the County was keeping costs down to \$35 per individual detained in order for ICE to make a profit.</p>

		<p>and Attorney Somheil answer “No Comment”</p> <p>December 6, 2021 CAC IN Coalition Members Meet with PAC Britt. <i>See</i> Exh. W.</p> <p>Thursday, December 9 – Friday, December 10, CNC IN Coalition telephone calls to Auditor Flater to confirm whether a Dec. “special meeting” has been scheduled</p> <p>Tuesday, December 14, 2021, CNC IN Coalition telephone call to Auditor Flater to confirm whether a Dec. “special meeting” has been scheduled</p>	<p>December 9, 2021 Attorney Somheil responds indicating BOT Agreement/MOU was reinstated on November 12, 2021 (unclear which entity he was speaking on behalf of). <i>See</i> Exh. X.</p>		
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