

October 14, 2003

Mr. Larry J. Dernay
405 South Liberty Drive
Bremen, Indiana 46506

Re: Advisory Opinion 03-FC-85: *Alleged Violation of the Open Door Law by the Bremen School Board*

Dear Mr. Dernay,

This is in response to your formal complaint, which was received September 15, 2003. In it, you allege that the Bremen School Board (the "Board") has violated the Indiana Open Door Law (the "Open Door Law"). Specifically, you allege that the Board conducted a meeting on August 19, 2003, which was closed to the public and which occurred before the scheduled public meeting at 7:30 p.m. Brent Kaufman, Superintendent of Bremen Public Schools ("Superintendent Kaufman"), has responded in writing to your complaint. A copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that the Board violated the Open Door Law when a quorum was present and a member of the Board asked the Superintendent a question relating to public business. It is also my opinion that to avoid future incidents of perceived impropriety, whenever the Board concludes an executive session before a public meeting, the Board should immediately disperse until the public meeting is scheduled to commence, or open the doors to the public and cease discussion of all matters of public business.

BACKGROUND

In your complaint, you allege that the Board conducted a meeting (the "Executive Session") on August 19, 2003, which was closed to the public and which took place prior to the scheduled public meeting (the "Public Meeting") at 7:30 p.m. You further allege that you observed that the Executive Session was taking place when you arrived at 7:10 p.m. for the Public Meeting. You allege observing that no one else was in the room in which the Executive Session was taking place. You allege that you remained outside the room, but that you could see in and "hear things like 'budget' and 'school' but could not clearly make out the details."

You also allege that at 7:25 p.m., another individual arrived for the Public Meeting and entered the room. You allege that "[a]t that point, the superintendent and some school board

members abruptly stood up and left the room with the superintendent commenting, 'It's just about time for the meeting.'" You allege that later in the evening after the Public Meeting, you phoned school board member Stan Klotz ("Klotz") and asked him if the Board was discussing school issues at the Executive Session. You allege that Mr. Klotz responded in the affirmative, explaining that they were hearing the superintendent give information concerning the upcoming school budget, and some other school matters that he would not relay to you.

In his response, Superintendent Kaufman stated, "[t]he executive session began as [sic] 7:00 p.m. and the discussion ended at approximately 7:20 p.m." Superintendent Kaufman continues, "After the meeting closed the board simply sat and talked among themselves concerning various community topics, the health of a board member's mother, etc. It was during that time that Mr. Stan Klotz, a board member, did ask if he could ask me a question concerning the budget. I was asked by him if I had included the board's travel expenses as we did last year. I answered in the affirmative and the conversation ended." Superintendent Kaufman takes the following position:

1. Bremen Public Schools posted an executive and regular board meeting. Such postings were in accordance with appropriate procedure and code.
2. An executive meeting was held, starting at 7:00 p.m. and ending at 7:20 p.m., August 19, 2003.
3. The topic of the executive session centered upon the job performance of an individual employee of Bremen Public Schools and no other topic was discussed during that time.
4. After the executive session and during transition from executive session to general session a board member asked the superintendent a question concerning the 2004 budget.
5. The regular meeting of the Board of School Trustees began at 7:30 p.m.

ANALYSIS

The intent and purpose of the Open Door Law 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." Ind. Code § 5-14-1.5- 1. Indiana Code section 5-14-1.5-3(a) provides, in pertinent part, 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."

A meeting is defined as "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business." Ind. Code §5-14-1.5-2(c). The Board is a governing body of a public agency, and any gatherings of a majority of its members would constitute a meeting subject to the requirements of the Open Door Law. Ind. Code §§5-14-1.5-2(a) and (b). "Official action" is defined very broadly to include receiving information, deliberating, making recommendations, establishing policy, making decisions or taking final action. Ind. Code § 5-14-1.5-2(d). "Public business" includes "any function upon which the public agency is empowered or authorized to take official action." Ind. Code § 5-14-

1.5-2(e).

This complaint presents the interesting question of what transpires when a majority of the governing body remains assembled between the time that an executive session concludes and a public meeting begins. Although this question in itself is novel, my analysis is guided by a recent advisory opinion, Advisory Opinion 02-FC-04, Alleged Violation of the Indiana Open Door Law by the Miami Board of Commissioners.¹ In that Opinion, I wrote:

The determination of whether the Board of Commissioners violated the ODL with respect to the actions that took place on January 10th is dependent upon three factors. First, a majority of the members must have been present. Second, the members must have taken official [action] and third, that action must have concerned the public business of the Board of Commissioners. All three of these factors must have been present in order for the ODL to apply to the gathering on January 10th.

A gathering of a majority of the governing body does not cease to be a meeting simply because the governing body is transitioning between an executive session and a public meeting. If the interim meeting of the Board satisfies each of the three factors set forth above, the meeting was subject to the Open Door Law notwithstanding the transition.

In this case, the Board did have a meeting between the executive session and the public meeting. A majority of the members were present. The board members took official action by receiving information when one member asked the Superintendent a question concerning the budget, and the Superintendent answered. See Ind. Code § 5-14-1.5-2(d). Finally, the Board received information concerning the public business of the Board, i.e., the budget. What transpired between the closed Executive Session and the open Public Meeting was a meeting subject to the Open Door Law, and holding the meeting without notice and without opening the meeting to the gathering public was a violation of the law.

Elsewhere in Advisory Opinion 02-FC-04, I wrote, “It is not a violation of the ODL for the Board of Commissioners to have lunch together and discuss matters not related to the public business of the Board of Commissioners.” I reaffirm that statement here. The Board did not violate the Open Door Law by remaining assembled after concluding the executive session and prior to calling the regular meeting to order. Indeed, the Board did not violate the Open Door Law even by discussing the health of a board member’s mother. However, when Mr. Klotz asked Superintendent Kaufman whether Mr. Klotz could ask a question concerning the budget, Superintendent Kaufman’s response should have been, “No, not until the Public Meeting begins.” That would not have been a violation of the Open Door Law.

The Open Door Law sets forth only the minimum protections assuring open government; governing bodies are encouraged to take further appropriate steps to realize the purpose of the Open Door Law. Therefore, in the future, the Board may wish to disperse upon the conclusion

¹ Accessible online at <http://www.in.gov/pac/advisory/2002/2002fc04.html>. Last visited October 6, 2003.

of the Executive Session, perhaps to take a few minutes to mingle with the gathering public. Alternatively, the Board can immediately open the doors upon conclusion of the Executive Session to remove the public's suspicion that the Board is governing, and the public is not invited. These are but two examples of simple steps that can be taken to avoid future incidents of not only impropriety, but also perceived impropriety.

CONCLUSION

It is my opinion that the Board did trigger the Open Door Law by meeting between the regularly scheduled Executive Session and Public Meeting. It is also my opinion that this interim meeting was a violation of the Open Door Law.

Sincerely,

Sandra K. Bowman
Acting Public Access Counselor