

October 12, 2004

Mr. Brian Kaplan
7425 Noel Forest Ct.
Indianapolis, IN 46278

Re: Formal Complaint 04-FC-157; Alleged Violation of the Open Door Law and the Access to Public Records Act by the MSD Pike Township Board of Education

Dear Mr. Kaplan:

This is in response to your formal complaint alleging that MSD Pike Township Board of Education (“Board”) violated the Open Door Law (“ODL”) and the Access to Public Records Act (“APRA”) by failing to maintain proper meeting memoranda and by failing to provide you with the public records you requested. For the following reasons, I find that the MSD Pike Township School Board of Education did not violate the Access to Public Records Act, and to the extent that the Board technically violated the Open Door Law, the Board substantially complied with the law.

BACKGROUND

On September 9, 2004, you submitted to this office a formal complaint in which you alleged several violations of the Open Door Law and the Access to Public Records Act. Your allegations are as follows:

1. The memoranda/minutes from the August 13 school board retreat are incomplete as they fail to list the general substance of any matters proposed, discussed, or decided.
2. You requested, on August 30, the memoranda or minutes from the June 13 or June 14, 2003 executive sessions. The School advised you that it had no records responsive to your request, which you allege means that the records were either lost or were not maintained, in violation of I.C. §5-14-1.5-6.1(d).
3. On May 12, 2004, you requested copies of “all notices of all MSD Pike Township school board executive sessions.” At that time, the Board failed to provide copies of those documents to you, and you were told that you had received all records

responsive to your request. However, you received those records pursuant to your August 30 record request. You allege that these records should have been provided to you pursuant to your May 12 request.

4. You allege that the memoranda for the executive sessions held on May 18, June 15, August 10, and August 13, 2004 violate the Open Door Law in that they fail to cite to the specific statutory provision within I.C. 5-14-1.5-6.1(b) authorizing the executive session.

I forwarded a copy of your formal complaint to the MSD Pike Township Board of Education, and Mr. William T. Hopkins, Jr., attorney, responded. I have enclosed a copy of Mr. Hopkins' response for your reference.

ANALYSIS

Allegation #1

Your first allegation is that the memoranda/minutes kept during the August 13, 2004 school board retreat are incomplete insofar as they fail to recite any matters proposed, discussed, or decided at that meeting. The Board is a governing body of a public agency for purposes of the Open Door Law. I.C. §5-14-1.5-2(b). The Open Door Law requires a governing body to keep memoranda both for public meetings and executive sessions. I.C. §5-14-1.5-4(b). For public meetings, the memoranda must include: (1) the date, time, and place of the meeting; (2) the members of the governing body who were present or absent; (3) the general substance of all matters that were proposed, discussed, or decided; (4) a record of all votes taken (by individual members if there was a roll call); and (5) any other additional information required pursuant to I.C. §5-1.5-2-2.5 or I.C. §20-12-63-7. "The memoranda is a brief summary of the meeting." *Opinion of the Public Access Counselor 04-FC-90*. The Open Door Law does not require that minutes be kept; however, if they are, they must be open for public inspection and copying. I.C. §5-14-1.5-4(c).

In *Opinion of the Public Access Counselor 00-FC-12*, this office held that an agency must keep memoranda of their meetings that at least conform to the very minimal requirements of Indiana Code section 5-14-1.5-4. In that opinion, the Commission kept meeting minutes but kept no memoranda. This office reviewed the minutes to determine if they conformed to the memoranda requirements of I.C. §5-14-1.5-4(b). During that meeting, the agency discussed approval of a claim regarding a particular parcel of real estate. This office stated that it was not evident after reviewing the minutes that the Commission ever acted on that parcel, as there was only a general reference to the approval of claims. Furthermore, while the minutes did reflect some of the actions taken by the Commission, there was often no detail at all, or there were inaudible statements that noted that the transcriber could not determine what was considered. In holding that those minutes violated the Open Door Law, this office stated that "[w]hile the minutes that were provided to me meet some of these requirements, it is entirely too difficult to determine what happened at the Commission's meetings by reviewing their minutes alone. The purpose of the Open Door Law is to ensure that the public is fully informed." *Id.*

In response to your allegation, Mr. Hopkins states that the Board complied with the requirements set out in I.C. §5-14-1.5-4(b). In support, he has provided a copy of the August 13 minutes, which states, in pertinent part “[t]he topics discussed were the 2003-2004 Student Data, Budget Update, and Open Door Access.” Mr. Hopkins’s response emphasizes that, at a minimum, the Open Door Law requires only the *general substance* of all matters proposed, discussed, or decided be included in the meeting memoranda. The August 30 memoranda do include a list of the items discussed, and further, include a certification by the Board that no subject was discussed other than those listed. You do not allege that final action was taken on any of these items, only that the minutes fail to recite any matters proposed, discussed, or decided at that meeting. Only if final action was taken but not recorded in the meeting memoranda would they have been insufficient. While the memoranda give no further detail on those items listed, the list does comply with the minimum requirements of I.C. §5-14-1.5-4(b). Therefore, it is my opinion that the memoranda do not violate the Open Door Law.

Allegation #2

You next state that on August 30, you requested copies of the memoranda/minutes from the June 13 or June 14, 2003 executive sessions. You allege that you were advised that the Board has no such records responsive to your request, and you state that this statement indicates that those records were either lost or were not kept, in violation of I.C. §5-14-1.5-4(d). As stated, the governing body of a public agency must keep meeting memoranda. Failure to do so is a violation of the Open Door Law. Therefore, if the Board failed to provide the memoranda to you because it failed to create the memoranda, as you allege, that failure is a violation of the Open Door Law.

Failure of an agency to provide the memoranda to you because it was lost or destroyed may also be a violation of the APRA. Generally, failure to produce a public record that does not exist and is not required to be maintained by an agency is not a denial under the Access to Public Records Act. *Opinion of the Public Access Counselor 01-FC-61*. However, if an agency is required to maintain a record, failure to provide a copy of it may be a violation of the Access to Public Records Act. If the Board’s meeting memoranda or minutes are subject to a record retention schedule under I.C. §5-15, destroying those records before the time allowed would be a violation of §I.C. 5-15 pursuant to I.C. §5-14-3-4(e).

I note that Mr. Hopkins’ response states that this allegation has been “subsumed by (your) prior allegations and Mr. Hurst’s June 25th opinion.” While it appears that you have submitted a similar, if not identical request that resulted in a formal advisory opinion from this office, the request at issue in your current complaint occurred on August 30, 2004. While it is not specifically addressed in the Access to Public Records Act, you may resubmit identical requests multiple times, and are entitled to receive the requested records each time, unless those records are confidential or otherwise nondisclosable under I.C. §5-14-3-4.

Allegation #3

You next state that on May 12, 2004, you requested copies of all notices of all MSD Pike Township school board executive sessions. You allege that the notices for the August 13 and August 14, 2003 executive sessions were not provided to you at that time, but you did receive

them in response to your subsequent, August 30 request. You state that the notices should have been produced in response to your May 12 request.

Pursuant to I.C. §5-14-5-7, a person who chooses to file a formal complaint with this office must do so not later than thirty (30) days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. You do not allege that the August 13 or August 14, 2003 executive sessions were held secretly or without notice. Therefore, your allegations regarding the Board's failure to provide copies of the executive session notices for those meetings in response to your May 12 request are untimely filed. Furthermore, that issue appears to have been addressed by this office in a prior advisory opinion.¹

Allegation #4

Finally, you allege that the memoranda for the executive sessions held on May 18, June 15, August 10, and August 13 all fail to cite to the specific exception under which notice of the executive session was given. Pursuant to I.C. §5-14-1.5-6.1(d), the memoranda of an executive session must identify the subject matter considered by specific reference the enumerated instance or instances for which public notice was given. Mr. Hopkins addresses each meeting individually, but asserts for each that a narrative description was provided, and that the narrative complies with I.C. §5-14-1.5-6.1(d). Further, he states that assuming, arguendo, that the narrative is a technical violation, the memoranda substantially comply with the Open Door Law.

As referenced above, a formal complaint must be made within thirty (30) days of either the date of the denial, or the date the complainant receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. Again, you do not allege that these meetings were held in secret or without notice. Therefore, with respect to the executive session held on May 18 and June 15, your complaint is not timely filed. However, the issues raised in your complaint with respect to those two meetings are identical to the issues raised with respect to the memoranda of the August 10 and August 13 executive sessions, which have been filed timely. Therefore, I address this issue with respect to only the two executive sessions timely filed in your complaint, but note that the allegations with respect to the May 18 and the June 15 executive sessions are analogous.

In a prior advisory opinion, this office addressed a situation in which the complainant alleged that the executive session memoranda were insufficient as they failed to cite to the specific statutory exception under which the executive session was held. *Opinion of the Public Access Counselor* 04-FC-90. As you know, that complaint was filed by you, and this office held that the memoranda were deficient. However, in that opinion, this office recognized that some of the memoranda contained a narrative description sufficient to inform the reader under which subsection of the statute the meeting was held. This office held that "the citation is still required for even those, but as to those a court would likely find that the Board technically violated but was in substantial compliance with the law." *Id.*, citing *Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind. Ct. App. 1998).

¹ 04-FC-90, which was issued pursuant to a formal complaint that you submitted to this office.

In *Town*, the court held that substantial compliance involves an analysis of: (1) the extent to which the violation denied or impaired access to a meeting; and (2) the extent to which public knowledge or understanding of the public's business was prevented or impaired. *Id.* The second prong of that test is applicable to the sufficiency of the meeting memoranda. The memoranda of the August 10 executive session stated that "[t]he purpose of the meeting was to discuss collective bargaining." The memoranda of the August 13 executive session stated that "[t]he purpose of the meeting was to train school board members with an outside consultant about the performance of their role as public officials." The Board is clearly referencing exceptions I.C. §5-14-1.5-6.1(b)(2)(a) and (b)(11), respectively. Because it is clear what exception is being referenced, the public's knowledge or understanding of the Board's business was not prevented or impaired. Therefore, it is my opinion that the August 10 and August 13 memoranda are technically in violation of I.C. §5-14-1.5-6.1(d), but that they are substantially compliant with the Open Door Law.

CONCLUSION

For the foregoing reasons, I find that the MSD Pike Township School Board of Education did not violate the Access to Public Records Act, and to the extent that the Board technically violated the Open Door Law, the Board substantially complied with the law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. William Hopkins