

December 6, 2004

Via Facsimile

Mr. Scott J. Sigman
150 West Market Street, Suite 100
Indianapolis, IN 46204

*Re: Formal Complaint 04-FC-209; Alleged Violation of the Open Door Law by the
Indiana Port Commission*

Dear Mr. Sigman:

This is in response to your formal complaint alleging that the Indiana Port Commission (“Commission”) violated the Open Door Law by holding a meeting without posting notice or keeping memoranda. I find that Commission technically violated the Open Door Law.

BACKGROUND

You allege in your complaint, filed November 5, 2004, that a majority of the Commission met on November 4, 2004 with 11 staff of the Ports of Indiana. During this meeting, there were discussions regarding various staff matters, including an announcement of the impending appointment of a public official, the reorganization of the Commission staff, and compensation plans and benefits. You further allege that there was no notice posted of this meeting, no memoranda kept, and that during the meeting you brought to the attention of the Commission that a majority (four) members were present in violation of the Open Door Law. You were advised that the gathering was for purposes of discussing personnel issues and as such, would qualify as an executive session. The meeting continued in spite of your concerns, you allege. You also allege that on October 20, 2004 there may have been a gathering of four commissioners, where there were four out of town commissioners present in the offices of the Port Commission that day. You state that “official investigation may or may not demonstrate this additional contravention of the Open Door Law.”

I sent a copy of your complaint to the Chairman of the Port Commission Ken Massengill. The enclosed response was sent by Chief Counsel William T. Niemier, on behalf of the Commission. In his response, Mr. Niemier explained that on November 4, three Commissioners conducted a meeting with staff regarding personnel issues. Chairman Massengill announced to staff that at the November 10 meeting, Rich Cooper would be named Acting Executive Director. He further states that issues were discussed regarding expectations for the conduct of current staff. Employees were instructed to follow their respective job descriptions and to work together as a team. Mr. Niemier states that toward the end of the meeting, a fourth commissioner entered the room, mistakenly believing the meeting to be a budget meeting that was to have been held after the staff meeting. The fourth commissioner sat along a side wall and listened to the Chairman's closing remarks. When the Chairman finished his comments, he invited the fourth Commissioner to address staff. This Commissioner thanked the staff for their work during the past year. Mr. Niemier acknowledges that, in retrospect, there was a technical violation of the Open Door Law. However, he argues that there was no intention to violate the Open Door Law, and because no final action was taken at this meeting, there was no harm as a result of these events. He does not address the question you raise concerning activities of four commissioners who were present in the Port Commission's offices on October 20.

ANALYSIS

It is the intent of the Open Door Law 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. The Indiana Port Commission is a public agency subject to the Open Door Law. IC 8-10-1-3(a); IC 5-14-1.5-2(a). Further, the Commission is a governing body. IC 5-14-1.5-2(b)(1).

A gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business constitutes a "meeting" under the Open Door Law. IC 5-14-1.5-2(c). Except as provided in IC 5-14-1.5-6.1, 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 governing body is required to post notice of its meetings 48 hours prior to the meeting, IC 5-14-1.5-5(a) and keep memoranda during the meeting, IC 5-14-1.5-4.

You have alleged, and the Commission acknowledges, that four members of the seven-member Commission met on November 4. Although not explicitly stated, Mr. Niemier implicitly admits that the Commission took official action at the November 4 meeting, and that there was no notice posted 48 hours prior to the meeting nor any memoranda kept during the meeting. I draw this inference from the lack of any argument contrary to those assertions. "Official action" includes receiving information, deliberating, making recommendations, establishing policy, making decisions, or taking final action. IC 5-14-1.5-2(d). From the description of the meeting given by you and the Commission, it appears that the Commission made decisions and established policy, at a minimum. Also, meeting with staff on internal administrative functions of the Commission is not outside the rubric of the Open Door Law, because IC 5-14-1.5-5(f)(2) excludes from the notice requirement of the Open Door Law (but not from the right for the public to attend), meetings held solely to confer with staff members on

matters relating to the internal management of the unit, but only for county executives or legislative bodies of towns.

You were told during the meeting that it was a proper executive session because personnel matters were being discussed. Mr. Niemier also mentions this conversation. Mr. Niemier understandably does not argue that this is justification for not posting notice of the gathering, since IC 5-14-1.5-5(a) requires such notice for executive sessions. However, I also note that even had the Commission posted notice as an executive session, the type of official action taken and the subject matter of the November 4 meeting would not fall within any of the four or so executive session instances involving personnel matters, and there is no general “personnel matters” exception to open meetings. IC 5-14-1.5-6.1(b).

Courts have recognized that an agency may commit a technical violation yet substantially comply with the Open Door Law. *Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind.Ct.App. 1998). Courts determine whether to declare any policy, decision, or final action void by determining the extent to which the violation: (A) affected the substance of the policy, decision, or final action; (B) denied or impaired access to any meetings that the public had a right to observe and record; and (C) prevented or impaired public knowledge or understanding of the public’s business. IC 5-14-1.5-7(d)(1).

Here, the gathering became a meeting only after the fourth commissioner, constituting a majority of the Commission, arrived after most of the meeting had been conducted. This appears to be only a technical violation of the ODL. However, I am concerned that the Commission did not heed your advice and request that the fourth Commissioner leave the room, especially given the Commission’s argument that his belated attendance at the gathering was inadvertent.

With respect to your second issue, without more information to substantiate a violation of the Open Door Law, the mere presence of four commissioners in the Port Commission’s offices on one day is not a violation of the Open Door Law. As stated earlier in this opinion, a gathering of four commissioners for the purpose of taking official action on public business would constitute a meeting that would be subject to the requirements of the Open Door Law.

CONCLUSION

For the foregoing reasons, I find that the Indiana Port Commission committed a technical violation of the Open Door Law when four of its commissioners gathered and took official action on November 4, 2004.

Sincerely,

Karen Davis
Public Access Counselor

cc: William T. Niemier