

June 25, 2004

Mr. Brian C. Kaplan
7425 Noel Forest Court
Indianapolis, Indiana 46268

*Re: Formal Complaint 04-FC-90; 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 the MSD Pike Township Board of Education (Board) violated the Indiana Open Door Law (Ind. Code §5-14-1.5) (Open Door Law) and the Indiana Access to Public Records Act (APRA) (IC 5-14-3) with regard to various meetings and that governing body's failure to keep proper records. The Board's response to your complaint is enclosed for your review. As more fully set forth below, I find that some but not all of your claims have merit and support actionable violations of Indiana's public access laws.

BACKGROUND

Following an informal inquiry with this office regarding your concerns that the Board might be routinely meeting in violation of the Open Door Law, on May 12, 2004, you made a public records request to the Board for copies of "all notices, agendas, and minutes/memoranda of all MSD Pike Township school board executive sessions and work sessions from the years 2003 and 2004." Your request also asked that the Board retain all audio tapes of Board meetings pursuant to the record retention schedule applicable to those records. You did not request copies of audio tapes, but made this statement based on your understanding that the Board routinely recycles the audio tapes of each meeting before at the next meeting of the Board and before approval of the minutes from the prior Board meeting. You indicate that the Board produced records in response to your request on May 21, 2004.¹ You provide copies of the records you received in response to the request, and now assert seven allegations that, if supported, raise issues under the Open Door Law and the APRA. Your Open Door Law claims assert that (1) the

¹ You do not indicate whether the Board provided you with any earlier response acknowledging your request, and you do not now assert any claim that the Board failed to timely respond to your written request.

memoranda of public meetings do not contain the general substance of all matters proposed, discussed or decided, and particularly do not mention matters raised by members of the public; (2) the memoranda for meetings were not prepared as the meetings progressed; (3) no notice was posted for executive sessions; (4) the memoranda for executive sessions failed to include citation to the specific enumerated statutory provision authorizing the meeting; (5) some executive sessions were conducted for unauthorized purposes; and (6) no memoranda were kept for “work sessions.” You also assert a single claim under the APRA, specifically, that audio tapes of the meetings were destroyed in violation of the applicable record retention schedule. The Board generally denies these allegations, save for your claim regarding the failure to keep memoranda for “work sessions.” Regarding that claim, the Board states that it will keep memoranda for those sessions in the future.

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.” IC 5-14-1.5-1. Toward that end, except under very limited circumstances, all meetings of the governing body of a public agency must be open for the purpose of permitting members of the public to observe and record the meetings. IC 5-14-1.5-3(a). 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.” IC 5-14-1.5-2(c). “Public business” means “any function upon which the public agency is empowered or authorized to take official action.” IC 5-14-1.5-2(e). “Official action” is very broadly defined by our state legislature to include merely “receiving information” and “deliberating” (defined by Indiana Code 5-14-1.5-2(i) as a discussion which may reasonably be expected to lead to a recommendation, policy, decision or vote of that governing body), to actually making recommendations, establishing policy, making decisions, or taking a vote. IC 5-14-1.5-2(d).

The Open Door Law requires notice of meetings. A majority of a governing body that gathers together for any one or more of the purposes described above is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. IC 5-14-1.5-5(a). The notice must be posted at the principal office of the public agency at issue, or if no principal office exists, at the location where the meeting is to be held. IC 5-14-1.5-5(b). Notice must also be provided to media, but there is no requirement that the media or the governing body “publish” the notice, and publication does not satisfy the posting requirements of the statute. *See* IC 5-14-1.5-5(b).

The notice requirement also applies to executive sessions. IC 5-14-1.5-5; 5-14-1.5-6.1(d). Executive sessions are governed by Indiana Code 5-14-1.5-6.1, and may only be conducted under very limited circumstances. In addition to date, time and place, the content of a notice for an executive session must also include citation to the specific “enumerated” section of the Indiana Code that permits the governing body to meet in executive session.

The Open Door Law also requires the governing body to prepare a “memoranda” of the meeting, “as the meeting progresses.” IC 5-14-1.5-4(b). The memoranda is a brief summary of

the meeting. For public meetings, the memoranda must include information on (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 any additional information required for specific governing bodies under other statutes. IC 5-14-1.5-4(b). A memoranda is required for all executive sessions too, except that for executive sessions the memoranda will not contain a record of any votes since none may be taken at an executive session (*see* IC 5-14-1.5-6.1(c)), and instead of setting out the general substance of all matters discussed, the governing body must cite to the same provision of Indiana Code authorizing the meeting as was cited in its notice. IC 5-14.1.5-6.1(d). Further, an executive session memoranda must contain a certification from the governing body that they discussed only the matter falling within the citation on the notice. IC 5-14-1.5-6.1(d).

I first address your Open Door Law claims under these standards. You first claim is that the memoranda of the public meetings do not contain the general substance of all items proposed, discussed or decided, and in particular, they do not contain matters raised by the public. The Board responds to your allegation with the statement that the Board memoranda do contain the general subject matter of all items discussed, but that the Board is not required to differentiate between and identify the originator of any matter coming before the Board. If your claim is that the memoranda *wholly omit* items that were originated by persons other than by members of the Board, (which is what I understand it to be), the Board contests that claim and thus raises a disputed issue of fact that cannot be resolved in this advisory opinion. The only evidence I have regarding what was and was not discussed at the meetings are the minutes or, memoranda, that you provided. I cannot know from these whether any specific matter discussed at any specific Board meeting was not included, and you do not cite to any specific example of omission. Indeed, it appears from the minutes that matters were certainly brought up by persons who were not Board members (*e.g.*, updates by contractors and staff). Given the factual dispute presented, your claim and any evidence you have to support it are more appropriate for resolution in a court of competent jurisdiction in any civil action you might file under Indiana Code 5-14-1.5-7. That said, I offer these additional comments. The Board's response appears to agree generally with the principle underlying your claim, that is, that the memoranda must contain reference to *all matters* proposed, discussed or decided, not just to those proposed or discussed *by members of the Board*. The Board's agreement notwithstanding, and while I believe that to be the best practice for a governing body and in compliance with the spirit of the law, I am doubtful that the failure to include an item brought up by someone who is not a member of the governing body constitutes a violation of the law. While the meeting is a public meeting, it is surely not the *public's meeting*. Rather, it is a meeting of the governing body. Under the Open Door Law, the public is afforded only the right to "observe and record" the meeting. It seems counterintuitive given the plain language of the statute that the General Assembly intended that the omission in a memoranda of a public meeting of an issue raised by someone that is not a member of the governing body would constitute a violation of Indiana state law. I would decline to find such an omission to be a violation of the statute.

Your next claim is that the memoranda were not prepared as the meeting progressed. You state, "school board meetings were recorded to audio tape, but no memoranda were

prepared as the meeting progressed.” Essentially, your argument is that the memoranda must be *written memoranda* prepared as the meeting progresses. The statute does not require this. As I explained to you in my response to your informal inquiry, the audio recording of the meeting may constitute the memoranda required under the Open Door Law so long as it contains the items required by that statute. This too is the argument of the Board in response to your allegation renewed in this formal complaint. I agree with the Board that a memoranda was created as the meeting progressed. There remains, of course, the issue of whether the memoranda of the public meetings is deficient in content. Again, your claim raises a factual dispute that cannot be resolved in this forum. You assert that the tape recordings do not contain all of the matters that are required to be in a memoranda pursuant to state. You do not say what information is missing, and the Board denies the allegation. The audio tapes are not provided, and all I have to review this claim are the minutes of the meetings that were created from the audio tapes and approved by the Board in subsequent meetings. Those minutes are not deficient. While that does not establish that the tapes contained the minimum content required by the Open Door Law, it is evidence of that fact. Accordingly, I decline to find a violation on this claim, but again refer you to your civil remedies and your opportunity to develop evidence to support your claim before a court of competent jurisdiction. *See* IC 5-14-1.5-7.

You fare better on your claim alleging that notice was not provided for executive sessions. On this point, the Board both denies your claim generally and at the same time concedes that it did not and could not provide you with notices of the meetings. The Open Door Law, and the APRA for that matter, place the burden of establishing compliance on the Board. With regard to whether or not a notice was posted, that burden is a rather easy matter; the Board need only produce the notice that was posted and submitted to the media in accordance with the statute. They do not do so here. For those executive sessions that the Board is unable to produce notice, the presumption is either that notice was not given (a violation of the Open Door Law), or that notice was given and the Board lost or destroyed the public record that proves that fact (a violation of the APRA). *See* IC 5-14-3-7(a) requiring a public agency to protect its records from loss or destruction). In my opinion, the Board’s failure to produce evidence that it complied with the notice requirement for any of its executive sessions establishes a violation of the Open Door Law with regard to those meetings.

Your next claim has merit as well. You assert that the memoranda of the executive sessions are deficient because they fail to cite to the specific statutory provision authorizing the executive session. I agree, and the Board’s response does as much to prove your point. The Board’s response to your complaint very carefully cites to the various specific subsections of Indiana Code 5-14-1.5-6.1(b) that authorize executive sessions for particular purposes. But the memoranda themselves (here, written memoranda) do not contain any of these careful references to statute. For example, many of them cite to Indiana Code 5-14-1.5-6.1(a). That statute does not set forth an authorized purposes for an executive session let alone authorize executive sessions at all. Rather, that statute defines the term, “public official.” IC 5-14-1.5-6.1(a). Other notices cite to Indiana Code 5-14-1.5-6.1(b). While that is closer, there are twelve different subsections to section 6.1(b), and the Open Door Law requires that a governing body give specific notice to the public concerning which one of those sections was utilized for a closed door meeting. IC 5-14-1.5-6.1(d); *see Gary/Chicago Airport Board of Authority v. Maclin*, 772

N.E.2d 463, 468 (Ind. Ct. App. 2002). Moreover, the memoranda are not salvaged by the narrative descriptions of the bases for the meetings set forth within them (*e.g.*, for discussion of “personnel matters”). *See Maclin*, 772 N.E.2d at 468 (a notice that merely refers to “legal matters or FOIA requests is insufficient). Aside from the plain language of the statute, that is so because not every personnel matter, for example, can be discussed in executive session. Rather, in this area an executive session can be held only to interview prospective employees (IC 5-14-1.5-6.1(b)(5)), to receive information about a specific employee’s misconduct (IC 5-14-1.5-6.1(b)(6)), or to discuss a job performance evaluation of an individual employee (IC 5-14-1.5-6.1(b)(9)). All of the Board’s memoranda for executive sessions are defective and in violation of the Open Door Law in that they fail to include a citation to the specific statute authorizing the executive session.²

Your next claim is that the executive sessions were held for improper purposes. As noted above, the purposes for which a governing body may meet in executive session are limited, and narrow. The Board now asserts that the sessions were all for proper purposes. For example, when in its memoranda (it does not say which one of many) it stated that an executive session was for purposes of discussing “personnel,” it meant (and allegedly discussed) a job performance evaluation authorized by Indiana Code 5-14-1.5-6.1(b)(9). And, when its memoranda it stated that an executive session was for purposes of discussing “Middle School Rigor,” it meant (and allegedly discussed) strategy with regard to pending litigation authorized by Indiana Code 5-14-1.5-6.1(b)(2)(B). Of course, if the Board did meet in executive session for proper purposes, notwithstanding what it actually said at the time, the meetings would not violate the Open Door Law aside from the notice and memoranda violations already discussed. In the face of the Board’s denial and the disputed issue of fact that it raises, I decline to find a violation on this claim and again refer you to your civil remedies and your opportunity to develop evidence to support your claim before a court of competent jurisdiction. *See* IC 5-14-1.5-7.

Your final claim under the Open Door Law is that no memoranda were kept for work sessions. Because these involved a majority of Board members and were for the purposes of taking official action on public business as those terms are broadly defined by statute, memoranda were certainly required. The Board’s failure to keep memoranda for its work session meetings violates the Open Door Law. The Board effectively concedes as much, and states that it will begin to keep memoranda for future work sessions.

Your last claim is brought under the APRA. You assert that the Board is destroying a public record outside the requirements of its record retention schedule. Specifically, you assert that the audio recordings of Board meetings are being recycled at the next meeting, before the minutes of the prior meeting are approved, all in violation of an approved record retention schedule. As noted above, a public agency is required to maintain its records and protect them from loss or destruction. IC 5-14-3-7(a). The Board responds that the tapes are being recycled,

² Some of the memoranda do contain a sufficient narrative description to inform the reader which subsection of the statute it was meeting under. *E.g.*, to interview prospective applicants and to discuss strategy with regard to land acquisition. 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. *Cf. Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind. Ct. App. 1998); *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. Ct. App. 1988).

but only after the prior meeting's minutes are approved, all in accordance with an approved record retention schedule. The Board's response to your claim creates a disputed issue of fact best resolved for a trial court. That said, it is my opinion that if the Board taped over any portion of the audio recording of a prior meeting before that meeting's minutes were approved, the Board would be in violation of the APRA and possibly other state statutes governing record retention. *See* IC 5-14-3-7(a); *see also* IC 5-15-6-3 (governing preservation of public records of local public agencies and requiring that records be kept for three years except under certain circumstances).

CONCLUSION

For the reasons set forth above, I find that some but not all of your claims have merit and support actionable violations of Indiana's public access laws.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. William T. Hopkins, Jr.