July 6, 2005

Stanley A. Stephens
6501 Winona Drive
Lawrence, IN 46236

Re: Formal Complaint 05-FC-115; Alleged Violation of the Open Door Law by the City of Lawrence Board of Public Works and Safety.

Dear Mr. Stephens:

This is in response to your formal complaint alleging that the City of Lawrence Board of Public Works and Safety ("Board") violated the Open Door Law ("ODL") by discussing public business outside of a publicly noticed meeting or executive session.

BACKGROUND

On June 6, 2005 you filed a formal complaint with the Office of the Public Access Counselor. Your complaint was assigned formal complaint number 05-FC-115. Your complaint alleges that the Board met in violation of the Open Door Law. Your complaint arises from the following facts. On April 25, 2005 you were notified by the Lawrence Deputy Police Chief that you were being charged with a violation of departmental rules and regulations and would, therefore, receive a five-day suspension. You requested that the Board review the disciplinary action via letter dated April 28, 2005. On May 5, 2005 you received a letter from the Board Chairman, Karen Horth Powers, stating that the Board upheld your suspension. You believe that the Board must have met in violation of the ODL since no public meeting or executive session was publicly noticed to discuss the issue of your suspension prior to your receipt of the May 5th letter. You contend that the Board could not have held an executive session to discuss this matter.

Stan Hirsch, Corporation Council for the City of Lawrence, responded to your complaint on behalf of the Board by letter dated June 22, 2005. He stated that the Board did not hold an executive session. He stated that you only requested review of the disciplinary action and that you did not request a hearing pursuant to IC 36-8-3-4.1. Moreover, he stated that the members

of the Board conducted individual review of the action. A formal vote to uphold the discipline was taken at the May 12, 2005 meeting of the Board.

My office called Mr. Hirsch to question what led to the May 5, 2005 letter upholding the disciplinary action, which predates the May 12, 2005 Board meeting. Mr. Hirsch stated that the Board members conducted independent review of the information provided to them concerning the disciplinary action. Following independent review of the materials, the Board members communicated via e-mail that each believed that the disciplinary action was appropriate and intended to uphold that action. Upon learning that the Board was already in unanimous agreement, a member of the Board contacted Mr. Hirsch and inquired whether they should go ahead and issue a letter indicating the Board's intent rather than waiting until the May 12, 2005 meeting. Mr. Hirsch indicated that the Board could go ahead and send the letter. Mr. Hirsch acknowledges that the better course of action would have been for the Board to wait until the May 12, 2005 meeting and has apologized for what he feels was an error on his part.

My office was unable to obtain copies of the e-mails concerning this matter prior to the issuance of this opinion. Mr. Hirsch indicated that he was unaware of any specific information concerning the content, timing, or recipients of the messages.

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 everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. IC 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes 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).

Does E-Mail Communication Constitute a "Meeting" for Purposes of the Open Door Law?

At issue here is whether a majority of the Board gathered together outside a public meeting for the purpose of taking official action on public business. Clearly, the Board is a governing body of a public agency and any gathering of a majority of its members would constitute a meeting subject to the requirements of the Open Door Law. IC 5-14-1.5-2(a) and (b). The Board is made up of three members; therefore a gathering of two members would constitute a majority for purposes of the Open Door Law.

The Board members' individual review of information packets concerning the disciplinary action and a subsequent vote at a properly noticed Board meeting would not constitute a violation of the ODL. However, the situation presented here is more complicated. Following individual review of the information the members of the Board communicated via e-mail concerning public business. The issue presented, therefore, is whether communication via e-mail constitutes a "gathering" for purposes of the ODL. This issue has not been previously addressed by Indiana courts or formal advisory opinions of this office. However, this office has strongly advised agencies to avoid communication between members that could lead to potential violations of the ODL.

While not binding, case law from other states that have addressed the issue are instructive. Of the cases and States'Attorney General opinions available, many were concerned with issues regarding the timing of communications and whether they were of a "serial" nature or simultaneous nature. Some cases also considered the intent of the members of the public agency in choosing the method of communication. Of the decisions available, *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004), construes a statute most similar to the ODL.

The Supreme Court of Virginia, in *Beck v. Shelton* addressed the e-mail communications of a council under a statute similar to the Indiana ODL. In that case the question was whether e-mail communications between councilmen, regarding public business, constituted a meeting for the purposes of the Virginia Freedom of Information Act ("VFOIA"). The VFOIA states in relevant part:

> "'Meeting' or 'meetings' means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body."

Va. Code Ann. § 2.2-3701. The Supreme Court of Virginia analyzed the definition of "meeting" using principles of statutory construction. The court stated:

> "[T]he key to resolving the question before us is whether there was an 'assemblage.' The term 'assemble' means 'to bring together' and comes from the Latin simul, meaning 'together, at the same time.' The term inherently entails the quality of simultaneity. While such simultaneity may be present when e-mail technology is used in a 'chat room' or as 'instant messaging,' it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission."

Id. at 198. The court, under the circumstances presented, declined to find that a meeting had occurred via e-mail.

There are no court cases in Indiana interpreting IC 5-14-1.5-2(c); therefore, we must rely upon the rules of statutory construction to interpret this provision. The primary goal of statutory construction is to determine and give effect to the intent of the legislative body. *Freeman v. State*, 658 N.E.2d 68, 70 (Ind. 1995). "In construing statutes, words and phrases will be taken in their plain or ordinary and usual sense unless a different purpose is clearly manifest by the statute itself . . ." *Indiana State Dept. of Revenue v. Colpaert Realty Corp.*, 109 N.E.2d 415, 418-419.

The ODL defines a "meeting" 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). The definition of "gather" is "to bring together." [1] The definition of "gathering" is "assembly" and "meeting." [2] Given the similarities between the VFOIA and the ODL, and the interchangeable usage of the terms "gathering" and "assembly" it is instructive to note that the Virginia Court found that the issue turned on the relationship in time, or the "simultaneity," of the communications.

While some states have specifically addressed forms of communication other than personal assemblage, Indiana has not. [3] Therefore, I find that it is wholly consistent with the ODL to interpret the term "gathering" to require some amount of simultaneous discussion. The determination of whether electronic communication would constitute a meeting for purposes of the ODL would be dependent upon the circumstances of the e-mail communication and should include consideration of the timing of the communications.

I cannot render an opinion whether the e-mail communications violated the ODL in this instance, due to the fact that the e-mail communications are not available for review. Without being able to determine the time proximity of the e-mail messages, it is difficult to say whether they would more closely resemble a gathering or written correspondence sent through the mail. Additionally, I believe that it would be necessary to address the intent of the parties in communicating by e-mail. The ODL clearly exempts from the definition of a "meeting" those "social or chance gatherings not intended to avoid [the ODL]." If intent to avoid the ODL were evidenced in e-mail communications, I would find it difficult to determine that no violation of the ODL had occurred. Without having all of the relevant facts presented, I cannot ascertain whether there was any intent to circumvent the ODL here.

Final Action Must be Taken at a Public Meeting

Although I could not make a determination as to whether the e-mail communications would constitute a gathering in violation of the ODL, I can address the action taken on May 5, 2005. The ODL clearly states that, "[a] final action must be taken at a meeting open to the public." IC 5-14-1.5-6.1 (c). "'Final action' means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order."

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[1] *Merriam-Webster Online Dictionary* (visited July 5, 2005) <*http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=gathering*>.
[2] *Id*.
[3] *See* John F. O'Connor and Michael J. Baratz*, Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719 (2004).

You requested a review of your suspension by the Board pursuant to IC 36-8-3-4.1, which states:

> "(a) This section also applies to all towns and townships that have full-time, paid police or fire departments. For purposes of this section, the appropriate appointing authority of a town or township is considered the safety board of a town or township. In a town with a board of metropolitan police commissioners, that board is considered the safety board of the town.
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> (b) In addition to the disciplinary powers of the safety board, the chief of the department may, without a hearing, reprimand or suspend without pay a member, including a police radio or signal alarm operator or a fire alarm operator, for a maximum of five (5) working days. For the purposes of this section, eight (8) hours of paid time constitutes one (1) working day. If a chief reprimands a member in writing or suspends a member, the chief shall, within forty-eight (48) hours, notify the board in writing of the action and the reasons for the action. A member who is reprimanded in writing or suspended under this section may, within forty-eight (48) hours after receiving notice of the reprimand or suspension, request in writing that the board review the reprimand or suspension and either uphold or reverse the chief's decision. At its discretion, the board may hold a hearing during this review. If the board holds a hearing, written notice must be given either by service upon the member in person or by a copy left at the member's last and usual place of residence at least fourteen (14) days before the date set for the hearing. The notice must contain the information listed under section 4(c) of this chapter. If the decision is reversed, the member who was suspended is entitled to any wages withheld as a result of the suspension."

IC 36-8-3-4.1. You did not request a hearing and it was at the Board's discretion whether to provide one. The Board could review the information independently. However, final action of the Board must still be taken at a public meeting, under the ODL. The May 5th letter sent to you by the Chairman of the Board stated that the Board had reviewed the information provided and determined that there was a violation of departmental rules and regulations and therefore, upheld the suspension. An order upholding a suspension would be a final action subject to the Open Door Law. In taking final action, outside of a publicly held meeting, on May 5th the Board violated the Open Door Law.

CONCLUSION

For the foregoing reasons, I find that the Board could independently review the suspension; however the Board violated the Open Door Law when it took final action on the suspension outside of a meeting open to the public.

Sincerely,

Karen Davis
Public Access Counselor

cc: Stan B. Hirsch