



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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September 19, 2005

Hans Markland
58 West 1000 North
Wheatfield, IN 46392

Re: Formal Complaint 05-FC-170; Alleged Violation of the Open Door Law by the Jasper County Board of Commissioners

Dear Mr. Markland:

This is in response to your formal complaint alleging that the Jasper County Board of Commissioners ("Board") violated the Open Door Law ("ODL") by failing to properly post notice regarding an executive session held on August 1, 2005.

BACKGROUND

You state in your formal complaint, filed with the Office of the Public Access Counselor on August 18, 2005, that the Board held an executive session on August 1, 2005. You allege that the notice for the meeting was not posted until approximately 10:30 or 11:00 a.m. on the day of the meeting. You also complain that notice of the meeting was not published in the newspaper.

Ms. Donya G. Jordan, Auditor of Jasper County, responded on behalf of the Board by letter dated August 29, 2005. A copy of that letter is enclosed for your reference. Ms. Jordan stated that the notice for the executive meeting was faxed to the newspapers on July 28, 2005. She also indicated that the notice was posted outside of the Board's room at the same time. Enclosed were copies of the faxed notices, which included the fax transaction reports dated July 28, 2005.

ANALYSIS

The intent and purpose of the Indiana Open Door Law ("ODL") 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. The provisions of the ODL are to be "liberally construed with the view of carrying out its policy." IC 5-14-1.5-1.

Indiana Code section 5-14-1.5-5(a) provides that:

Public notice of the date, time, and place of any meetings, *executive sessions*, or of any rescheduled or reconvened meeting,
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shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting.

(Emphasis added). A notice of an executive session must also state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under IC 5-14-1.5-6.1(d). The public agency is required to:

(1) (post) a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and

(2) deliver notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency. The notice may be delivered to the media via facsimile.

IC 5-14-1.5-5(b).

There is a dispute of fact regarding when the Board's notice was posted at the Board's principal office. If the notice was posted on July 28, 2005, at the same time that the media notices were faxed, as indicated by Ms. Jordan, then the Board would not be in violation of the ODL. The notice would have been posted at least 48 hours prior to the meeting, excluding the weekend days. If the notice was posted at 10:30 or 11:00 am on the day of the meeting, as you contend, then the Board violated the ODL.

The ODL does not require public agencies to *publish* notice of meetings in the newspaper. It does require that public agencies provide notice to the media 48 hours in advance. The Board did provide notice to the media at least 48 hours, excluding weekends, before the executive session. The Board complied with the ODL when notice was faxed to the media 48 hours prior to the meeting.

I note that the notice posted by the Board did not include all of the information required under IC 5-14-1.5-6.1(d). The notice states that the Board will meet to discuss the agreed judgment Cause #37-D01-0308-PL-326 pending before the Jasper Superior Court. The Board failed to state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). The Board violated the ODL by failing to include the citation and language of the code exemption that was the basis for the executive session.

Consequently, it is unclear which instance the Board intended to rely on to discuss the agreed order; therefore, it is difficult to say whether the Board could properly meet in executive session to discuss the agreed order. It appears that the Board might have intended to meet pursuant to IC 5-14-1.5-6.1(b)(2)(B), which allows the Board to meet in executive session to discuss strategy with respect to the initiation of litigation or litigation that is either pending or has been threatened specifically in writing. Although the Board met to discuss an agreed order that is pending, it is not evident that the Board met for the purpose of discussing strategy with respect to pending litigation. The Board's discussion might have been appropriate for an executive

session; however, as the Board did not cite an instance for which it could meet I cannot determine that the Board could have properly met in executive session on August 1, 2005.

CONCLUSION

For the foregoing reasons, I find that the Jasper County Board of Commissioners did not violate the Open Door Law when it faxed notice to the media at least 48 hours in advance of the executive session. If the Jasper County Board of Commissioners posted notice of the executive session, at its principal office, at least 48 hours before the meeting it did not violate the Open Door Law. The Jasper County Board of Commissioners did violate the Open Door Law when it failed to cite to specifically enumerated exemption or exemptions for which the executive session was held. Additionally, the Jasper County Board of Commissioners may have violated the Open Door Law when it met in executive session on August 1, 2005, if the purpose of the meeting was not one of the enumerated instances under IC 5-14-1.5-6.1(b).

Sincerely,

Karen Davis
Public Access Counselor

cc: Donya G. Jordan