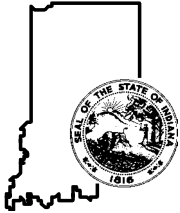


# STATE OF INDIANA

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October 12, 2005

Lynn A. Donathen
3684 3rd Road
Bremen, IN 46506

*Re: Formal Complaint 05-FC-183; Alleged Violation of the Open Door Law by the Bremen Public Schools Board of School Trustees*

Dear Mr. Donathen:

This is in response to your formal complaint alleging that the Bremen Public Schools Board of School Trustees ("Board") violated the Open Door Law by holding an executive session to discuss an issue that did not appear in the public notice for the executive session.

## BACKGROUND

The Board posted a public notice for an executive session to be held at 6:30 pm on August 16, 2005. The public notice provided that the executive session would be held "[t]o receive information about prospective employees" pursuant to IC 5-14-1.5-6.1(b)(5). The memoranda for the executive session state that "[n]o topics were discussed other than those allowed by law and properly advertised. There being no further business, the meeting was adjourned at 7:30." However, you believe that the executive session included a discussion of whether the varsity basketball coach should continue in his current position. You allege that this is confirmed by discussions with two Board members and by an e-mail message of the superintendent. Bremen's superintendent, Russ Mikel, sent an e-mail to a third party, Mark Malone, on Wednesday, August 17th, stating that the Board had met to review his letter concerning the varsity basketball program. He indicated that the Board had agreed that the current varsity basketball coach would continue in his position after reviewing his previous evaluations and other information.

Mark E. Wagner, attorney for the Board, responded to your complaint by letter dated September 19, 2005. A copy of that letter is enclosed for your reference. Mr. Wagner admitted that at the executive session, the Board "received information about an existing employee of [the school corporation] which the Board had received written complaints about." Mr. Wagner stated that when Mr. Mikel posted the notice for the executive session he thought the meeting was to be held for the evaluation of the basketball coach and to discuss possible replacements for him. Mr. Wagner confirmed that prior to discussion of whether to receive information about a possible replacement for the coach, the Board discussed whether it was necessary to terminate the coach's contract and find a replacement. The Board did not receive information about prospective employees because it determined that it would not replace the coach; and, therefore, ended the

meeting prior to receiving information about prospective employees. He said that, "[i]n retrospect it would have been better if Mr. Mikel had added to the notice for the executive session that it was also 'to discuss, before a determination, the individuals status as an employee. . .', as allowed by I.C. 5-14-1.5-6.1(b)(6)(B)." Mr. Wagner argued that, "[t]he spirit of the Open Door Law was certainly not violated if the Board first had to decide whether it wanted to start the process of replacing an existing employee before it would receive information about possible replacements for that employee." He asserted that there was no intent by the Board to "cover up" what happened at the executive session since the party who made the complaint was informed of the outcome of the executive session the following day.

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. Hence, all meetings of a governing body of a public agency must be open at all times for the purpose of permitting members of the public to observe and record them, except as provided in section 6.1. IC 5-14-1.5-3(a). A meeting is defined as a gathering of a majority of a governing body for the purpose of taking official action on public business. IC 5-14-1.5-2(c). "Official action" means to: receive information; deliberate; make recommendations; establish policy; make decisions; or take final action. IC 5-14-1.5-2(d).

*Executive Session Subject Matter*

It is the public policy of the ODL that it is to be construed liberally in favor of disclosure. For this reason, Indiana courts have generally held that exceptions to the general rule of openness are to be narrowly construed. IC 5-14-1.5-1. "Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . '[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions.'" *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995) [Citations omitted.], quoting, *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E 2d 726, 729 (Ind. Ct. App.1982) [Citations omitted]. Hence, the burden is on the Board to show that its August 16th executive session was held for the stated purpose under IC 5-14-1.5-6.1(b)(5).

An executive session is a meeting from which the public is excluded. IC 5-14-1.5-2(f). Executive sessions may be held only for the instances contained in IC 5-14-1.5-6.1(b). Notice of an executive session must be posted at least 48 hours in advance of the executive session, excluding Saturdays, Sundays, and legal holidays. IC 5-14-1.5-5(a). The notice must contain the date, time and place of the meeting, and for executive sessions, must state the subject matter of the session by specific reference to the enumerated instance or instances for which executive sessions may be held under IC 5-14-1.5-6.1(b). IC 5-14-1.5-6.1(d). An executive session may be held for the purpose of receiving information about and interviewing prospective employees. IC 5-14-1.5-6.1(b)(5).

While the Board asserts that it did not intend to circumvent the ODL, it is evident that the Board failed to comply with the ODL. It is clear that the Board intended to meet in order to both receive information about the basketball coach and to discuss possible replacements for him. However, the Board has admitted it was not preparing to receive information about and interview prospective employees *per se*. Rather, the Board asserts that it anticipated the need to discuss possible replacements for the coach. After holding "preliminary discussions" the Board determined that it was not necessary to discuss possible replacements. The exceptions that allow a public agency to hold an executive session must be narrowly construed. The ODL does not provide that public agencies may take any action other than those specifically enumerated in IC 5-14-1.5-6.1(b). Therefore, under its notice, the Board could only have received information about and interviewed prospective employees; it could not have discussed "possible replacements" for the boys' basketball coach.

As Mr. Wagner suggested, the Board could have met in executive session with respect to an individual over whom the Board has jurisdiction, to receive information concerning the individual's alleged misconduct, and to discuss, before a determination, the individual's status as an employee.[1] IC 5-14-1.5-6.1(b)(6). However, the Board did not state this specific instance in its public notice. The Board violated the ODL when it met in executive session to discuss, before a determination, an individual's status as an employee, without posting a proper notice that included the specific enumerated instance for which the Board met.

Additionally, the Board asserts, as evidence that it was not trying to "cover up" the discussion at the executive session, that it informed the complainant, Mr. Malone, of the result of the executive session the following day. The Board's argument misses the mark. The intent of the 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. Hence, it is the interests of the public at large that are impaired when a public agency fails to comply with the ODL. The fact that one member of the public was informed of the outcome after the fact does not negate the violation of the ODL.

*Memoranda of Executive Sessions*

Under the Open Door Law, public agencies that conduct meetings are required to keep memoranda.

> "As the meeting progresses, the following memoranda shall be kept:
> (1) The date, time, and place of the meeting.
> (2) The members of the governing body recorded as either present or absent
> (3) The general substance of all matters proposed, discussed, or decided.
> (4) A record of all votes taken, by individual members if there is a roll call.
> (5) Any additional information required under Indiana Code 5-1.5-2-2.5 or Indiana Code 20-12-63-7."

IC 5-14-1.5-4(b). These memoranda are to be available within a "reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings." IC 5-

[1] In order to meet in executive session pursuant to IC 5-14-1.5-6.1(b)(6) it would have been necessary for the Board to both receive information concerning the individual's alleged misconduct and to discuss, before a determination, the individual's status as an employee. See *Baker v. Town of Middlebury*, 753 N.E.2d 67, 73 (Ind. Ct. App. 2001).

14-1.5-4(c). In addition, memoranda of executive sessions must also conform to the requirements under IC 5-14-1.5-6.1(d), which provides that memoranda for an executive session must:

> "[I]dentify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda . . . that no subject matter was discussed in the executive session other than the subject matter specified in the public notice."

IC 5-14-1.5-6.1(d).

The Board's memoranda of the executive session failed to identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. Additionally, the memoranda state that no other topics were discussed other than those properly advertised. However, the Board did not hold the discussion that was advertised in the public notice; rather, it discussed a topic other than that which was publicly noticed. The Board violated the ODL when it failed to identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given and when it certified in the memoranda that no topics were discussed other than those allowed by law and properly advertised.

## CONCLUSION

For the foregoing reasons, I find that the Bremen Public Schools Board of School Trustees violated the Open Door Law when it met in executive session for a purpose that was not properly noticed. The Bremen Public Schools Board of School Trustees also violated the Open Door Law when its memoranda did not identify the subject matter considered by specific reference to the enumerated instance or instances for which it met and incorrectly certified that no other topic was discussed in its memoranda of the executive session.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mark Wagner