

September 29, 2006

Sent Via Facsimile

Larry Medlock
Lewis Maudlin
1 East Main Street
Paoli, IN 47454

*Re: Formal Complaint 06-FC-164; Alleged Violation of the Open Door Law by the
Washington County Commissioners*

Dear Messrs. Medlock and Maudlin:

This is in response to your formal complaint alleging that Washington County Commissioners (“Commissioners”) violated the Open Door Law by meeting after a public meeting to take official action on public business, in violation of the Open Door Law. I find that the Commissioners took official action on public business in violation of the Open Door Law.

BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor on September 22, 2006, seeking an opinion regarding whether the Commissioners met behind closed doors immediately following a public meeting on September 5, 2006. You requested priority for your complaint because you intend to file a complaint in court to enjoin any future violations of the Open Door Law. You have stated one of the circumstances under which priority status may be granted, and I am issuing this opinion within seven days of filing. *See* Ind. Code 5-14-5-10; Ind. Admin. Code tit. 62, r. 1-1-3.

You allege that the *Salem Democrat* newspaper reported that the Commissioners had met after adjournment of a public meeting to discuss the taking of gravel by Commissioner Byron Green, and other Highway Department crew members. Commissioner Byron Green was alleged to have taken the gravel from the County Highway Department, where he works as a foreman.

You allege that payment for the gravel by those alleged to have taken it was the topic of discussion after adjournment.

You enclosed the newspaper report of the account. Commissioner Mike Goering was quoted as well as Highway Department Superintendent Rick Graves. Graves was reported as stating that he was “informed by Commissioner Mike Goering that Green and Commissioner Phillip Lofton had decided to waive the payment after the Commissioners’ meeting Monday morning.” In addition, the *Democrat* reported that Commissioner “Goering said at the end of the Commissioners’ meeting, after they had adjourned, the three commissioners talked about the situation.”

I sent a copy of your complaint to the Commissioners. County Attorney Thomas E. Scifres responded by letter, a copy of which is attached for your reference. Mr. Scifres investigated the matter and reported the following.

Both Commissioners Green and Lofton are Highway Department employees. Superintendent Graves confronted Green and the other employees about the claim that gravel had been taken. This discussion occurred on the day of the Commissioners’ meeting. Superintendent Graves demanded that all of them reimburse the County for the cost of one load of gravel. It was that decision by Superintendent Graves that resulted in an informal discussion by the Commissioners.

Mr. Scifres denies that the subject of the gravel was discussed in the public meeting. The subject of the gravel did not come up until after the meeting was over and the meeting room was being shut down. At the time of the discussion, the persons who had attended the public meeting had left. The Commissioners were preparing to leave the room when a casual conversation ensued.

Commissioner Green revealed that he and several men in his district had been approached by Superintendent Graves about allegations of taking gravel, or other road scrapings, and told they each would be responsible for paying the County for one load of gravel as reimbursement. All three Commissioners confirmed that the nature of this conversation was a casual one about the fairness of the demand to the employees, who were acting as instructed by a foreman. All three Commissioners discussed their opinion on the matter of fairness of the demand for reimbursement to the employees, not as applied to Commissioner Green.

Commissioner Goering does not recall any discussion that would have directed him to go to the Highway Superintendent about the opinions of the Commissioners. Commissioner Goering claims that he had determined in his own mind that he would do so, but cannot say he was told to do so. Commissioners Green and Lofton claim that they were not intending for their personal opinions on the issue to be delivered to the Superintendent as a decision or mandate of the Commissioners.

Superintendent Graves confirmed that he had met with the men involved with the alleged taking of scraped road material and asked that each reimburse the county for one load. He also confirmed that Commissioner Mike Goering informed him of the Commissioners’ discussion

that day. Superintendent Graves advised that after reading the newspaper account that stated that the matter had been referred to the Washington County Prosecutor's office, he withdrew his request for reimbursement. It was for that reason alone that he withdrew his request.

In summary, Mr. Scifres asserts that the three Commissioners admit that they discussed the matter after the meeting, that Commissioners Green and Lofton felt they were having a personal discussion about the fairness to the employees of a demand by the Superintendent, and was not to be construed as official action or communication relating to the Highway Department. Commissioner Goering admits he cannot recall being directed to take the opinions of the Commissioners to the Superintendent.

Mr. Scifres contends that the Commissioners are not required under the Open Door Law to refrain from casual personal conversation as they close down the meeting room and exit a meeting. Admitting that the encounter was not a "chance" one, the spirit is the same. One of the Commissioners had been personally bothered by a decision made by his Superintendent at work and was soliciting his contemporaries' opinions. Since the Superintendent withdrew his request for reimbursement pending the outcome of the Prosecutor's investigation, any discussion, perceived decision, or aftermath, are without effect. The Commissioners acknowledge that they would have no problem with any perceived decision by them rescinded as no formal action was intended.

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. Except as provided in section 6.1 of the Open Door Law, 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. IC 5-14-1.5-3(a). "Meeting" means 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). A meeting does not include a social or chance gathering not intended to avoid the Open Door Law. IC 5-14-1.5-2(c)(1).

"Official action" means to 1) receive information; 2) deliberate; 3) make recommendations; 4) establish policy; 5) make decisions, or 6) take final action. IC 5-14-1.5-2(d). "Deliberate" means a discussion which may reasonably be expected to result in official action. IC 5-14-1.5-2(i). "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). The Commissioners are a public agency and a governing body. IC 5-14-1.5-2(a)(2); IC 5-14-1.5-2(b).

The facts that are not in dispute show that all the Commissioners were gathered after the conclusion of a public meeting. In addition, the Commissioners held a discussion, or received information, on the public business of the Commissioners: the County Highway Department. The discussion regarding the fairness of the Highway Superintendent's demand for reimbursement to the County was a function upon which the public agency was empowered or authorized to take official action.

The Commissioners have not directly disputed that the discussion regarded a function upon which they were empowered or authorized to take official action. The Commissioners admit that the gathering was not “chance” because they had already held a public meeting. Instead, the Commissioners advance an argument that I should consider their subjective intent in holding the discussion: that no “official action” was intended and was meant to address only the Commissioners’ personal views of the matter.

However, the Open Door Law sets forth objective standards for governing bodies. That the Commissioners agree subjectively that their discussion was of a personal nature and not intended as official action does not dispel the fact that the Commissioners took official action on their public business. This is true irrespective of whether or not Commissioner Goering acted on his own or at the direction of the other Commissioners, and whether or not the rescission action by the Superintendent was a result of the communication by Commissioner Goering. Once the Commissioners began discussing the fairness of the Highway Superintendent’s action, they took official action on public business. This meeting took place without notice and outside of the public. The meeting was a violation of the Open Door Law.

CONCLUSION

For the foregoing reasons, I find that the Washington County Commissioners violated the Open Door Law when they met on September 5 at the conclusion of a public meeting.

Sincerely,

Karen Davis
Public Access Counselor

cc: Thomas E. Scifres