

March 1, 2006

Edith Jackson
1355 Baywood Drive
New Haven, IN 46774

Re: Formal Complaint 06-FC-30; Alleged Violation of the Access to Public Records Act and the Open Door Law by the East Allen County School Board

Dear Ms. Jackson:

This is in response to your formal complaint alleging that the East Allen County School Board (“School Board”) violated the Access to Public Records Act and Open Door Law by failing to produce memoranda of meetings in a timely fashion, and by deciding in an executive session to end the search for a Superintendent.

BACKGROUND

On January 16, 2006, the School Board met in an executive session. The notice of the executive session recited that the session was “to receive information about, and interview, prospective employees.” You allege that during the executive session, the School Board met to receive information about and interview the interim Superintendent Kay Novotny. The School Board met the next evening, January 17, 2006, and voted to hire Superintendent Novotny. You contend that the School Board took final action in its executive session to stop the process of considering other potential candidates from outside the school district, as it had decided to do some months prior to the January 2006 meetings.

You also allege that you were not given the minutes from the January 17 public meeting in a timely fashion. You allege that you were told you could not have the minutes of the public meeting until the Board met on February 7 to approve them.

I sent the School Board a copy of your complaint. The School Board responded via memorandum; the response is attached for your reference. General Counsel J. Timothy McCaulay stated that the School Board did not take a vote to end the search for a superintendent

at its January 16 executive session. Rather, the School Board members present at the executive session met with Dr. Novotny to interview her. After the interview, Dr. Novotny left the meeting place. Board President Terry Jo Lightfoot advised the other members of an e-mail she had received from Dr. Lee Harman, of Ball State University. President Lightfoot reported to her colleagues that Dr. Harman believed that Dr. Novotny was a strong internal candidate and it would be difficult to develop a pool of qualified external candidates. During the discussion of Dr. Novotny's qualifications, one or more of the School Board members expressed an intention to add an item to the agenda at the next night's meeting to propose that the School Board hire Dr. Novotny as the Superintendent. No vote was taken on the question of whether to hire Dr. Novotny or to terminate the Superintendent selection process. Also, no other public business was discussed.

At the next night's public meeting, the Board posted the already prepared agenda, which did not contain any item relating to hiring the Superintendent. A member of the School Board proposed to amend the agenda to add an action item to consider the hiring of Dr. Novotny. The motion to amend the agenda carried. Later in the meeting, when the new item was raised, there was considerable discussion among the School Board's members. Chiefly, that discussion related to whether consideration of the proposal to hire Dr. Novotny was inconsistent with the Board's prior public statements that the Board would consider external candidates. A vote taken after this discussion carried, resulting in the hiring of Dr. Novotny as the Superintendent.

Although you do not raise any issues with respect to the notice of the executive session, Counsel McCaulay admitted that the technical requirements of the Open Door Law were not met because the notice lacked the citation to the specific authority in the Open Door Law for the executive session. However, Mr. McCaulay contends that the notice met the substantial compliance standard applied to such notices, because the notice contained the precise text of the executive session exemption.

Finally, with respect to the issues you raise regarding the Access to Public Records Act, Mr. McCaulay stated that your request for "agenda, minutes, memoranda and taped recordings" of the meetings of January 16 and 17 was delivered to the School Board on January 24, 2006. The School responded on January 24 by sending you a letter granting your request in part and denying it in part. For records developed during the executive session, the School denied them under the exemption specifically for such records, with the exception that the memoranda would be disclosed. You would be provided with various other records, including the minutes of the January 17 meeting when completed. In his response to your complaint, Mr. McCaulay did not address your contention that you were told the Board first had to meet to approve the January 17 minutes. Rather, Mr. McCaulay stated that you were sent copies of the minutes on February 8. Mr. McCaulay contends that there is no requirement that written memoranda be prepared as the meeting progresses, since an audio recording may suffice as the memoranda. Also, there is no statutory deadline for producing memoranda. He contended that draft minutes of the January 17 meeting were not available until February 2.

ANALYSIS

Open Door Law

The intent of the Open Door Law is that 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 for executive sessions, 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).

An executive session is a meeting from which the public is excluded. IC 5-14-1.5-2(f). Public notice of the date, time and place of any meetings or executive sessions shall be given at least forty-eight hours before the meeting, excluding Saturdays, Sundays, and legal holidays. IC 5-14-1.5-5(a). Public notice of an executive session must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under section 6.1(b). IC 5-14-1.5-6.1(d). 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. IC 5-14-1.5-2(g).

One possible executive session is "To receive information about and interview prospective employees." IC 5-14-1.5-6.1(b)(5). You do not raise a concern with that part of the executive session during which Dr. Novotny was interviewed. However, you contend that the School Board violated the Open Door Law by discussing and deciding to stop the search for a superintendent during the executive session.

While narrow construction of the executive session exceptions under the Open Door Law is the general rule, an Indiana Court of Appeals decision interpreting the executive session exception for job performance evaluations allowed a more liberal reading of this provision. In *Baker v. Town of Middlebury*, 753 N.E.2d 67, (Ind. App. 2001), *transfer denied* (2002), an employee of the Town alleged that during an executive session to discuss his job performance, the Town Council had violated the Open Door Law. Specifically, the plaintiff alleged that the Town Council had taken final action during the executive session, which is not permitted under Indiana Code section 5-14-1.5-6.1(c), by compiling a list of persons to be rehired during that private session and keeping his name off the list. The list was later used in the open, public meeting to make decisions on who would be rehired. The Court held that the compilation of the list was not "final action" and that doing so did not go beyond the scope of the General Assembly's expressed intention to permit governing bodies the ability to meet privately to discuss certain personnel matters.

Based upon this interpretation of the Open Door Law and the facts before me, I conclude that no final action occurred during the February 16 executive session of the School Board. Further, the ensuing discussion in the executive session about the intention of some members to move to hire Superintendent Novotny at the next public meeting did not violate the Open Door Law under the construction accorded the Open Door Law in *Town of Middlebury*. It also is my

opinion that the notice met the substantial compliance standard at IC 5-14-1.5-7(d). Although the School Board omitted the pinpoint citation to the instance for which it met in executive session, it recited the text of the instance. This technical violation would not have prevented or impaired public knowledge or understanding of the public's business. IC 5-14-1.5-7(d)(1)(C).

A governing body utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. IC 5-14-1.5-4(a). This office has advised that nothing in the Open Door Law prevents a governing body from amending its agenda during the meeting. Therefore, there was no violation of the Open Door Law by amending the agenda during the meeting to consider hiring Dr. Novotny.

Inherent in your complaint is your dissatisfaction with the School Board's decision to terminate the search for a Superintendent prior to considering other outside applicants, where the School Board had stated publicly it intended to pursue external candidates. Although the School Board's action may have surprised or disappointed members of the public, it is not a violation of the Open Door Law for a governing body to pursue a different course of action from one promised previously.

Access to Public Records Act

You complain that you had not received copies of the memoranda from the public meeting of January 17 in a timely manner. You claim that you were told that you would not receive those memoranda until the School Board met on February 7 to approve the minutes. The School Board's response does not confirm or deny that you were told you must await the School Board's adoption of the minutes before receiving a copy. Rather, the School Board explained that you had received a copy of the audiotape of the meeting in a timely manner, there is no statutory deadline in which written memoranda must be produced, and tape recording maintained during the meeting sufficed for memoranda.

Under the Open Door Law, the following memoranda shall be kept as the meeting progresses:

- (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 IC 5-1.5-2-2.5 or IC 20-12-63-7.

(c) The 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. The minutes, if any, are to be open for public inspection and copying.

IC 5-14-1.5-4(b).

I agree with the School Board that the audio recording of the meeting meets the requirements of IC 5-14-1.5-4(b) *so long as* the audio recording contains all the information required in section 4(b) of the Open Door Law. *See Opinion of the Public Access Counselor 04-FC-90.* I have no information regarding whether the audio recording is complete. If it is not, the

School Board violated IC 5-14-1.5-4(b) if the School Board has proffered the audio recording as its memoranda.

However, I do not agree with the assertion that there is no statutory deadline for producing memoranda. IC 5-14-1.5-4(c) provides that memoranda are to be available within a reasonable period of time after the meeting. If you were provided the audio recording within just a day or two of the meeting, that would have been reasonable, in my opinion. Also, since you requested minutes as well as the recordings of the meetings, it would have been incumbent upon the School Board to produce the minutes, in draft or final form, when those minutes were created. This office has often advised that a public agency may not delay inspection or copying of minutes that exist in draft form until such time as the governing body has approved the minutes. If the School Board had created draft minutes of the January 17 meeting at the time you made your request, the School Board should have disclosed those to you prior to February 8.

CONCLUSION

The East Allen County School Board substantially complied with the Open Door Law, but may have violated the Access to Public Records Act if it delayed giving you draft minutes that existed when you made your request.

Sincerely,

Karen Davis
Public Access Counselor

cc: J. Timothy McCaulay