

April 5, 2007

Sent Via Facsimile

Jan Carroll
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, IN 46204

Re: Formal Complaint 07-FC-80; Alleged Violation of the Open Door Law by the Board of Trustees of Ivy Tech Community College of Indiana

Dear Ms. Carroll:

This is in response to your formal complaint alleging that the Ivy Tech Community College of Indiana (“Ivy Tech”) violated the Open Door Law by taking impermissible action, including final action, in a March 22, 2007 executive session.

BACKGROUND

You filed a formal complaint on behalf of *The Indianapolis Star* against Ivy Tech on March 28, 2007. You allege that Ivy Tech held an executive session on March 22, 2007, during which the Board of Trustees took impermissible action in violation of the Open Door Law. Based on public statements by the trustees, votes were taken during the executive session both on whether to defer the selection of Ivy Tech’s new president and on which of the two final candidates would be hired. You also complain that the board of trustees deliberated in executive session, so that only the pro forma “official” vote was conducted in the public meeting that followed. The fact that the board of trustees took a formal vote in the later public meeting cannot cure the violation of the Open Door Law during the executive session, as set forth in Indiana Code 5-14-1.5-7(c).

The extensive deliberations that took place in executive session also violated the Open Door Law, you contend. Ivy Tech posted a notice of the executive session reciting that it would meet “to receive information about and interview prospective employees.” This exception does not permit discussion about the relative merits of the various prospective employees. Other executive session purposes clearly permit discussions or deliberations during the executive session, in contrast with the clearly delineated purpose for which Ivy Tech met. The trustees should have deliberated in public about which candidate should lead Ivy Tech, where the public could have heard the rationale for hiring this important public employee. Instead, the public meeting opened with a motion to name Tom Snyder as president. There was no discussion on the motion, and the ensuing vote was identical to that taken in the executive session, except that one of the trustees who cast a “no” vote in executive session was not present for the public re-enactment.

You requested that I make this complaint a priority in my discretion. Although I have not issued this opinion within seven days, I have issued it well before the 30 days required in IC 5-14-5-9.

I sent a copy of your complaint to Ivy Tech. I enclose a copy of the response, submitted by Mr. Richard A. Smikle, who represents Ivy Tech. Mr. Smikle set out the sequence of events leading to the appointment of Mr. Tom Snyder as president of Ivy Tech. I summarize the timeline as follows.¹ On March 13, Ivy Tech posted notice of the March 22 public meeting and executive session. The purpose of the executive session was “to receive information about and interview prospective employees.” The executive session commenced at 1:00 p.m. on March 22. During the initial part of the executive session, the trustees heard a report from The Hollins Group, the executive search firm retained to conduct a search for a new president. The Hollins Group reported on their evaluation of the two candidates scheduled to interview with the trustees during the executive session.

Prior to commencing the interviews, the trustees engaged in a thorough discussion regarding the search process, the final two candidates, and the exclusion of some candidates from the final interview, including at least one internal candidate who remains an employee of Ivy Tech. After those discussions, board of trustees Chairman Goins asked what the consensus was among the Trustees as to whether they wished to proceed with the candidate interviews. Ten of the fourteen trustees voiced their desire to continue with the interviews as originally scheduled and noticed.

The trustees interviewed Mr. Snyder and Tom Klinicar. The interviews began at approximately 2:30 p.m. and ended at approximately 5:15 p.m. After a short break, the trustees proceeded to discuss in detail the historical performance of each candidate, their interview performance, and their relative strengths and weaknesses. At the request of some of the trustees, The Hollins Group distributed copies of sensitive personal materials obtained as a result of the candidates’ applications. These materials included criminal background checks, personal reference checks, credit histories, employment histories and educational reference checks. Also presented was information about psychological testing of both candidates.

After about one hour of discussion about the information, Chairman Goins inquired whether the trustees desired to move forward with the process of selecting a president at the public meeting. Ten of the 14 trustees indicated that they were in favor of moving forward with the public meeting, as originally scheduled. Chairman Goins then asked each of the trustees to identify whether they individually felt that Tom Snyder or Tom Klinicar was better qualified to serve as president of Ivy Tech.

According to Ivy Tech, at no time during the executive session did any trustee make a motion to select a new president. At no point during the executive session was a vote taken to select a new president. Rather, both candidates were openly discussed and Chairman Goins asked the trustees to indicate their thoughts on both candidates equally.

¹ Much of the summary is taken verbatim from the submission of Ivy Tech, although quotation marks have been omitted.

The executive session concluded around 6:15 p.m. At 6:30, the public meeting was convened. Trustee Griffin made a motion to select Tom Snyder as president of Ivy Tech, effective July 1, 2007. The motion was seconded. Chairman Goins opened the floor for discussion. No discussion ensued. Chairman Goins called for a vote. Ten trustees voted in favor of the motion to select Tom Snyder and three trustees voted against the motion.

On behalf of Ivy Tech, Mr. Smikle emphasized that the trustees approached the executive session with the utmost caution with regard to the requirements of the Open Door Law. The college requested outside legal counsel to thoroughly research the rules relating to conduct of the executive session and the actions that could and could not occur in the executive session. Counsel advised that the trustees could receive information, deliberate and make preliminary decisions in executive session, but any final action that would be in any way binding on the college (i.e., a motion and vote to select an individual candidate, with an opportunity for public discussion) could take place only in a public meeting. Outside counsel was present during the executive session to monitor the trustees' compliance with the Open Door Law.

The trustees argued in their complaint response that no final action was taken during the executive session. Because no motion, proposal, resolution, rule, regulation, ordinance, or order was ever proposed or voted on during the executive session, no final action was taken. The decision whether to move forward was a mere procedural determination that does not rise to the level of final action. After the interviews were complete, Chairman Goins assessed the views of the individual board members by asking which members favored each of the two final candidates. However, Chairman Goins was careful not to present any motion or proposal for election of a specific candidate and no such proposal was made. Although the individual trustees expressed their preferences during the executive session, it was not until the public meeting that any motion was presented to the trustees or any formal vote taken.

Further, the trustees argued that the deliberations that occurred are permitted under the holding in *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001). Not only is *Baker* controlling, but the same policy considerations applied to the discussion of the two candidates, which included consideration of sensitive private information. Finally, although given an opportunity for discussion during the public meeting, none of the trustees present took advantage of the opportunity. This fact underscores the trustees' recognition of the privacy interest at stake.

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).

“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).

A governing body may convene an executive session, which means a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f). However, the governing body may meet in executive session for only those purposes set forth in section 6.1. Among the thirteen enumerated instances for which an executive session may be held, one is “to receive information and interview prospective employees.” IC 5-14-1.5-6.1(b)(5). It is this exception to openness that forms the basis for your complaint.

In addition, you contend that the trustees took final action during the executive session. 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).

Deliberations During Executive Session

The Trustees argue that they could deliberate about the candidates during the executive session because caselaw has expanded the official action that can be taken during a properly noticed executive session to other types of official action, so long as no votes are taken.

In *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), the court of appeals considered whether a town council, meeting in executive session for the purpose of discussing a job performance evaluation of an individual employee, could compile a rehire list that excluded the town marshal. The plaintiff Baker asserted that the town council went beyond the scope of the exception for employee evaluations and took impermissible final action by compiling the rehire list. The court of appeals held that the town could compile the rehire list in executive session because “the Open Door Law does not prohibit [the town] from receiving information, making recommendations, establishing policy, and making decisions in executive session.” *Id.* at 71.

The court’s holding “comported with the guiding principles of the statute and with public policy protecting the privacy rights of individuals with respect to sensitive personnel matters,” *Id.* at 72. Forcing the council to compile the rehire list in public would run the risk of exposing personal information about employees which the exceptions to the Open Door Law seek to protect. *Id.* at 73.

The Trustees argue that their discussions of the relative merits of the two candidates falls squarely within the holding in *Baker v. Town of Middlebury*. Further, the same policy considerations identified in *Baker* apply to the discussions of the candidates undertaken in the executive session, where the trustees considered personal and confidential information such as

background checks, credit history, personal references, and psychological testing results. A third candidate that the trustees discussed was and still is a member of the Ivy Tech workforce. That person's job performance was part of the deliberations. Also, the public meeting did not foreclose the opportunity for public discussion of the candidates, but none ensued because the trustees were aware of the need to be discreet.

You argue that the holding in *Baker v. Town of Middlebury* should be limited in scope to only those exceptions involving discussions about employees, since *Baker* was based on an exception that included the word "discuss," as does another employment-related exception, IC 5-14-1.5-6.1(b)(6)(to receive information concerning misconduct and to **discuss**, before a determination, the individual's status as an employee.) Moreover, the privacy concerns addressed in *Baker* do not attach to prospective employees, or prospective appointees, as evidenced by the exception in IC 5-14-1.5-6.1(b)(10) for appointments of public officials, where the interviews must be conducted in public. To engraft the authority to deliberate on section 6.1(b)(5), which clearly and unambiguously states that the governing body may "receive information" and "interview" prospective employees in executive session is contrary to the expressed purpose of the Open Door Law to conduct business in the open "unless otherwise expressly provided by statute." IC 5-14-1.5-1.

In the nearly six years since *Baker v. Town of Middlebury* was decided, no reported case has determined whether the exception for receiving information about and interviewing prospective employees includes other types of official action short of a vote. Such a holding would confirm the broad holding of *Baker* that seems to conclude that all executive sessions may include all types of official action except for a vote. Other parts of *Baker* seem to confirm the opposite: that the literal interpretation of the executive session instances is the rule. *See Baker v. Town of Middlebury* at 74 (where, in order for subsection (b)(5) [now (b)(6)] to apply, the council had to meet to receive information about misconduct **and** discuss his employment status because the clause is written in the conjunctive.)

It is my opinion that holding deliberations during an executive session "to receive information about and interview prospective employees" would go beyond the official action permitted in the exception to public meetings unless *Baker v. Town of Middlebury* applies with equal force to the exception in IC 5-14-1.5-6.1(b)(5).

Votes Taken During An Executive Session

As previously stated, a final action must be taken in a meeting open to the public. A final action is a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. The parties do not disagree on the law concerning voting during an executive session. Rather, Ivy Tech denies that it took a vote.

A previous opinion of the public access counselor has stated that there are no formal requirements for final action. *Opinion of the Public Access Counselor 00-FC-12* (the Open Door Law does not prescribe a certain method of voting). In addition, final action can occur as a result of the totality of acts in the absence of a formal vote taken by motion, second of motion, or roll call vote. *Baker v. Town of Middlebury* at 72, citing *Evansville Courier v. Willner*, 553 N.E.2d 1386 (Ind. Ct. App. 1990). In *Evansville Courier*, the county commissioners had convened a public meeting and announced their selection of Riney as superintendent and signed the employment change form, evidencing final action even where no motion was made or formal vote taken. *Evansville Courier* at 1390.

Ivy Tech argues that no formal motions were made or votes taken during the March 22 executive session. Hence, no final action was taken; the only final action that occurred was at the public meeting when trustee Griffin made the motion to select Mr. Snyder as the college president. Further, the trustees were careful not to present any motion or proposal for election of a specific candidate.

The Trustees took several actions that concern this issue. The first came prior to the interviews, when Chairman Goins asked what the consensus was among the trustees as to whether they wished to proceed with the candidate interviews. The trustees argue that this action was little more than a procedural determination to proceed as scheduled and does not rise to the level of official action, citing *Baker* and *Opinion of the Public Access Counselor 06-FC-30*.

The second action occurred after the interviews and discussion took place on the two final candidates, when Chairman Goins inquired whether the trustees desired to move forward with the process of selecting a president at the public meeting. Ten of the 14 Trustees indicated that they were in favor of moving forward with the public meeting as scheduled. Third, Chairman Goins then asked each of the trustees to identify whether they individually felt that Tom Snyder or Tom Klincar was better qualified to serve as president of Ivy Tech. Ivy Tech did not report what the outcome of this individual poll was, but in the public meeting, ten of the 13 trustees present voted in favor of Snyder as president.

It is my opinion that the actions taken to poll the trustees was final action. I do not find compelling the argument that there was no formal proposal or motion to select the president during the executive session. The description of the actions outlined above clearly evidence that the Chairman sought a vote of the individual trustees on whether to appoint one of the two candidates as president, and this was a motion or proposal. Ivy Tech by its argument that there were no formal proposals seems to accord formality only to public pronouncements of a motion

or proposal, and there is nothing in the Open Door Law that says a motion or proposal must be “formal.” Surely the trustees, by indicating approval or not, had before them a specific question. That question was a proposal regardless whether the proposal contained some unspecified formality to it. I do not find any contrary authority in *Opinion of the Public Access Counselor 06-FC-30*, where I found that where some members of the governing body expressed intent to bring up the hiring of a superintendent at the next public meeting, but the members were not polled on the question, there was no final action.

I also do not agree that the only final action occurred during the public meeting. Rather, final action occurred both during the public meeting and in the executive session. To find that the public vote cured or superseded the votes taken behind closed doors ignores the plain prohibition on final action in executive sessions. *See IC 5-14-1.5-6.1(c); IC 5-14-1.5-7(c).*

I wish to emphasize that I do not find any intent on the part of the Trustees to violate the Open Door Law. Rather, it is clear the Trustees undertook to understand the Open Door Law during the process of appointing a new president. Nevertheless, the intent of the governing body is not determinative. Accordingly, it is my opinion that the Board of Trustees of Ivy Tech Community College of Indiana took final action during the executive session, in violation of the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Richard A. Smikle