



STATE OF INDIANA

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June 2, 2010

Ms. Angela Piazza
1599 Riverside Road
Niles, MI 49120

Re: Formal Complaint 10-FC-106; Alleged Violation of the Open Door Law by the Veritas Academy Charter School

Dear Ms. Piazza:

This advisory opinion is in response to your formal complaint alleging that the Veritas Academy Charter School (the "Academy") violated the Open Door Law ("ODL"), Ind. Code § 5-14-3-1 *et seq.* The Academy's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that the Academy's governing board held several meetings from February to April of 2010 that violated the ODL. Due to the time limits for filing a complaint with this office, this opinion will be limited to those meetings held within 30 days of the date you filed your complaint (April 29, 2010). *See* I.C. § 5-14-5-7.

You allege that on April 14th, the Academy held an executive session to discuss the job performance of an employee pursuant to subsection 6.1(b)(9) of the ODL. You also claim that with respect to that same meeting, minutes from the Academy's March 10th meeting were withheld from you. You claim that the Academy created neither an agenda nor minutes for the April 14th meeting. You make similar allegations regarding an executive session held on April 28th. Further, you note that you are an *ad hoc* member of the Academy's board, but you were denied access to the executive sessions while other members of the public were invited to attend.

My office forwarded a copy of your complaint to the Academy. Attorney Andrew Murphy responded on its behalf. Mr. Murphy states that the Academy did not meet in executive session on April 14th. He claims that meeting was cancelled and no quorum was present at any time on April 14th. With regard to your allegation that you were denied minutes of the March 10th meeting, Mr. Murphy states that the Academy never denied your request. Rather, the Academy produced the minutes to you at its board

meeting on April 14th, which was just two days after you requested them from Board Secretary Patricia Mastagh.

With regard to the April 28th meeting, Mr. Murphy maintains that it was a properly noticed and executed executive session held for the purpose of discussing the job performance evaluation of an individual employee: you. He further states that to “enable the [Academy] Board to conduct a holistic evaluation of Ms. Piazza’s performance, the Board President invited members of the Academy’s community who wished to provide input on Ms. Piazza’s performance evaluation to the executive session for the purpose of discussing the evaluation.” The board members met individually with members of the public who attended the executive session in order to “preserve the confidential nature of the evaluation process.” Mr. Murphy argues that the ODL permitted the Academy to admit to the executive session “persons necessary for carrying out [the session’s] purpose” under Ind. Code § 5-14-1.5-2(f), but did not obligate the Academy to admit you to the meeting. He acknowledges that you are an *ad hoc* member of the Academy’s board, but states that you are unelected, cannot vote, and do not count towards a quorum of board members. Moreover, he claims that it has “never been a practice of the Board for either the Director of Education or the teacher Liaison to attend executive sessions.”

ANALYSIS

The General Assembly enacted the ODL with the intention that the business of the State of Indiana and its political subdivisions be conducted openly so that the general public may be fully informed. *See Baker v. Town of Middlebury*, 753 N.E.2d 67, 70 (Ind. Ct. App. 2001); I.C. § 5-14-1.5-1. Courts “are required to liberally construe the statute in order to give effect to the legislature’s intention.” *Id.* “Accordingly, ‘all doubts must be resolved in favor of requiring a public meeting and all exceptions to the rule requiring open meetings must be narrowly construed.’” *Id.*, citing *Evansville Courier v. Willner*, 553 N.E.2d 1386, 1388 (Ind. Ct. App. 1990), *vacated in part, adopted in part by* 563 N.E.2d 1269 (Ind. 1990). The Academy’s board is a public agency and a governing body subject to the ODL. I.C. § 5-14-1.5-2.

A meeting for the purposes of the ODL is defined as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). As noted above, the general rule is that meetings of public agencies are to be held openly, so that the public may “observe and record them.” I.C. § 5-14-1.5-3(a). The exception to the general rule that a meeting of the governing body must be open to the public is an executive session.

“Executive session” is defined as a meeting “from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.” I.C. § 5-14-1.5-2(f). One of these exceptions provides that a governing body may meet in executive session to discuss a job performance evaluation of an individual employee.

However, the provision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process. I.C. § 5-14-1.5-6.1(b)(9).

With respect to your allegation that the Academy failed to create agenda and minutes for its meetings, the ODL does not require that a governing body utilize an agenda or create minutes of its meetings. However, the ODL does require governing bodies to create memoranda for each meeting, including executive sessions. Regarding minutes and memoranda, the ODL provides the following for all meetings of governing bodies:

- (b) 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 IC 5-1.5-2-2.5.
- (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.

I.C. § 5-14-1.5-4 (emphasis added). With respect to executive sessions in particular, the memoranda must also “identify the subject matter considered [at the executive session] by specific reference to the enumerated instance or instances for which the public notice was given.” I.C. § 5-14-1.5-6.1(d). The governing body must also certify in the memoranda that “no subject matter was discussed in the executive session other than the subject matter specified in the public notice.” *Id.* Nothing in these provisions required the Academy to create minutes of its executive session, however. If the Academy created memoranda in accordance with these provisions, it complied with the ODL.

As to your allegation that the Academy denied you access to meeting minutes from the March 10th meeting, Mr. Murphy maintains that the Academy provided those to you and never denied you access. If that is true, there was no violation of the APRA. *See* I.C. § 5-14-5-6.

With respect to your allegation that the Academy violated the ODL by failing to allow you to attend the executive sessions notwithstanding your status as an *ad hoc* member of the Academy’s board, that is an issue that is not contemplated by the ODL. Like any other member of the public, the ODL gives you the right to attend any public meetings of the Academy’s board. However, I see nothing in the ODL that would give you the right to access an executive session, which is a non-public meeting of the board. *See* I.C. § 5-14-1.5-2(f). Moreover, Mr. Murphy is correct that the ODL authorizes a governing body to “admit those persons necessary to carry out [the executive session’s] purpose.” I.C. § 5-14-1.5-2(f).

You also argue that the Academy's board cannot rely on the executive session instance allowing it to "discuss a job performance evaluation of an individual employee" because it was *creating* the evaluation by inviting members of the public to participate in the discussion rather than merely *discussing* an evaluation that had already been created. I see some merit in your argument because the exception in subsection 6.1(b)(9) does not explicitly provide a governing body with the authority to do anything other than "discuss." Moreover, what the Academy's board did here was to invite feedback from members of the public regarding your job performance. It seems to me that if the General Assembly had intended on such activity occurring in executive sessions held under subsection 6.1(b)(9), it would have provided specific authority to "receive information" as it did in subsection 6.1(b)(6).

Notwithstanding these considerations, I am of the opinion that the Academy did not violate the ODL here. Although executive session instances are narrowly construed against governing bodies, Indiana courts have read subsection 6.1(b)(6) somewhat more liberally. In the *Town of Middlebury* case, for example, the Indiana Court of Appeals noted that it was permissible for a governing body meeting under that subsection could engage in activity beyond mere discussion of an existing evaluation:

Our determination that it was appropriate for the Council to compile its list of rehires in private session, rather than in public, also comports with the guiding principles of the statute and with public policy protecting the privacy rights of individuals with respect to sensitive personnel matters. Specifically, private discussion of an employee's job performance evaluation does not significantly prevent or impair the public's knowledge or understanding of the people's business, and it is in the public interest to promote efficient personnel management and maintain employee morale. Furthermore, permitting employee evaluations to take place in private session prevents the employee from experiencing public embarrassment related to the critique of his or her work performance and avoids needless injury to the employee's reputation.

Town of Middlebury, 753 N.E.2d at 72. The Court of Appeals' reasoning in *Town of Middlebury* suggests that the Academy's board did not act contrary to the purposes of the ODL. It is important to note that you are the only employee of the Academy. In most public agencies, performance evaluations are prepared by supervisors in advance of subsection 6.1(b)(6) executive sessions and the governing body only needs to discuss the already-completed evaluations. In this case, however, you have no supervisor other than the board, so it is reasonable for the board to gather some information in conjunction with evaluating and discussing your performance. I can see how this might be objectionable because the board is receiving information, which goes beyond the "discuss[ion]" explicitly allowed under subsection 6.1(b)(6). On the other hand, a board member who reads a prepared performance evaluation also receives information by reading and analyzing the content therein, so the Academy's actions are not necessarily distinguishable from the type of scenario that is unquestionably permitted by the subsection. Consequently, it is my opinion that the Academy did not violate the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that the Academy has not violated the ODL.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, prominent "K" and "A".

Andrew J. Kossack
Public Access Counselor

Cc: Andrew Murphy