



STATE OF INDIANA

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August 9, 2011

Ms. Rhonda A Greene
10130 West Suder Lane
Campbellsburg, Indiana 47108

*Re: Formal Complaint 11-FC-170; Alleged Violation of the Open Door Law
by the Washington County Commissioners*

Dear Ms. Greene:

This advisory opinion is in response to your formal complaint alleging the Washington County Commissioners ("Commissioner") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* The Commissioner's response is enclosed for your reference.

BACKGROUND

In your complaint you allege that the Commissioners have an executive meeting prior to each regularly scheduled monthly meeting and continually fail to provide a statement as to why the executive meetings are being held and what is being discussed during the executive meetings. You further allege that a meeting cited on the Commissioner's website as being held on July 6, 2011, was actually held on July 5, 2011.

In response to your formal complaint, Attorney Thomas E. Scrifes responded on behalf of the Commissioners. Mr. Scrifes advised that the Commissioners have held its regularly-scheduled meeting, which included an executive session followed by a public meeting, on a semi-monthly basis for years. The meeting dates, times, and location are established at the first meeting in January each year pursuant to I.C. § 36-2-2-6.

In addressing the first part of your complaint, Mr. Scrifes provided that notice of an executive session is given 48 hours in advance and is posted outside the meeting room where the executive session is held. The Commissioner's enclosed a sample of the notice used for "special" meetings:

Commissioners Executive Session

The Washington County Board of Commissioners will meet in Executive Session on Monday, October 19, 2009 at 9:00 a.m. at the Government Building in the Conference Room. The purpose of the executive session is to interview people for the County's IT position. This meeting is being held as an Executive Session pursuant to Ind. Code § 5-14-1.5-6.1(5) To receive information about and interview prospective employees.

For "regular" meetings, Mr. Scifres provided that notice of an executive session is given 48 hours in advance and is posted outside the meeting room where the executive session is held. The Commissioners provided the following sample of the notice that was being provided for executive sessions prior to "regular" meetings, which I provide in part:

Commissioners Meeting

Agenda

August 2, 2011

8:30 a.m.-Open Session

Executive Session-7:30 a.m.

5-14-1.5-6.1, b(5), b(2)(B)

Personnel and Litigation

Mr. Scifres further advised that memoranda of any executive session, in compliance with I.C. §5-14-1.5-6.1(d), was made available after every meeting. A sample of the executive session memoranda was provided in the Commissioner's response:

The Executive Session of the Board of Commissions was held at 5:30 p.m. Present were Commissioner Brown, Commissioner Fultz, Commissioner Mishler, and Auditor Sarah Bachman. Attorney Tom Scifres was not present. Only litigation and personnel matters were discussed.

As to the second part of your complaint, Mr. Scifres admitted that the computer printout attached to your complaint contained a scrivener's error that reflected a meeting date of July 6, 2011, when in fact the meeting occurred on July 5, 2011. Mr. Scifres stated that there is no requirement in the ODL that notice be posted online and is only done as a public service. Mr. Scifres further advised that that notice for the July 5, 2011 meeting complied with the requirements of the ODL, and the Commissioner went a step further and provided notice in the June 28, 2011 edition of the *Salem Reader*.

ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, 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. *See* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). In addition, certain things may be done in executive session when considering the appointment of a public official. *See* I.C. § 5-14-1.5-6.1(b)(10).

Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2)

This office has consistently addressed the requirements of notice for an executive session. *See Opinion of the Public Access Counselor 07-FC-64; 08-FC-196; 11-FC-39.* In *Opinion of the Public Access Counselor 05-FC-233*, Counselor Davis wrote the following:

This office has stated on many occasions that “personnel issues” is wholly inadequate under the Open Door Law. First, there are several enumerated instances involving personnel-related matters that are permissible for an executive session. Accordingly, “personnel issues” lacks the required specificity, because the Open Door Law states that 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. IC 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, “To discuss a job performance evaluation of an individual employee, pursuant to IC 5-14-1.5-6.1(b)(9),” for example, would satisfy the notice requirements.

In response to the first part of your complaint, the Commissioners provided copies of the notice that is currently being used for executive sessions in regards to “special” meetings and one provided for use with “regular” meetings. I will address each notice provided separately.

For the “special” meetings notice, notice is posted 48 hours in advance, outside of the meeting room where the executive session is held. The date, time, and location of the executive session are listed, along with the specific statutory exception(s) and the language of the exception(s). There is no requirement in the ODL that notice of the executive session be posted online. As such, the notice provided for the special meetings is in compliance with the ODL.

For the “regular” meetings notice, the notice is posted 48 hours in advance, outside of the meeting room where the executive session is held. The date and time is listed, along with the specific statutory exception(s). Although posted at the door where the meeting is taking place, the location of the meeting and the language of the specific statutory exceptions are not provided in the notice. The location of the meeting needs to be provided in the notice as required by the ODL. To the extent the Commissioners conduct executive sessions to discuss personnel or litigation matters allowable under the ODL; the Commissioners must cite the specific statutory instance allowing the executive session and the language of the statute. Currently, the Commissioners are only providing the statutory citation and “personnel” or “litigation”. To the extent the Commissioners intends to address personnel matters not specifically enumerated in I.C. § 5-14-1.5-6.1, the Council should address those matters at a meeting open to the public. It is my opinion that the notice being provided by the Commissioners for “regular” meetings violates the ODL.

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.

I.C. § 5-14-1.5-4(b). In the case of executive sessions, the memoranda requirements are modified in that the memoranda "must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given." See I.C. § 5-14-1.5-6.1(d). The public agency must also certify in a statement in the memoranda that no subject was discussed other than the subject specified in the public notice. Id.

The Commissioner's response provided a sample copy of the executive session memoranda being used to comply with the ODL. The memoranda failed to comply with the requirements of the ODL because the required certification under Ind. Code §5-14-1.5-6.1(d) was not included. Additionally, the memoranda failed to cite the specific the specific statutory exemptions and the language of the exemption as provided by I.C. §5-14-1.5-6.1(d) and prior opinions of this office. *See Opinion of the Public Access Counselor 05-FC-65*. For those reasons, the executive session memoranda provided by the Commissioners is deficient and violated the ODL.

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. I.C. § 5-14-1.5-5(a). In addition to providing notice to any news media who by January 1 of the year have requested notice, the agency must post notice at the principal office of the agency or, if there is no office, at the building where the meeting will be held. *See I.C. § 5-14-1.5-5(b)*. Notice has not been given in accordance with Section 5 of the ODL if a governing body of a public agency convenes a meeting at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting. *See I.C. §5-14-1.5-5(h)*.

Here you allege that the Commissioner's violated the ODL by incorrectly posting the date of the July 2011 meeting on its website. As the ODL does not require notice of meeting to be posted online and the Commissioners have complied with all other aspect of the notice requirements for the July 2011 meeting, it is my opinion it did not violate the ODL in regards to the July 2011 online posting that contained a scrivener's error.

CONCLUSION

For the foregoing reasons, it is my opinion that the Commissioners did not violate the ODL in providing notice of its executive sessions for “special” meetings; however it did violate the ODL in regards to the notice provided for “regular” meetings. Further, it is my opinion that it did violate the ODL by failing to comply with the memoranda requirements for executive sessions. The Commissioners did not violate the ODL in regards to the scrivener’s error listed on Commissioner’s website that provided notice of the July 2011 meeting.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Thomas E. Scifres