



STATE OF INDIANA

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June 5, 2012

Patricia C. Andrews
7631 Reynolds Road
Camby, Indiana 46113

*Re: Formal Complaint 12-FC-114; Alleged Violation of the Open Door Law by
the Indianapolis Airport Authority Board*

Dear Ms. Andrews:

This advisory opinion is in response to your formal complaint alleging the Indianapolis Airport Authority Board (“Board”) violated the Open Door Law (“ODL”), Ind. Code § 5-14-1.5-1 *et seq.* Joseph R. Heerens, General Counsel, responded on behalf of the Board. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that the Board failed to conduct a vote in favor of filing a lawsuit at an open, duly noticed meeting in violation of the ODL. You provide that the lawsuit in question was filed under Cause No. 49-D07-1203-MI-010507 in the Marion County Superior Court as a result of the unilateral action of Board President, Michael Wells. You maintain that you made a series of public records requests to the Board to identify any law, rule, or by-law that would allow the Board President to take unilateral action as to this matter. The Board provided that statutory law provides that the Board can employ personnel necessary to carry out the duties, functions, and power of the Board; however, the Board President has the inherent authority to approve and authorize legal counsel to implement legal matters and recommended procedures. You provide that I.C. § 8-22 does not provide for any “inherent authority” retained by the Board President and the right to commence litigation lies solely with the Board.

In response to your formal complaint, Mr. Heerens advised that based on a previous advisory opinion issued by the Public Access Counselor’s Office, the Board’s prompt public announcement of the litigation, the opportunity provided to you to address the Board at a public meeting concerning your opposition, the subsequent unanimous vote taken by the Board to ratify the filing and pursuit of litigation, and the existence of certain delegated authority from the Board to certain personnel, no violation of the ODL has occurred.

The Board is an independent municipal corporation created pursuant to I.C. § 8-22-3 *et seq.* The Board owns and operates six (6) airports in the Indianapolis area and is governed by a board consisting of nine (9) voting members appointed by the mayor of Indianapolis as well as officials from Hamilton, Hancock, Hendricks, and Marion counties. The Board also retains one non-voting member from Morgan County. The instant complaint arises out of a dispute involving a parcel of real estate located in Decatur Township. On February 15, 2012, the Board, by counsel, appeared before the Marion County Metropolitan Development Commission (“MDC”) and remonstrated against a proposed change in land use for the property in Decatur Township. At the conclusion of the hearing, the MDC approved the requested change in land use.

Pursuant to applicable MDC rules, the Board was given thirty (30) days in which to challenge the decision. The deadline for filing a petition for judicial review was March 16, 2012, to which the Board filed Verified Petitions on March 14, 2012. Both Verified Petitions challenge the MDC’s authority over the land and were signed by Mr. Michael Wells, in his capacity as president of the Board. Both petitions were filed without conducting a public meeting. Less than ten (10) days after filing the petition, the Board held a public meeting, and at that time President Wells took the opportunity to publicly announce and report that the Board had recently filed the Verified Petitions challenging the MDC’s approval. At the conclusion of Mr. Wells’s comments, you were given five (5) minutes to address the Board as to this particular subject. You indicated at that time that the Decatur Township Civic Council was opposed to the Board’s actions and requested that the action be withdrawn or dismissed. At the conclusion of your comments, no member of the Board voiced any concern or doubt about continuing with the legal action or indicated that they no longer supported the litigation.

In response to your formal complaint, Mr. Heerens advised that the Public Access Counselor’s Office addressed a similar complaint in 2008. *See Opinion of the Public Access Counselor 08-FC-136.* Counselor Neal provided that “. . . nothing in the ODL requires an executive session or public meeting before litigation may be initiated. The ODL is generally triggered when a governing body decides to conduct a meeting, but it is not instructive as to what actions of a governing body require a meeting or vote.” Here, there was no public meeting or final action which could trigger an ODL violation, and nothing in the ODL requires the Board to hold a public meeting before initiating the litigation in question.

Further, to ensure that the matter was handled in a fully transparent manner; President Wells publicly announced and reported at an open public meeting that the Board had commenced litigation by challenging the MDC approval. You were given an opportunity to speak at the public meeting and address the Board on this issue. While the Board has not historically secured vote of its members before initiating litigation, the Board has regular opportunities to be advised and to discuss recommended proceedings, threatened and pending litigation, and the strategy about or in connection therewith. These discussions are frequently held in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B). Further, the Board took a public vote on May 25, 2012, which ratified the initiation of litigation in this matter by a vote of 9-0.

Lastly, the delegation of authority as to this issue was considered and voted on by the Board on June 5, 2009, at which time the Board's Executive Director was given the authority to enter into contracts for professional services which did not exceed \$150,000, which has since been extended to members of the Board's management team. This delegation permits the hiring of outside attorney to perform legal services, which may include a variety of items, including, but not limited to the provision of legal advice, legal research, and preparation and filing of litigation. As applicable here, the Board's General Counsel signed an engagement letter to evidence this representation of the Board by the law firm of Doninger Tuohy & Bailey. The firm prepared and filed the Verified Petitions in this matter.

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).

The ODL requires that 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. *See* I.C. § 5-14-1.5-5(a). 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).

A meeting is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* I.C. § 5-14-1.5-2(c). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14.1.5-2(e). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c).

The allegation contained in your formal complaint is similar to an issue addressed by the Public Access Counselor's Office in 2008. *See Opinion of the Public Access Counselor 08-FC-136*. In 08-FC-136, the LaPorte County Board of Commissioners and the LaPorte County Assessor were accused of violating the ODL by initiating legal action without conducting a meeting. Counselor Neal's opined that:

You have alleged the Commissioners initiated legal action in violation of the ODL. I do not agree. While the ODL *allows* a governing body to conduct an executive session to discuss strategy with respect to initiation of litigation (See I.C. § 5-14-1.5-6.1(2)(B)), nothing in the ODL *requires* either an executive session or a public meeting before litigation may be initiated. The ODL is generally triggered when a governing body decides to conduct a meeting, but it is not instructive as to what actions of a governing body require a meeting or a vote.

You are correct in your assertion that any final action must be taken at a meeting open to the public and may not be taken in executive session. I.C. § 5-14-1.5-6.1(c). Final action, though, means a vote. I.C. § 5-14-1.5-2(g). Any other official action, including making decisions, can be made in executive session. *See Baker v. The Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), holding a governing body may make decisions in an executive session.

The Commissioners contend an executive session was conducted for a discussion of strategy with respect to the initiation of litigation. So long as appropriate notice was provided pursuant to I.C. § 5-14-1.5-5 and other requirements of the ODL were followed (e.g. the memoranda requirement found in I.C. § 5-14-1.5-4), the Commissioners acted in accordance with the Open Door Law. *Opinion of the Public Access Counselor 08-FC-136*.

As applicable here, the ODL requires that all final action be taken at an open public meeting; however, while a separate law, ordinance, or by-law may proscribe the conduct a governing body must follow in order to commence litigation, the ODL does not require an executive session, public meeting, or a final action to be taken prior to the initiation of litigation. The ODL does not instruct governing bodies as to what actions specifically require a meeting and/or vote. *Id.* Further, the ODL does not prohibit an agency from receiving information, making recommendations, establishing policy, and making decisions in executive session. *See Baker v. The Town of Middlebury*, 753 N.E. 2d 67, 71 (Ind. Ct. App. 2001).

The Board had provided records to indicate that it delegated certain authority to the Board's management team to enter contracts which did not exceed \$150,000. The measure delegating authority was passed in an open public meeting in June of 2009. The contract entered into between the Board and its legal representative in the MDC matter was limited to \$70,000, without prior approval from the Board. Lastly, I would note that to clear up any impropriety, or perceived impropriety; the Board conducted a vote on

May 25, 2012 in an open, properly noticed public meeting where the Board unanimously ratified the initiation of the legal action. Based on the foregoing, it is my opinion that the Board did not violate the ODL.

CONCLUSION

It is my opinion that the Board did not violate the ODL.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Joseph R. Heerens