



STATE OF INDIANA

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April 19, 2012

Ms. Kelly L. Khuri
4819 Salem Noble Road
Jeffersonville, Indiana 47130

*Re: Formal Complaint 12-FC-77; Alleged Violations of the Open Door Law by
the Clark County Board of Commissioners*

Dear Ms. Khuri:

This advisory opinion is in response to your formal complaint alleging the Clark County Board of Commissioners ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Gregory Fifer, Attorney, responded on behalf of the Board. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege on March 15, 2012 the Board recessed its regular monthly meeting in order to reconvene on March 19, 2012. On March 19, 2012, the Board reconvened, only to announce a recess until March 20, 2012 at 10:15 a.m. On March 20, 2012, you were in attendance prior to the start of the meeting. At approximately 10:36 a.m., you were told that the Commissioners were in an adjacent office with their attorney. Thereafter, the door to the office opened and you observed the Commissioners inside. You believe the Board actions constituted an executive session to which it failed to provide proper notice for.

In response to the formal complaint, Mr. Fifer advised that the Board is responsible for the coordination and management of emergency disaster response and recovery efforts in conjunction with the Indiana Department of Homeland Security. On Wednesday, March 7, 2012 the Board held a properly noticed special meeting to adopt an ordinance declaring the existence of an emergency. The March 7, 2012 meeting recessed in order to be reconvened on March 13, 2012.

On March 13, 2012, the Board reconvened the special meeting at which time they addressed several matter related to the local disaster emergency, including the opening of proposal for (i) professional debris monitoring and grant consulting services and (ii) professional debris removal services. The March 13, 2012 meeting was adjourned at its conclusion.

On March 15, 2012, the Board held its regular meeting, to which proper notice was provided pursuant to the ODL. The Board dealt with a number of issues relating to the local disaster emergency, including the preliminary award of contracts for the (i) professional debris monitoring and grant consulting services and (ii) professional debris removal services. The meeting was adjourned at its conclusion.

On March 19, 2012 the Commissioners held a properly noticed special meeting that was initially called to receive proposals to perform professional debris removal services from designated creek areas. Mr. Fifer had determined on March 16, 2012 that the previously received proposals for professional debris removal were not uniform to which a memorandum was distributed to the (8) prospective bidders. Further, Mr. Fifer had also previously received and distributed a draft contract from Tidal Basin Government Consulting, LLC ("Tidal Basin) to provide professional debris monitoring and grant consulting services. At the March 19, 2012 meeting, the Commissioners authorized Tidal Basin to continue work under its initial contract and opened bids for clearing debris from the designated creek areas. The meeting was recessed until March 20, 2012 at 10:15 a.m.

At or after the March 19, 2012 meeting, Commissioners Ed Meyer and John Perkins approached Mr. Fifer with concerns regarding certain provisions of the Tidal Basin contract. Mr. Fifer was unable to address their concerns on March 19, 2012 due to previously scheduled meetings regarding the disaster declaration. Mr. Fifer asked the individual Commissioners to meet him at the Board's offices prior to the reconvened meeting on March 20, 2012 to discuss the Tidal Basin contract.

Upon arrival to the Board's offices on March 20, 2012, Mr. Fifer met individually with each Commissioner regarding their concerns. The Commissioners each maintain a mailbox in the conference room and copies of public records are also stored in that location. The Commissioners also met with Jim Ross, County Highway Superintendent, in order to obtain updated informing about the ongoing debris removal work. Mr. Fifer has no factual knowledge to dispute the contention that the reconvened meeting on March 20, 2012 did not commence until 10:36 a.m. At the meeting, the Commissioners awarded the creek clearing contract and again authorized Tidal Basin to continue work under its temporary contract. The meeting recessed until March 21, 2012 in order to resolve the final details of the Tidal Basin contract. Minutes of all of the above referenced meetings are enclosed for your reference.

The Commissioners assert that they did not meet in a closed door session prior to the commencement of the reconvened meeting on March 20, 2012 regarding any matter for which an executive session may validly be held pursuant to I.C. § 5-14-1.5-6.1(b). A "meeting" 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. *See* I.C. § 5-14-1.5-2(d). The conduct of the Commissioners prior to the start of the meeting on March 20, 2012 did not meet the requirements of a meeting pursuant to the ODL either in the individual discussions with Mr. Fifer or the interaction with Superintendent Ross. The

ODL allows for “administrative function meetings.” *See* I.C. § 5-14-1.5-5(f). The actions of Commissioners prior to the meeting were clearly to carry out administrative functions of the county executive. As provided by subsection (f), notice is not required for meeting dealing with administrative functions.

Further, each Commissioner is a member of the Democratic Party. To the extent that they conferred amongst themselves prior to the start of the reconvened meeting, they engaged in a “caucus”, which are excluded from the definition of a meeting pursuant to I.C. § 5-14-1.5-2(h). Mr. Fifer advised that you are currently a Republican candidate for an at-large seat on the Clark County Council; as such it would be unreasonable to require the Commissioners to allow her to attend the Democratic political caucus.

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).

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.

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). 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). “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 requirements for posting notice do not apply when the executive of a county or the legislative body of a town (e.g., the Board) meets, if the meeting is held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. *See* I.C. § 5-14-1.5-5(f)(2). Administrative functions do not include the awarding of contracts, the entering into contracts or any other action

creating an obligation or otherwise binding a county or town. *Id.* Even though notice is not required, the “administrative function” meeting must be held in the public, since the notice provision of the ODL is *the only provision* that does not apply to an “administrative function” meeting. I.C. § 5-14-1.5-5(f)(2), emphasis added.

A “caucus” means a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members to take official action. *See* I.C. § 5-14-1.5-2(h). The ODL expressly provides that a “caucus” is not a “meeting.” *See* I.C. § 5-14-1.5-2(c)(4). The Indiana Supreme Court has provided the following analysis regarding caucuses:

Under the Indiana Open Door Law, "caucus" is defined as "a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action." I.C. § 5-14-1.5-2(h). The nature of such political meetings will often necessarily involve receiving information, deliberating expected issues, and holding discussions concerning anticipated official action and public business. If the persons attending such meetings happen to constitute a majority of a governing body, such a caucus is not thereby transformed into a meeting subject to full public scrutiny under the Open Door Law. It is the taking of official action which changes the character of a majority political party strategy meeting from a private caucus to a public meeting. *Evansville Courier v. Willner*, 563 N.E.2d 1269, 1271 (Ind. 1990).

In *Willner*, the Court found the caucus exemption inapplicable where a majority of the governing body met prior to the official meeting, deliberated and decided on the selection of a new superintendent, held a subsequent press conference prior to the official meeting of the governing body, and had all of the appointment paperwork prepared for signatures prior to the official meeting. *Willner*, 563 N.E.2d at 1270; *see also Evansville Courier v. Willner*, 553 N.E.2d 1386 (Ind. Ct. App. 1990).

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. You have alleged that on March 20, 2012 prior to the commencement of the reconvened meeting, you momentarily observed all three Commissioners and Mr. Fifer in a room with the door closed; that such conduct was considered to be an executive session pursuant to the ODL; and that no notice of the executive session was posted by the Board. It should be noted that you were not a party to the discussion at the alleged executive session.

In regards to Mr. Fifer’s individual discussions with Commissioner Meyer and Perkins, the Board is comprised of three individuals. In order for a meeting to occur, a majority of the Commissioners must gather. As applicable to the Board, a meeting would consist of a gathering of at least two Board members. If Mr. Fifer met individually with

Commissioner Meyer and Commissioner Perkins to discuss the Tidal Basin contract, a meeting did not occur as a majority of the Board was not present. Accordingly, it is my opinion that the Board would not have violated the ODL if Mr. Fifer met in such a manner with each individual Commissioner.

As to the discussions between Superintendent Ross and Board; Mr. Fifer advised that the discussions were limited to a status update of the ongoing debris removal work. It is my opinion that the Board could hold an “administrative function meeting” to receive information regarding the status of the debris removal. As long as the Board complied with all of the other requirements of the ODL, aside from posting notice, in regards to its administrative function meeting, it is my opinion that it did not violate the ODL.

Lastly, the Commissioners would be allowed to hold a caucus for the purpose of planning political strategy and holding discussion designed to prepare the members to take official action. As long as the Commissioners complied with the requirements of I.C. § 5-14-1.5-2(h) and *Willner* in the caucus held on March 20, 2012, then it is my opinion such caucus would not be considered a meeting pursuant to the ODL.

CONCLUSION

Based on the foregoing, it is my opinion that if the Board held an executive session on March 20, 2012 and failed to provide proper notice and comply with the requirements of I.C. § 5-14-1.5-6.1, then it acted contrary to the ODL. Alternatively, if two members of the Board met individually with Mr. Fifer, such conduct would not be considered a “meeting” pursuant to the ODL due to a lack of majority. It is also my opinion that the Board could hold an “administrative functions meeting” to receive a status update in regards to the debris removal, as long as the Board complied with the applicable requirements of the ODL for “administrative functions meetings.” Lastly, if the Commissioners conducted a caucus in compliance with I.C. § 5-14-1.5-2(h) and *Willner*, such caucus would not be considered a meeting pursuant to the ODL.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Greg Fifer