



# STATE OF INDIANA

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April 17, 2012

Mr. Justin N. Gower  
635 W. Pearl Street  
Union City, Indiana 47390

*Re: Formal Complaint 12-FC-92; Alleged Violation of the Open Door Law by  
Union City Board of Public Works*

Dear Mr. Gower:

This advisory opinion is in response to your formal complaint alleging that Union City Board of Public Works ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Ryan Prinkey, Attorney, responded on behalf of the Board. His response is enclosed for your reference. I have granted your request priority status pursuant to 62 Indiana Administrative Code 1-1-3(1).

## BACKGROUND

In your formal complaint, you allege that on March 9, 2012 the Board held an executive session to discuss your alleged misconduct. During the executive session, members of the Board were advised by Chief Wells ("Chief") that you had been suspended for two days without pay and ordered to undergo a physiological evaluation. You allege that at that time the Board recommended that you be terminated. Following the executive session, the Chief advised you that you had been terminated, but provided you with documentation stating that only a recommendation for termination had been submitted to the Board. You had the option of requesting a hearing within five days, which you did so at that time.

You assumed that a public meeting had been held regarding your termination. Thus, on April 2, 2012, you submitted a request for all documentation, minutes, and recordings of the Board's public meetings or executive sessions that involved the request and approval of your termination. On April 3, 2012, the Deputy City Clerk provided that no minutes or recording of the executive session had been taken and that there had not been any other meetings of the Board that discussed your status as an employee. On April 3, 2012 you received State Form 54092, completed by the City, which indicated that you had been terminated on March 9, 2012. You allege that the Board took final action on your termination in an executive session on March 9, 2012 in violation of the ODL.

In response to your formal complaint, Mr. Prinkey advised that the Board maintains that your complaint is without merit. The Board met on March 9, 2012 in an executive session pursuant to I.C. § 5-14-1.5-6.1(b)(6) regarding your alleged misconduct. A copy of the public notice of the executive session is enclosed. The notice was posted pursuant to the requirements of I.C. § 5-14-1.5-5(b). Prior to the executive session, you had been suspended by the Chief for two days. The Chief delivered written notice to you on March 9, 2012 that a recommendation for your termination has been forwarded to the Board. You exercised your right to a public hearing, which is currently set for April 19, 2012.

No final action has been taken by the Board with respect to your recommended discharge. The Board will evaluate and determine whether to uphold the Chief's recommendation at the April 19, 2012 hearing. Further, your formal complaint is untimely as it was not filed within 30 days of the date of the executive session at which the alleged "final action" occurred or the date you knew or should have know of the alleged final action. *See* I.C. § 5-14-1.5-7(b)(2)(A)-(B).

#### 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).

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the counselor must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. *See* I.C. § 5-14-5-7. I.C. § 5-14-1.5-7(b), cited by the City, pertains to the statute of limitations for filing an action in a court of competent jurisdiction alleging violation of the ODL. Here, you allege that the City took final action at an executive session on March 9, 2012, that you were not made aware of until April 3, 2012. You filed your formal complaint with the Public Access Counselor's Office on April 18, 2012. The Chief submitted to you on March 9, 2012 documentation which provided his recommendation of your termination. However, on April 3, 2012 you received State Form 54092 "Request for Earning Information", a form provided by the Indiana Family and Social Services Administration-Division of Family Resources. The form, completed by the City's Payroll Clerk, indicated that you had been terminated on March 9, 2012. Prior to receiving State Form 54092, you had only received written documentation that a recommendation had been sent by the Chief to the Board. From the narrative of your formal complaint and the records provided with it, it is my opinion that your formal complaint was timely filed pursuant I.C. § 5-14-5-7 as you are alleging that the final

action was conducted at the Board's March 9, 2012 executive session to which you were not provided sufficient notice; a fact you were not made aware of until April 3, 2012.

As to the substance of your complaint, 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).

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).

For 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.*

You allege that the Board took final action at its March 9, 2012 executive session regarding your employment, based it would seem primarily on the notification provided to you in State Form 54092 on April 3, 2012. You further allege that the Chief informed you of your termination following the executive session held on March 9, 2012. The Board in response advised that no final action was taken at the March 9, 2012 executive session regarding your employment status and the public hearing regarding your status will be held on April 19, 2012. At that time, the Board will take final action on the issue. You were apprised of this fact when you received from the Chief his recommendation that you be terminated; at no time were you informed by the Board that the termination had already taken place. 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*. As such, if the Board took final action regarding your termination at its March 9, 2012 executive session, it is my opinion that it acted contrary

to the requirements of the ODL. However, if the Board did not take final action at its March 9, 2012 executive session, then it is my opinion that it did not violate the ODL.

#### CONCLUSION

Based on the foregoing, it is my opinion that if the Board did not take final action on your employment status at its March 9, 2012 executive session, then it 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 "H".

Joseph B. Hoage  
Public Access Counselor

cc: Ryan Prinkey