



STATE OF INDIANA

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March 6, 2013

Ms. Mari H. Miller
P.O. Box 70
Nashville, Indiana 47448

*Re: Formal Complaint 13-FC-38; Alleged Violation of the Open Door Law by the
Brown County Economic Development Commission*

Dear Ms. Miller:

This advisory opinion is in response to your formal complaint alleging the Brown County Economic Development Commission ("Commission") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* John B. Kennard, President, responded on behalf of the Commission. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that the notice posted for the Commission's executive session that was held on February 6, 2013 provided that it was meeting pursuant to I.C. § 5-14-1.5-6.1(b)(9) in order to discuss a job performance evaluation of an individual employee. You maintain that the Commission has no employees and thus would violate the ODL by meeting in executive session pursuant to the (b)(9).

In response to your formal complaint, Mr. Kennard advised that the executive session was held to discuss former employees of the Commission and what recourse might be available in obtaining records of their past actions. Mr. Kennard further stated that as you have no relationship or involvement with the Commission, you would not in any way be aware of the Commission's actions and responsibilities. The Commission formerly had two employees who both resigned.

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). Notice of an executive session must be given 48 hours in advance of every session, excluding holidays and weekends, 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). 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 I.C. § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.*

Pursuant to I.C. § 5-14-1.5-6.1(b)(9), a governing body may hold an executive session to discuss a job performance evaluation of individuals employees. However, this subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process. *See* I.C. § 5-14-1.5-6.1(b)(9). In the Commission’s response, Mr. Kennard provided that an executive session was held pursuant to (b)(9) to discuss certain former employees and what recourse might be available to obtain records of their past actions. Counselor O’Connor addressed this issue in a previous opinion which provided that a governing body may not meet in executive session pursuant to (b)(9) to discuss a former employee. *See Opinion of the Public Access Counselor 01-FC-51.* Counselor O’Connor advised:

“It is my opinion that the Council was not authorized to discuss the job performance evaluation of the former employee in executive session. First, as was noted above, the exceptions to the ODL are to be narrowly construed given the General Assembly's directive that the ODL be liberally construed in favor of openness. Ind. Code §5-14-1.5-1. Given the plain and ordinary dictionary meaning of employee, I do not agree with Mr. Bever that the exception can be read broadly to encompass both present and former employees of the City. If the General Assembly had intended to include present and former employees within this exception, they could have included a reference to "present or former" as was done with respect to personnel files under Access to Public Records Act ("APRA"). *See*, Indiana Code section 5-14-3-4(b)(8)(A).” *Id.*

If the Commission was considering legal action against the former employee, it would be allowed to meet in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B), which would allow for a discussion of strategy in regards to the initiation of litigation. Here, it is my opinion that the Commission acted contrary to section 6.1(b) of the ODL in meeting in executive session to “discuss a job performance evaluation of an individual employee” when the topic of discussion concerned former employees of the Commission and what actions might be taken to obtain records of their past actions.

CONCLUSION

Based on the foregoing, it is my opinion that the Commission acted contrary to section 6.1(b) of the ODL in meeting in executive session to “discuss a job performance evaluation of an individual employee”, when the topic of discussion concerned former employees of the Commission and what actions might be taken to obtain records of their past actions.

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 long horizontal stroke.

Joseph B. Hoage
Public Access Counselor

cc: John B. Kennard