



# STATE OF INDIANA

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March 3, 2014

Ms. Kimberly L. Morgan  
2720 Tumbleweed  
Kokomo, IN 46901

*Re: Formal Complaint 14-FC-14; Alleged Violation of the Access to Public Records Act ("APRA") by the Howard County Convention and Visitors Commission, Inc.*

Dear Ms. Morgan,

This advisory opinion is in response to your formal complaint alleging the Howard County Convention and Visitor's Commission, Inc. ("Commission") violated the Open Door Law (ODL), Ind. Code § 5-14-3-1 *et. seq.* The Commission has responded individually via some members rather than *en masse*. The President of the Greater Kokomo Economic Development Alliance ("Alliance") has also responded. All responses are attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on January 30, 2014.

## BACKGROUND

Your complaint dated January 30, 2014, alleges Howard County Convention and Visitor's Commission, Inc., violated the Open Door Law by conducting improper business during an executive session and an open public meeting.

On January 22, 2014, the Executive Committee of the Howard County Convention and Visitor's Commission, Inc., held a meeting labeled on its agenda as an 'executive session'. The Executive Committee ("Committee") only consists of four of the nine members of the total board. The agenda lists eight items for discussion, none of which relates to personnel management. During the session, however, you were dismissed as an employee. There is dispute whether the Committee or the Commission had the authority to terminate your employment. The facts are also in dispute as to whether a vote was taken, as it is suggested another non-public entity, the Greater Kokomo Economic Development Alliance, was your sole employer. Additionally, at a public meeting on January 28, 2014, you allege no mention of the firing took place, nor was the Vice-President allowed to comment during the meeting.

The Commission appears to be split as to its response. Two of the four Executive Committee members appear to concur with your factual and legal assertions. The President of the Committee, as well as the President of the Alliance argues the Committee is not a quorum of the Commission, nor are they a delegation thereof, therefore the executive session is not subject to the Open Door Law. Moreover, the responses are split as to the authority of the Commission to regulate its actions during the open meeting on January 28, 2014.

## ANALYSIS

It is the intent of the Open Door Law (ODL) 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 Ind. Code § 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 Ind. Code § 5-14-1.5-3(a).

There is no dispute the Executive Committee of the Howard County Convention and Visitor's Commission, Inc., is a public agency as contemplated by the ODL. Certain members of the Commission contend the Committee is not a public agency because it does not exercise any powers of the Commission, nor do the four members constitute a majority for the purposes of establishing a quorum. A "public agency", except as provided in section 2.1 of this chapter, means the following:

(1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state.

(2) Any county, township, School Corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.

In order for the ODL to apply, the meeting must be held by a governing body of a public agency. A governing body is defined as:

- (b) "Governing body" means two (2) or more individuals who are:
- (1) a public agency that:
    - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
    - (B) takes official action on public business;
  - (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
  - (3) **any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated.** An agent or agents appointed by the

governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter. *See* I.C. § 5-14-1.5-2(b)

Emphasis added.

A delegation or a subcommittee of a public agency is not exempt from the ODL merely because they have spun-off a separate entity for the purpose of carrying out business. Clearly the Commission as a whole creates the Committee for some purpose. The Open Door Law is uniquely broad in its definitions of what actions are subject to its purview.

“Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* Ind. Code § 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* Ind. Code § 5-14.1.5-2(e).

The executive session was called in part to convene with the Greater Kokomo Economic Development Alliance President on the business of your termination. Although the Executive Committee claims it has no power to execute Commission business, it clearly gathered on January 22, 2014 behind closed doors to take official action in receiving information from the President of the Greater Kokomo Economic Development Alliance.

Ind. Code § 5-14-1.5-6.1(d) states public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. All of the subject matters intended to be discussed fall under the permissible discussion topics for a closed door executive session under the ODL.

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* Ind. Code § 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 Ind. Code § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice.

It does not appear any of these steps were taken. The Executive Committee has violated the Open Door Law by not giving proper notice of the executive session and the subject matter to be discussed.

Your next allegation involves the issue of a vote by the Executive Committee. The ODL states “final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* Ind. Code § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* Ind. Code § 5-14-1.5-6.1(c). If the Greater Kokomo Economic Development Alliance President had the unilateral authority to terminate your employment, then no violation has occurred. The

Management Agreement between the Commission and the Alliance indicates your position reports directly to the Alliance CEO and the Commission must be consulted on all personnel issues. That does not indicate the Commission has to ratify any Alliance decision. While the interpretation of the Management Agreement is not under my jurisdiction, it does not appear the Agreement calls for a vote. Even if one were taken, it would be moot.

In regard to the subsequent Commission meeting on January 28, 2014, I have stated several times the procedures and order of a public meeting are outside the scope of the Office of the Public Access Counselor. It is clear from the record the Vice President was prohibited from bringing up the subject of the executive session and your dismissal from employment. The ODL provides no guidelines for the content or structure of a meeting agenda, and this Office has indicated an agenda can take essentially any form. *See Opinions of the Public Access Counselor 04-FC-02 and 08-FC-17.*

### CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the Howard County Convention and Visitor's Commission, Inc., violated the Open Door Law by not providing proper notice of an executive session, but did not violate any provisions of the ODL during the January 28, 2014 open meeting. If a vote was taken during the executive session, the final action was a violation of the ODL; however, if it was merely a consultation with the Greater Kokomo Economic Development Alliance, there would be no violation of the final action prohibition.

Regards,



Luke H. Britt  
Public Access Counselor

Cc: Howard County Convention and Visitor's Commission, Inc.