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April 14, 2014

Ms. Molly A. Thomas-Jensen
C/o Change to Win
90 Broad St., Ste. 710
New York, NY 10004

Re: Formal Complaint 14-FC-44; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Indiana Board of Pharmacy and the Indiana Professional Licensing Agency

Dear Ms. Thomas-Jensen,

This advisory opinion is in response to your formal complaint alleging the Indiana Board of Pharmacy ("Board") and the Indiana Professional Licensing Agency ("IPLA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 et. seq. and the Open Door Law ("ODL") Ind. Code § 5-14-3-1 et. seq. The IPLA provided a response to your complaint via Mr. Jeff Collins, Esq. His response is 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 March 12, 2014.

TIMELINESS

Ind. Code § 5-14-5-7 holds a person who chooses to file a formal complaint with the counselor, must file the complaint not later than thirty (30) days after the denial of a public records request; or not later than thirty days after 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.

The Open Door Law violation you allege took place in June of 2011. Your original public records request was emailed to the Indiana Board of Pharmacy on July 29, 2013. You followed that request with a more detailed inquiry on September 24, 2013. By December 16, 2013 you received the majority of the documents which have been produced to date. Based on your complaint, the documents produced between July and December 2013 led you to believe a violation of the Open Door Law may have occurred. Because you had notice in fact of the alleged violation more than thirty days before the filing of your complaint on March 12, 2014, I will only address the Open Door Law violation

allegations as an academic exercise and this Advisory Opinion should not be used as persuasive authority or a conclusive statement on the facts by a court of law.

Similarly, the basis of your Access to Public Records Act violations stems from redacted emails provided to you between July and December 2013. No other APRA issues beyond December 2013 are incorporated in your complaint. Therefore, the portion of this Opinion addressing APRA is strictly for didactic purposes and should not be considered conclusive by a trier of fact reviewing this issue *de novo*.

However, I do find it beneficial from an educational perspective for to speak to both the ODL and APRA issues instead of rejecting your complaint outright.

BACKGROUND

Your complaint dated March 12, 2014 alleges the Indiana Board of Pharmacy violated the Open Door Law by conducting a serial meeting when two groups of Board members traveled on out-of-state business on separate occasions yet creating a quorum in the aggregate. Additionally, you allege the Indiana Professional Licensing Agency and the Board violated the Access to Public Records Act by redacting portions of emails produced pursuant to a public records request.

As to the Open Door Law violation, the facts are not necessarily in dispute. The Indiana Board of Pharmacy is a six-member governing board. On June 7, 2011, three (3) members of the Board travelled to Chicago for an on-site inspection of a Walgreens pharmacy facility. The agenda for the meeting included lunch and a tour of the facility. This occurred again on June 14, 2011. You contend these gatherings were in violation of Ind. Code § 5-14-1.5-3.1 and constituted a serial meeting which is prohibited under the ODL.

The Board and IPLA argue the two (2) gatherings of three (3) members each was not a serial meeting because they did not take place within a period of not more than seven (7) consecutive days. They dispute the two (2) gatherings were meetings at all because they were onsite inspections under Ind. Code § 5-14-1.5-2(c)(2).

Your APRA complaint takes exception with the series of documents released to you between July and December of 2013. These documents, provided for my inspection in redacted form, consist of a series of emails with substantial portions of the subject matter blacked out. You contest the emails with redactions are not deliberative in nature and should therefore be released in their entirety. Additionally, you suggest the communication is not intra- or inter-agency material as contemplated by Ind. Code § 5-14-3-4(b)(6). This is due to one (1) of the communicators is not only a Board member, but also a manager of a regulated entity. Additionally, you argue the Board member's direct interest in an upcoming Board decision excludes him as a public official for the purposes of Ind. Code § 5-14-3-4(b)(6).

The Board and IPLA respond by arguing the documents were properly redacted as all of the materials blacked out were deliberative in nature.[1]

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).

> Serial meetings are prohibited by Indiana Law. Ind. Code § 5-14-1.5-3.1 states:
>
> (a) Except as provided in subsection (b), the governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:
>
> (1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.
>
> (2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.
>
> (3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.
>
> (4) The gatherings are held to take official action on public business.

As three (3) members of the Board would not constitute a quorum, you suggest the two (2) groups traveling to the out-of-state facility constituted a serial meeting as the aggregate sum of the members formed a majority. You also argue the meeting took place within seven (7) days if the Indiana Rules of Trial Procedure rules for calculating timelines are followed. Rule 6 states "the day of the act, event, or default from which the designated period of time begins to run shall not be included".

1 Upon further reflection, the IPLA did release two of the emails in un-redacted form and consented it was an error on their part to withhold it initially.

Under the ODL, "meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. It excludes from the definition of meeting (and serial meeting), however, any on-site inspection of any project, program or facilities of applicants for incentives or assistance from the governing body. See both Ind. Code § 5-14-1.5-2(c)(2) and Ind. Code § 5-14-1.5-3.1(c)(2).

It is clear from information provided the tour of the facility was clearly intended to be an on-site inspection. It would be difficult to categorize it any other way. As the Indiana General Assembly has carved out an exception for these types of gatherings, it cannot be considered a violation.

The agenda for the two (2) groups, however, also included a lunch with Walgreens representatives. The subject matter of the lunch meeting is not clear. If it went beyond a social gathering and public business was discussed, the lunch could be considered to be taking official action on public business. Official action is broadly defined and means to receive information; deliberate; make recommendations; establish policy; make decisions; or take final action. See Ind. Code § 5-14-1.5-2(d). Although not conclusive, one could make the inference some of these actions took place. For the purposes of discussion, I will assume they did, thus triggering Ind. Code § 5-14-1.5-3.1(d).

Now the question becomes if the lunch meetings, at which we are presuming official action on public business took place, are serial meetings. The collective sum of the meetings constituted the totality of the Board – obviously a quorum. The fact in contention is if the meetings took place within seven (7) days. When determining violations of the access laws, I will often look to other rules and statutes if the situation warrants it. I have used, and will continue to use, the Indiana Rules of Trial Procedure as persuasive guidance. Even taking into consideration Rule 6, I do not find your argument to be meritorious in this case.

Ind. Code § 5-14-1.5-3.1(3) clearly states the meetings are serial meetings if held *within* a period of seven (7) days. The first meeting is the condition precedent to the tolling of timeframe; the condition subsequent is the second meeting. The antecedent meeting was on Tuesday, June 7. The second meeting occurred on Tuesday, June 14. This is not *within* seven (7) days, but rather eight (8). I do not find this to be an exercise in semantics as other provisions of the ODL makes specific reference to strict timelines and when to exclude weekends, holidays, etc. Trial rules do as well, but the plain language of the serial meeting law is *within* seven (7) days. If the law used the language *seven (7) days apart*, I may be compelled to find differently.

Additionally, the emails provided to you allude to the members' cognizance of the Open Door Law and its arrangement to split the two (2) groups to avoid a quorum. The emails contain specific references to Open Door Law provisions and the Board's awareness of its responsibilities under the ODL. I do not find this to be indicative of the Board's intention to subvert the law, only to be mindful of its considerations. Mere mention of the ODL in making travel preparations is not proof positive of unlawful behavior.

As to the Access to Public Records Act violation, the public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." See Ind. Code § 5-14-3-1. The Indiana Board of Pharmacy and the Indiana Professional Licensing Agency are public agencies for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Agency's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

The use of the so-called deliberative materials exception under Ind. Code § 5-14- 3-4(b)(6) is one of the more elusive and subjective provisions of Indiana access laws. The intent of the law is clear – to protect the quality of decision making – but its application is far from immutable. That said, myself and former Access Counselors have stated *ad naseum* that the Public Access Counselor is not a finder of fact. I do not have the benefit of reviewing redacted materials *in camera* nor is it my expectation that agencies provide them to me in their original form. Whether communication is deliberative is indeed a matter of fact and not of law.

Ind. Code § 5-14- 3-4(b)(6) states records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making may be withheld at the discretion of the public agency. I cannot infer, let alone conclusively determine, the materials redacted are or are not deliberative. I will defer to a trier of fact for that conclusion. I do agree, however, the majority of communication between public officials is deliberative in nature.

I have cited Former Public Access Counselor Hoage's Informal Opinion found at 13-FC-32 before and I will do so again. He opined:

> Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. *See Opinion of the Public Access Counselor 98-FC-1*. Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12.

I would only add that an agency be particularly mindful of the perception engendered when large swaths of materials are redacted. In no way am I suggesting the Board of

IPLA has run afoul of the law by doing so, but it inevitably invites scrutiny. They cite *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana University*, 787 N.E. 2d 893(Ind. Ct. App. 2005) and should give great weight to the operative portion of the holding – that non-dislcosable materials should be separated from those subject to disclosure.

Turning to the issue of whether a Board member acting in non-official capacity can claim the deliberative materials exception, I know of no authority which speaks directly to the matter. In order to withhold such records from disclosure under Ind. Code § 5-14-3-4(b)(6), the documents must also be intra-agency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. See *Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17*.

The member in question is a Board member. He is also a Walgreens company manager. Consider Ind. Code § 25-26-13-3(a):

> Except for the member representing the general public, the members must be pharmacists in good standing of recognized experience and ability from varied practice settings who hold a current license to practice pharmacy in Indiana.

Inevitably, situations will arise when the Board will be called upon to make a decision which directly affects a Board member's interest. Such is the inherent peril of a self-regulating industry. But I know of no authority, in Indiana or otherwise[2], which would suspend a member's status as a public official when a conflict of interest necessitates recusal. The extent of his participation in final actions would certainly be affected, but such matters are more appropriate for the Indiana Inspector General to consider from and ethics perspective.

As an appointed member of the Board, the release of opinion-based communications by the individual in question is afforded the same discretionary status as the rest of the Board. Likewise, his actions and non-deliberative communications regarding public business are equally subject to public scrutiny.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the Indiana Board of Pharmacy and the Indiana Professional Licensing Agency have not violated the Open Door Law or the Access to Public Records Act.

[2] I have reviewed *Dep't of the Interior v. Klamath Water Users,* 532 U.S. 1 (2001) and do not find the case to be on-point in this factual scenario. It would seem to address the section of Ind. Code § 5-14-3-4(b)(6) dealing with independent contractors, but not a board member's ongoing status as a public official.

Regards,

Luke H. Britt
Public Access Counselor

Cc: Mr. Jeff Collins, Esq.