



STATE OF INDIANA

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March 1, 2016

Mr. Rick Lorrison
2700 East 27th Street
Muncie, Indiana 47303

Mr. Roger Overbey
2201 East Dartmouth Avenue
Muncie, Indiana 47303

Re: Formal Complaint 16-FC-11; Alleged Violation of the Open Door Law by the Delaware County Board of Commissioners

Dear Mr. Lorrison and Mr. Overbey:

This advisory opinion is in response to your formal complaint(s) alleging the Delaware County Board of Commissioners ("Commissioners" or "Board") and Commissioners James King and Shannon Henry violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 et. seq. The Commissioners have responded via counsel, Mr. John H. Brooke, Esq. His opinion is enclosed 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 19, 2016.

BACKGROUND

Your complaints dated January 14 and 15, 2016 allege the Delaware County Commissioners violated the Open Door Law by taking official action outside of a public meeting.

On December 21, 2015, letters were sent to both of you terminating your business relationships with Delaware County. These letters were signed by two (2) of the three (3) county commissioners. You contend the fact only two (2) commissioners signed the letters and because one (1) commissioner was unaware of the letter being sent to you that official action took place outside of a public meeting. There was a Commissioners meeting on December 21, 2015; however, the minutes provided do not show a vote to eliminate any positions or business relationships.

On February 8, 2016, the Commissioners responded via counsel. Counsel notes that County Commissioners conduct continuous meetings and are exempt from the 48 hour notice requirement set by the Open Door Law. *See Ind. Code 5-14-1.5-5(f)* and *Board of County Comm'rs v. Tinkham*, 491

N.E.2d 578 (1986). Counsel also contends Commissioner Riggin was aware of the decision to terminate Mr. Lorrison's employment and she merely was unaware of the decision to send a letter to Mr. Lorrison regarding the termination. Finally, counsel notes the vote on this matter occurred on January 4, 2016.

Counsel contends Mr. Overbey's contract with the County Commissioners had expired in January 2015 and any employment past this date was at the pleasure of the Commissioners. Similar to Mr. Lorrison's complaint, counsel contends Commissioner Riggin was aware of the decision to terminate Mr. Overbey's employment and she was merely unaware of the decision to provide a letter to Mr. Overbey of this fact. Counsel contends the decision to terminate your "at pleasure employment" was a mere administrative function of the Commissioners.

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)*.

As for County Commissioners meeting in continuous session, the notice law was amended after the Tinkham case, *See P.L. 67-1987*.

The general rule is that notice must be provided of meetings of a governing body of a public agency under Indiana Code 5-14-1.5-5(a). There are two (2) exceptions listed at Indiana Code 5-14-1.5-5(f), one for governing bodies which meet in continuous session and another for town and county executives to consider administrative functions of their respective units. If neither of these two (2) exceptions to the notice requirement are met, notice of the date, time and place of any such meeting must be posted at the principal office or meeting location of the governing body. *See Ind. Code § 5-14-1.5-5(b)*.

The Commissioners claim they qualify as a body which meets in "continuous session" and are not subject to the notice requirements of the Open Door Law. They cite to *Board of Commissioners of St. Joseph County v. Tinkham*, a case decided in April, 1986, by the Indiana Court of Appeals, as authority for the notion that county commissioners are generally exempt from the meeting notice requirements. *See, 491 N.E.2d 578 (1986)*.

After the *Tinkham* decision (and as a result of, along with several other cases), the General Assembly amended the notice exemptions set out at Indiana Code 5-14-1.5-5(f). *See, P.L. 67-1987*. The amended law struck County Boards of Commissioners from the authorized list of those governing bodies meeting in continuous session. No other Indiana Code section gives County Boards of Commissioners the authorization to meet in continuous session, a fact recognized in *Informal Opinion of the Public Access Counselor 98-05*. That Opinion goes on to state:

Indiana Code 5-14-1.5-5(f)(1) remains applicable to governing bodies that meet in continuous session and exempts them from providing notice except for meetings that are required by or held under statute, ordinance, rule or regulation. If the General Assembly intends to characterize a governing body as meeting in continuous session, it does so by

specific language. For example, the State Board of Tax Commissioners' enabling act clearly states that they meet in continuous session. See Ind. code § 6-1.1-30-4. In contrast, the enabling act for boards of county commissioners provides that the commissioners are to set meetings once each month and at other times as necessary. See Ind. Code § 33-2-2-6. The Commissioners, therefore, do not meet in continuous session as contemplated under Indiana Code 5-14-1.5-5(f)(1).

Alternatively, P.L. 67-1987 recognized the need for boards of commissioners to undertake administrative, operational functions without notice, therefore the public law added the administrative function exception to Ind. Code § 5-14-4.5-5(f):

if the meetings are held solely to receive information or recommendations in order to carry out administrative functions . . . or confer with staff members on matters relating to the internal management of the unit. "Administrative functions" do not include the awarding of contracts, or any other action creating an obligation or otherwise binding the county.

This new provision replaces the continuous session language in subsection (f), however, in every other way, the notice requirements of the Open Door Law absolutely and unequivocally apply to county boards of commissioners. *Tinkham*, as it applies to boards of commissioners, has been rendered moot by subsequent legislation.

At some time prior to December 23, 2015, a decision was made to terminate your services by not renewing your contract. The Board states it did so as “a financial decision to save the County funds”. Matters of financial bearing are not administrative in nature, but rather are official action on public business. For a definitive statement on administrative function meetings, see *Informal Opinion of the Public Access Counselor 12-INF-36*.

A “meeting” as contemplated by the Open Door Law 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 *Ind. Code § 5-14-1.5-2(c)*. “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.

While the decision to terminate both contracts was properly ratified on January 4, 2016, the decision had been made and communicated in the prior weeks. While the Board is correct statements made outside official meeting minutes are not binding, the Board clearly canceled your contract(s). In contract law terms, the action of delivering you a letter was most definitely binding on the county. The official letters for the termination were dated December 23, 2015. The implication is the Commissioners decided to terminate the contractual relationships prior to December 23, 2015 and merely undertook a vote as a formality after the fact.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Delaware County Commissioners have violated the Open Door Law.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. John H. Brooke, Esq.