STATE OF INDIANA

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OPINION OF THE PUBLIC ACCESS COUNSELOR

MARK A. BOONE	)	
	)	
Complainant	)	
	)	
v.	)	**17-FC-41**
	)	
NEW ALBANY-FLOYD COUNTY CONSOLIDATED SCHOOL CORP.	)	
	)	
	)	
Respondent	)	

ADVISORY OPINION
March 27, 2017

This advisory opinion is in response to a formal complaint alleging the New Albany-Floyd County Consolidated School Corporation ("School") violated the Open Door Law ("ODL"), Indiana Code § 5-14-1.5-1 et. seq. The School has responded via Mr. John W. Woodard, Jr., Esq. The response is enclosed for review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on February 21, 2017.

BACKGROUND

The formal complaint alleges the New Albany Floyd County Consolidated School Corporation violated the Open Door Law by taking final action in an executive session and for posting inadequate notice of the executive session.

Per the complaint, on January 18, 2017, the School Board of Trustees posted notice of an executive session to discuss the job performance of an individual employee and to narrow the list of prospective appointees for a Board vacancy. The executive session took place the same day.

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The School responded to the formal complaint by arguing that while a consensus was informally reached in executive session, the final action was taken by vote at a later public meeting. The School also contends the notice was posted on January 13, 2017, well in advance of the 48-hour deadline for posting notice.

ANALYSIS

It is the intent of the Open Door Law ("ODL") that 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 Indiana Code § 5-14-1.5-1.* Forty-eight (48) hours-notice of the meeting must precede commencement of the meeting, including executive sessions.

The Complainant does not specify any evidence regarding the deficient notice being posted the same day as the executive session. Therefore, that portion of the complaint will not be addressed.

As to the executive session decision, the Open Door Law states that executive sessions may take place under narrow subject-matter-sensitive situations. The law is clear final action must not be taken at those gatherings. *See Indiana Code § 5-14-1.5-6.1(c).* "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. Indiana Code § 5-14-1.5-2(g). Any binding decision can be considered to be a 'vote' for the purposes of the Open Door Law.

I caution the School not to take a liberal position on case law or statute when interpreting executive session requirements. This Office scrutinizes executive sessions closely, as they are the only authorized instances of closed-door meetings where the public is not allowed.

A plain reading of the Open Door Law clearly indicates the intent of its drafters is for executive sessions to be pre-determinative if not substantively pre-decisional. They are for discussion, deliberation, and information gathering and are not to result in seminal outcomes. Even the case cited by the School is persuasive toward this point. An inference can be made the decision to narrow down any list of candidates to one person is a final action. See *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. App. 2001) ("the Council's "final action" on the issue of which employees would be rehired consisted of its vote at the public meeting" citing *Evansville Courier v. Willner*, 553 N.E.2d 1386 (1990)).

When considering the appointment of a public official, a School Board may do the following pursuant to Indiana Code § 5-14-1.5-6.1(b)(10):

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> (A) Develop a list of prospective appointees.
> (B) Consider applications.
> (C) Make one (1) initial exclusion of prospective appointees from further consideration.
> …
> An initial exclusion of prospective appointees from further consideration may not reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3) prospective appointees.

A plain reading of the latter portion of the statute is unequivocally intended to bar decisions narrowing down the list of prospective employees to less than three (3). While the School is correct certain decisions can be reached in executive session, the statute for this particular executive session type indicates the *only* authorized decision would be to narrow down the list to three (3) individuals. Discussion of the final three (3) (and any interviews) must be conducted at an open meeting. Only then may a governing body take official action. The School Board concedes it made a decision and reached a "consensus" as to one appointee. As the *Baker* court suggests, merely ratifying an improperly made decision after the fact does not cure the defect. The final action taken behind closed doors was not a vote in name, but given the parameters of Indiana Code § 5-14-1.5-6.1(b)(10), it certainly was in character and nature.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the New Albany-Floyd County Consolidated School Corporation has violated the Open Door Law by making a decision tantamount to a final action in executive session.

Luke H. Britt
Public Access Counselor

Cc: Mr. John W. Woodard, Jr., Esq.