

January 18, 2000

Mr. Richard Frost
507 Stonehedge Drive
Carmel, IN 46032-7400

Re: *Advisory Opinion 99-FC-22*;
Meeting Notices and Memoranda of the Hamilton County Board of Commissioners.

Dear Mr. Frost:

This is in response to your formal complaint, which was received on December 28, 1999.¹ You have alleged that the Hamilton County Board of Commissioners ("County Commissioners,") has violated the Indiana Open Door Law, Indiana Code chapter 5-14-1.5, on several occasions. Specifically, you claim that the County Commissioners violated the Open Door Law when they scheduled executive sessions on a yearly basis, accompanying each public meeting regardless of whether one is held. Further, you contend that forty-eight (48) hours notice is not provided when a bona fide executive session is held and that memoranda for executive sessions held are not prepared or ready for inspection until thirty (30) days after the executive session has been held. Ms. Sharon R. Clark, President of the County Commissioners responded in writing to your complaint in a letter dated January 3, 2000. A copy of her response and an attached letter from attorney Michael Howard are enclosed for your reference.

It is my opinion that County Commissioners may only conduct executive sessions for the purposes listed at Indiana Code section 5-14-1.5-6.1(b), and providing notice that they will discuss "litigation, personnel and land acquisition" may not conform to the Open Door Law notice requirements. Any attempts to provide annual notice of such sessions is a violation of the Open Door Law. Further, the County Commissioners may have also violated the Open Door Law by failing to comply with all of the forty-eight (48) hour notice requirements of Indiana Code section 5-14-1.5-5 and by failing to provide all required information in the memoranda of their executive sessions.

BACKGROUND

According to your complaint, the County Commissioners schedule executive sessions for each date that they have a regular, public meeting, regardless of whether they actually hold an executive session. You also stated that the County Commissioners provide annual notice of executive sessions in violation of the Open Door Law. Further, you allege that you do not believe that the County Commissioners are providing forty-eight (48) hours notice of legitimate executive sessions as required under the Open Door Law. Finally, you stated that the County Commissioners do not provide access to their abbreviated memoranda of their executive sessions until thirty (30) days after an executive session

takes place.

In her response, Ms. Clark stated that the County Commissioners' meeting agendas recognize that executive sessions will be held before each public meeting for "personnel, litigation and land acquisition" in order to enable them to discuss matters that may be relevant to the public meeting that follows.² All executive sessions were held as noticed in 1999. Annual meeting notices are provided to all publications that request them, and each newspaper receives agendas (which all list an executive session) for each meeting of the County Commissioners at least forty-eight (48) hours in advance. Legal advertisements under Indiana Code chapter 5-3-1 are not published for their meetings, but copies of the agenda for the County Commissioners' meetings are forwarded to the news media at least forty-eight (48) hours in advance. Finally, since January 1999, the County Commissioners have approved executive session memoranda at the beginning of the public meeting that follows the executive session. The memoranda lists the issues discussed, members in attendance and time of the executive session.

ANALYSIS

The intent and purpose of the Indiana Open Door Law is 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." IND. CODE § 5-14-1.5- 1. The provisions are to be "liberally construed with the view of carrying out its policy." IND. CODE § 5-14-1.5-1. The County Commissioners are a clearly both a public agency and a governing body under the Open Door Law. Ind. Code §5-14-1.5-2. Your specific concerns about the conduct of executive sessions by the County Commissioners are addressed below.

Conduct of Executive Sessions

Under the Open Door Law, an executive session is defined as "a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." Ind. Code §5-14-1.5-2(f). The purposes for which executive sessions may be held are limited to the eleven situations listed at Indiana Code section 5-14-1.5-6.1(b). Some of these exceptions permit a governing body to hold an executive session:

- (1) Where authorized by federal or state statute.
- (2) For discussion of strategy with respect to any of the following:
 - (A) Collective bargaining.
 - (B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing.
 - (C) The implementation of security systems.
 - (D) The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

* * *

- (4) To receive information about and interview prospective employees.
- (5) With respect to any individual over whom the governing body has jurisdiction:

- (A) to receive information concerning the individual's alleged misconduct; and
- (B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is a physician.

* * *

(8) To discuss a job performance evaluation of individual employees. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.

Indiana Code §5-14-1.5-6.1(b). " 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 under subsection (b). Ind. Code §5-14-1.5-6.1(d).

In her response, Ms. Clark admits that the County Commissioners hold executive sessions to discuss "litigation, personnel and land acquisition." Discussion of strategy concerning pending or threatened litigation would be permissible under Indiana Code section 5-14-1.5-6.1(b)(2)(B) and discussion of strategy concerning the acquisition of land would also be permissible under Indiana Code section 5-14-1.5-6.1(b)(2)(D). There is no specific exception that would permit general discussion of personnel matters, but a few of the exceptions would permit very limited action in executive sessions on personnel matters. See, Indiana Code §§5-14-1.5-6.1(b)(4), (5) and (8). The County Commissioners' notices of executive session, in any event, should specifically refer to the instance(s) under Indiana Code section 5-14-1.5-6.1(b) that they are holding each executive session. The County Commissioners, therefore, are not authorized under the Open Door Law to conduct executive sessions to discuss "litigation, personnel or land acquisition" unless those discussions are permissible under Indiana Code section 5-14-1.5-6.1(b).

Notice of Executive Sessions

Indiana Code § 5-14-1.5-5(a) provides that:

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least *forty-eight (48) hours* (excluding Saturdays, Sundays, and legal holidays) before the meeting.

(Emphasis added). While notices of regular meetings may be given once a year, Indiana Code section 5-14-1.5-5(c) specifically states that this provision does not apply to executive sessions. It appears that the County Commissioners are now providing separate notice of executive sessions, but any practice of advertising executive sessions on an annual basis would violate the Open Door Law.

Public notice of the date, time and place of executive sessions, therefore, must be provided at least forty-eight (48) hours in advance of an executive session under Indiana Code section 5-14-1.5-5(a). This notice must also state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under Indiana Code section 5-14-1.5-6.1(d). The public agency is required to:

1. (post) a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and
2. (deposit) in the United States mail with postage prepaid or by delivering notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency.

Indiana Code section 5-14-1.5-5(b).

In her response, Ms. Clark states that the County Commissioners are not required to publish notice under Indiana Code chapter 5-3-1 (notice by publication) for most of their meetings and this is correct. Any agenda forwarded to the media that requested notice of the all meetings prior to January 1 of the calendar year will satisfy the notice requirements of the Open Door Law so long as the date, time, place and enumerated instance(s) under Indiana Code section 5-14-1.5-6.1(b) are included. The County Commissioners are also required to post a notice with the same information either outside their principal office or the meeting location in order to inform the public, but from the response provided, it appears that this is not done.

If the information provided to the media at least forty-eight (48) hours in advance of any executive session includes all of the notice information required under the Open Door Law, the County Commissioners will have partially complied with the notice requirements of the Open Door Law. The failure to provide all of the required information to the media or to post such either outside of the County Commissioners' principal office or the meeting location, are violations of the Open Door Law.

Memoranda Prepared for Executive Sessions

Under the Open Door Law, public agencies that conduct meetings are required to keep memoranda.

As the meeting progresses, the following memoranda shall be kept:

- (1) The date, time, and place of the meeting.
- (2) The members of the governing body recorded as either present or absent.
- (3) The general substance of all matters proposed, discussed, or decided.
- (4) A record of all votes taken, by individual members if there is a roll call.

Indiana Code section 5-14-1.5-4(b). These memoranda are to be available within a "reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings." Ind. Code §5-14-1.5-4(c). In the case of executive sessions, the memoranda requirements are modified in that the memoranda "must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given." Ind. Code §5-14-1.5-6.1(d). The public agency must also certify in a statement in those memoranda that no subject was discussed other than the subject specified in the public notice. Id.

According to Ms. Clark, memoranda for each executive session are approved at the public

meeting following each such session. These memoranda include the issues discussed, members in attendance and time of the session.

If the County Commissioners are producing memoranda immediately after each executive session, then the requirement that memoranda be provided within a reasonable period of time after the session took place is satisfied. The content of those memoranda, however, does not appear to fully comply with the Open Door Law. Memoranda of the County Commissioner's executive sessions must also include the date and place of the session, identify the specific instance or instances under Indiana Code section 5-14-1.5-6.1(b) and include a certification that all that was discussed was the subject matter (s) identified in the public notice of that executive session. To the extent that the County Commissioner's memoranda do not include all of the information required to be in memoranda of executive sessions, it is a violation of the Open Door Law.

CONCLUSION

It is my opinion that Hamilton County Board of Commissioners may only conduct executive sessions for the purposes listed at Indiana Code section 5-14-1.5-6.1(b) and merely providing notice that they will discuss "litigation, personnel and land acquisition" may not conform to the Open Door Law notice requirements. It appears that the County Commissioners are now providing separate notices for each executive session, but it is clear that any practice of providing annual notice of such sessions would violate the Open Door Law. Further, the County Commissioners may have violated the Open Door Law by failing to comply with all of the forty-eight (48) hour notice requirements of Indiana Code section 5-14-1.5-5 and by failing to provide all required information in the memoranda of their executive sessions.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Ms. Sharon R. Clark, President
Hamilton County Board of Commissioners

¹ According to the information provided in your complaint, you thought that you had filed a formal complaint in July 1999 by speaking to the Director of the Indiana Commission on Public Records, a separate state agency from the Office of the Public Access Counselor. No formal complaint was ever received prior to the one that is the subject of this opinion.

² According to Ms. Clark's response and an attached letter from attorney Michael Howard, their notice practices did change as a result of your complaints to the County Commissioners some months ago. While Ms. Clark references "agendas," I will assume, for the purposes of this opinion, that the County Commissioners use a combined notice and agenda for their meetings.