



STATE OF INDIANA

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November 16, 2011

Ms. Adele Russell
7810 North County Road 675 West
Fairbanks, Indiana 47849
Via email: maryjlapointelawfirm.com

Re: Formal Complaint 11-FC-277; Alleged Violation of the Open Door Law by the Sullivan County Board of Commissioners; Converted to Informal Inquiry 11-INF-69

Dear Ms. Russell:

This advisory opinion is in response to your formal complaint alleging the Sullivan County Board of Commissioners ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* John Elmore, Attorney, responded on behalf of the Board. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that you were employed by Sullivan County as the Assistant Director of the Sullivan County Ambulance Services until your termination on April 13, 2011. You allege that the decision to terminate your employment, made by the Board, was made in secret and not at a public meeting. You maintain that your termination would be considered "final action" under I.C. § 5-14-1.5-2(g) and required to be made at a meeting open to the public. The Sullivan County Council, the county's legislative and fiscal body, recognized the "closed-door nature" of your termination and unanimously voted to void the termination. However, you have never been advised to return to work or been contacted by the County about your employment since your April 13, 2011 termination.

In response to your formal complaint, Mr. Elmore advised that you were terminated on April 14, 2011, in person, by Commissioner John McCammon. The Board consists of three members. Commissioner McCammon conferred with Commissioner Luke Misner prior to your removal by phone, thus acting as a majority of the Board. At an executive session following your termination, the Commissioners made known to the Director of the Sullivan County Ambulance Service of the complaints that Board had

received regarding your conduct but ultimately gave the director authority to rehire you, which the he declined to do so.

Mr. Elmore provides that your complaint is untimely filed pursuant to I.C. § 5-14-5-7. Further, the executive session held subsequent to your termination could have been held pursuant to I.C. § 5-14-1.5-6.1(b)(6) or alternatively under I.C. § 5-14-1.5-5(f)(2).

ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 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* I.C. § 5-14-1.5-3(a).

A person denied the right to attend any public meeting of a public agency in violation of I.C. § 5-14-1.5 or denied any other right conferred by I.C. § 5-14-1.5 may file a formal complaint with the public access counselor. *See* I.C. § 5-14-5-6. A person that chooses to file a formal complaint with the public access counselor must file the complaint not later than thirty days after the denial, or the person filing the complaint received notice that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. *See* I.C. § 5-14-5-7(a)(1)-(2).

There is no dispute that thirty days has expired from the date of your termination and the date you filed your formal complaint with the public access counselor. As such, you must avail yourself to I.C. § 5-14-5-7(a)(2) in order to have standing to file a formal complaint with this office. You allege that the Board violated the ODL when the decision to terminate your employment was not made at a public meeting and alternatively, made in secret. You were made aware of your termination by Commissioner McCammon, in person, on April 13, 2011. You do not provide in your formal complaint the date you received notice in fact of the alleged secret meeting, the date of the alleged secret meeting, or any other analysis why you have standing to file a formal complaint with the public access counselor pursuant to I.C. § 5-14-5-7(a)(2). You did submit a June 29, 2011 newspaper article that detailed, in part, a June 28, 2011 Sullivan County Council meeting that dealt with your dismissal; however, thirty days have elapsed since the article was published and date that you filed your formal complaint. As such, it is my opinion that you lack standing to file a complaint with this office. However, you are entitled to make an informal inquiry about the state's public access laws. *See Opinions of the Public Access Counselor 00-FC-11 and 8-FC-168*. The substance of your complaint will therefore be addressed as an informal inquiry. *See* I.C. § 5-14-4-10(5).

A meeting 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* I.C. § 5-14-1.5-2(c). While the ODL does not define “gathering,” this office has generally said that members

must be physically present to be considered a “gathering.” See *Opinion of the Public Access Counselor 08-FC-208, 10-FC-314, 2006-INF-Indiana Council of Independent Living*.¹ A member of a governing body of a public agency who is not physically present at the meeting but communicates with members by telephone, computer, or other electronic means cannot be considered present at the meeting and cannot participate in final action unless expressly authorized by statute. See I.C. § 5-14-1.5-3(d). If members participating by telephone cannot be counted as present, a telephone conversation between two people where each is at a different location would not constitute a meeting pursuant to the ODL.

Here, the Board has provided that “Commissioner McCammon conferred by telephone with Commissioner Luke Misner so that the two commissioners were acting as a majority of the three member board of the Sullivan County Commissioners.” It is my opinion that the telephone conversation held between Commission McCammon and Misner did not constitute a meeting pursuant to the ODL. Even if it were to be considered a meeting pursuant to the ODL, I.C. § 5-14-1.5-3(d)(1) provides that a member participating by telephone may not participate in final action or be counted as present at the meeting unless the member’s participation is expressly authorized by statute. I am not aware of any statute that expressly authorizes the Board to participate in final action or be counted as present via telephone or other electronic means.

Generally, the ODL requires 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 hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. See I.C. § 5-14-1.5-5(a). However, the requirements for posting notice do not apply when the executive of a county or the legislative body of a county meets, if the meeting is held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to internal management. Administrative functions do not include the awarding of contracts, the entering into contracts, or any other action creating an obligation or otherwise binding a county or town. See I.C. § 5-14-1.5-5(f)(2). Even though notice is not required, the “administrative function” meeting must be held in the public, since the notice provision of the ODL is *the only provision* that does not apply to an “administrative function” meeting. I.C. § 5-14-1.5-5(f)(2), emphasis added. Thus, the ODL provides for circumstances where public agencies would meet without notice to handle day-to-day issues in the internal management of the agency.

The ODL permits public agencies to hold executive sessions in certain specified instances, including receiving information about an employee's alleged misconduct and to discuss, before a determination, the employee's employment status. *Frye v. Vigo County*, 769 N.E.2d 188, 192 (Ind. Ct. App. 2002) *citing* I.C. § 5-14-1.5-6.1(b)(6). An "executive

¹ The 2006 Informal Opinion can be found at http://www.in.gov/pac/informal/files/ICOIL_Simers_inquiry_phone.pdf

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." *See* I.C. § 5-14-1.5-2(f). The only official action that cannot take place in executive session is a final action which must take place at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). "Final action " is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Notice of an executive session must be given 48 hours in advance of every session 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* I.C. § 5-14-1.5-6.1(d). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

As applicable here, if the Board is claiming it met to discuss any preliminary matters regarding the status of your employment as an administrative function it would be allowed to do so pursuant to I.C. § 5-14-1.5-5(f)(2). *See Opinion of the Public Access Counselor 11-FC-14*. The Board could also meet in executive session to discuss your alleged misconduct and employment status pursuant to I.C. § 5-14-1.5-6.1(b)(6). Both of the examples operate under the assumption that the Board takes any final action (and actions leading up to final action, such as testimony) regarding your employment status at a regular or special meeting that is open to the public. *Frye*, 769 N.E.2d at 193; *See also Opinions of the Public Access Counselor 01-FC-79; 05-FC-183; 11-FC-14*. If the Board failed to take final action regarding your status as an employee at a meeting open to the public, it is my opinion it would have violated the ODL.

Lastly, I would note that a Court, not the Public Access Counselor, may declare a final action of a governing body of a public agency void. *See* I.C. § 5-14-1.5-7(a). If a complainant continues to believe that a public agency has acted in violation of the ODL following the issuance of an advisory opinion from this office, that complainant may file an action in any court of competent jurisdiction to obtain a declaratory judgment; enjoin continued, threatened, or future violations; or declare void any policy, decision, or final action. *Id*; *See Opinions of the Public Access Counselor 10-FC-327 and 11-FC-11*. In determining whether to declare any policy, decision, or final action void, a court shall consider certain factors, including the extent to which the violation affected the substance of the policy, decision, or final action; denied or impaired access to any meetings that the public had a right to observe and record; and prevented or impaired public knowledge or understanding of the public's business. *See* I.C. §5-14-1.5-7(d). Not all violations of the ODL would result in a court finding that the action should be voided. *Hinojosa v. Bd. of Pub. Works & Safety*, 789 N.E.2d 533 (Ind. Ct. App. 2003); *See also Opinion of the Public Access Counselor 09-FC-193*.

If I can be of any additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with the first letter of the first name being a large, stylized 'J'.

Joseph B. Hoage
Public Access Counselor

cc: John Elmore