



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

October 10, 2012

Ms. Gina M. Burgess

Via e-mail: ginamburgess@aol.com

Re: *Informal Inquiry 12-INF-43*

Dear Ms. Burgess:

This is in response to your informal inquiry regarding the Allen County Election Board ("Board"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion. My opinion is based on applicable provisions of the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Beth A. Dlug, the Board's Director of Elections, responded in writing to your informal inquiry. Her response is enclosed for your reference.

BACKGROUND

You inquire whether the Board violated the ODL. You provide that on Monday, September 17, 2012, you sent a request to the Board to correct an error on the ballot as it pertained to certain language required by state statute. This request was received and acknowledged by the Board on the same date. Your request did not ask for a formal hearing on the matter. On Tuesday, September 18, 2012, you provide that the Board made a determination that there was no error. You followed up with communications on that same date to ask if a hearing was needed on the matter and have received no response to that question. The Board's lack of response makes you suspect that a hearing is indeed needed.

You provide that the Board made a determination outside of a public meeting. You disagree with the Board's determination. You believe that the Board is under an obligation to hold public meetings on anything that requires a determination. If they are required to hold a public meeting, then that meeting would require a public notice. Also, you acknowledge that there is a statute of limitations in regards if someone wants to file suit pursuant to the ODL. You inquire in matters where actions were taken outside of a meeting, with no public notice, when does the statute of limitation begin to toll.

In response to your informal inquiry, Ms. Dlug advised that on September 17, 2012, you contacted Ms. Dlug regarding a perceived error in the 2012 Allen County Presidential ballot. The email was sent directly to Ms. Dlug, as Allen County's Director of Elections. Upon receipt of the mail, Ms. Dlug began an investigation into your

inquiry. After researching the relevant statutes and conferring with several colleagues, including the Indiana Election Division and the Board's legal counsel, Ms. Dlug made the determination that the ballot did not contain an error.

Ms. Dlug further provided that there is no mandatory duty for the Board to hold a meeting to determine if a mistake has been made on the ballot. Ms. Dlug did contact Board President, Zachary E. Klutz, to advise him of the inquiry, Ms. Dlug's research, and to inquire whether he wanted to call a meeting of the Board. Mr. Klutz declined to call a meeting. The next day, without discussing the matter with either of the other two Board members, Ms. Dlug advised you of her decision. The Board did not meet in any fashion in regards to your inquiry.

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).

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). 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).

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). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14.1.5-2(e). "Final action" means 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). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). While the ODL requires that all final action must be taken at a meeting open to the public, the law does not provide instruction as to what actions of a governing body require a meeting and/or vote. *See Opinions of the Public Access Counselor 08-FC-136 and 12-FC-114*. As such, as long as the Board did not take final action on the issue that was presented outside of a public meeting, then the Board did not violate the ODL.

As to your inquiry regarding the applicable statute of limitations where actions are alleged to have been taken outside of a properly noticed, public meeting, I.C. § 5-14-1.5-7(b) provides that:

(b) Regardless of whether a formal complaint or an informal inquiry is pending before the public access counselor, any action to declare any policy, decision, or final action of a governing body void, or to enter an injunction which would invalidate any policy, decision, or final action of a governing body, based on violation of this chapter occurring before the action is commenced, shall be commenced:

(1) prior to the delivery of any warrants, notes, bonds, or obligations if the relief sought would have the effect, if granted, of invalidating the notes, bonds, or obligations; or

(2) with respect to any other subject matter, within thirty (30) days of either:

(A) the date of the act or failure to act complained of; or

(B) the date that the plaintiff knew or should have known that the act or failure to act complained of had occurred; whichever is later. If the challenged policy, decision, or final action is recorded in the memoranda or minutes of a governing body, a plaintiff is considered to have known that the act or failure to act complained of had occurred not later than the date that the memoranda or minutes are first available for public inspection.

If I can be of 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 stylized and cursive.

Joseph B. Hoage
Public Access Counselor

cc: Beth A. Dlug