



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

May 8, 2013

Paul F. Lottes, General Counsel
State Board of Accounts
302 West Washington Street
Room E418
Indianapolis, Indiana 46204-2769

Re: Informal Inquiry 13-INF-25; State Board of Accounts

Dear Mr. Lottes:

This is in response to your informal inquiry regarding the application of the Open Door Law ("ODL"), Ind. Code 5-14-1.5 *et. seq.* to gatherings conducted by the State Board of Accounts ("SBOA") with government officials. Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry

BACKGROUND

You provide that upon completion of an audit or examination of a governmental unit, a field examiner ("Examiner") on behalf of the SBOA will meet with the respective government official or officials in order to review the draft audit report and discuss the Examiner's findings. This gathering allows the governmental officials to file a written response to the proposed findings as described in I.C. § 5-11-5-1(b). The gathering is commonly referred to as an exit conference. Pursuant to I.C. § 5-11-5-1(c) the draft audit report distributed to the governmental officials at the exit conference is confidential until it is made public.

In many of the political subdivisions that are audited, the chief executive officer that the Examiner would discuss the draft report with during the exit conference represents an executive body, such as a board or commission. The Examiner will make an effort to discuss the report and the SBOA's findings with the president of the board or commission, but often other members of the board or commission will desire to participate in the discussion. You inquire that if, during the exit conference, the Examiner meets with and discusses the draft audit report with a majority of a governing body, would this be considered a potential violation of the ODL.

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).

As provided in section 3(a), the requirements of the ODL apply to governing bodies of public agencies. A governing body is defined as:

- (b) "Governing body" means two (2) or more individuals who are:
 - (1) a public agency that:
 - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
 - (B) takes official action on public business;
 - (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
 - (3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter. *See* I.C. § 5-14-1.5-2(b)

The Examiner would not be considered a "governing body" under the ODL and there has been no indication that a majority of the actual SBOA would be in attendance at the exit conference. However, you have indicated that the exit conference may be attended by the chief officer of an executive body, such as the president of the county board of commissioners. The question remains that if a majority of the board or commission is in attendance at the exit conference, has a violation of the ODL occurred.

A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon 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 to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14-3-2(e).

If a majority of the governing body is present during the exit conference, then due to the broad definition of "official action", it is my opinion that a meeting of the governing body would occur. As a result, all requirements of the ODL would apply,

which would include providing proper notice and taking memoranda. *See* I.C. §§ 5-14-1.5-4; 5-14-1.5-5. If such procedures are not followed, the governing body, not the SBOA, would have acted in violation of the ODL. Although not raised in your inquiry, it may be possible for the exit conference to be conducted during an executive session.

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). A governing holding an executive session 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). 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). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, “To discuss a job performance evaluation of an individual employee pursuant to I.C. § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39; 12-FC-209.* In addition to providing notice, memoranda must be kept for all executive sessions. *See* I.C. 4 5-14-1.5-6.1(d). Including in said memoranda, the governing body must include a statement certifying that the only subject matter discussed during the executive session was that which was provided for in the public notice. *Id.*

Pursuant to I.C. § 5-14.1.5-6.1(b)(7), a governing body may conduct an executive session for discussion of records classified as confidential by state or federal statute. In reference to the audit report compiled by the Examiner on behalf of the SBOA, I.C. § 5-11-5-1(a)-(b) provides:

“The reports shall immediately be filed with the state examiner, and, after inspection of the report, the state examiner shall immediately file one (1) copy with the officer or person examined, one (1) copy with the auditing department of the municipality examined and reported upon, and one (1) copy in an electronic format under IC 5-14-6 of the reports of examination of state agencies, instrumentalities of the state, and federal funds administered by the state with the legislative services agency, as staff to the general assembly. Upon filing, the report becomes a part of the public records of the office of the state examiner, of the office or the person examined, of the auditing department of the municipality examined and reported upon, and of the legislative services agency, as staff to the general assembly. A report is open to public inspection at all reasonable times after it is filed. . .”

“(b) Before an examination report is signed, verified, and filed as required by subsection (a), the officer or the chief executive officer of the state office, municipality, or entity examined must have an opportunity to review the report and to file with the state examiner a written response to that report. If a written response is filed, it becomes a part of the examination report that is signed, verified, and filed as required by subsection (a).”

Thus, the report discussed by the Examiner and the public agency during the exit conference is confidential until the report is filed by the State Examiner. *See Opinions of the Public Access Counselor* 09-FC-216; 12-FC-217. At the time of the exit conference, the report has yet to have been filed by the State Examiner. Upon filing by the State Examiner, the final report and any response issued by the agency that has been filed is open for inspection at all reasonable times. *See* I.C. § 5-11-5-1(a). As such, if the report is deemed confidential by I.C. § 5-11-5-1 at the time of the exit conference, if a majority of the governing body desires to attend the exit conference, the governing body at its discretion may hold the meeting with the Examiner in executive session. *See also Opinion of the Public Access Counselor* 09-INF-08.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor