



STATE OF INDIANA

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May 24, 2013

Mr. Jeff Eakins
The Banner
24 N. Washington St.
Knightstown, Indiana 46148

Mr. Gregg Morelock
Brand & Morelock
6 W. South Street
P.O. Box 6
Greenfield, Indiana 46140

Re: 13-INF-27; Executive Sessions conducted pursuant to I.C. § 5-14-1.5-6.1(b)(6)

Dear Sirs:

This informal opinion is in response to your inquiry regarding executive sessions conducted by a governing body pursuant to Ind. Code § 5-14-1.5-6.1(b)(6). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.*

BACKGROUND

The Knightstown Town Council ("Council") conducted a properly noticed executive session on May 8, 2013. The notice provided that the executive session was called to receive information concerning an individual's misconduct, as the Council maintained jurisdiction over the individual, and for a discussion of strategy with respect to the initiation of litigation or litigation that was either pending or been threatened specifically in writing. The Council cited I.C. § 5-14-1.5-6.1(b)(6)(A) and I.C. § 5-14-1.5-6.1(b)(2)(B) for the authority that allowed the body to meet in executive session.

Annually, the Council appoints members to serve on a Police Committee ("Committee"). Although appointed annually, there have been situations in the past where committee membership has been changed by the Council during the year. Mr. Eakins believes that the Committee qualifies as a "governing body" pursuant to I.C. § 5-14-1.5-2(b)(3), as it is appointed by the Council and authority to take official action on

public business has been delegated to it by the Council. Mr. Eakins further notes that the Committee has previously conducted executive sessions. Mr. Morelock provides that the Committee is not a governmental entity as it does not make any decisions with regard to the operation of the police department and does not exercise any executive, administrative, judicial or legislative power. The Committee's sole function is to act as a conduit between the Council, the police chief, and member of the department.

Mr. Morelock advised that the executive session held on May 8, 2013 pursuant to (b)(6)(A) involved a grievance filed by one or more employees of the town. As such, Mr. Morelock concludes that the issues were regarding personnel and entitled to be heard in executive session. The grievance was completely unrelated to the Committee. Mr. Morelock maintained that the fact that the grievance was against more than one Council member, only one of whom was a member of the Committee, was significant. No decision or action was taken by the Council during the executive session; all decisions made by the Council regarding this issue will be made in an open, public meeting. Mr. Morelock is not aware of any statute or case law that indicates merely because a potential grievance involves a Council member that it is somehow taken outside the personnel exception found in the ODL. Mr. Morelock confirmed that no committee assignments were changed at the May 8, 2013 executive session and should such changes occur, action would be taken at an open, public meeting. Further, to decide grievances involving employees and Council members in a meeting open to the public would appear to violate the Access to Public Records Act ("APRA") as it relates to confidential matters pursuant to I.C. § 5-14-3-10. I.C. § 5-14-3-10 specifically applies to public officials, and thus would include the members of the Council.

Mr. Eakins disagrees with the Council's assertion that a grievance filed by a Town employee against a Council member who be considered "personnel" as it relates to (b)(6). Mr. Eakins further maintains that under general circumstances, Council members are not Town employees and the Council would have no jurisdiction over its individual members, as they are elected by the public. Further, the issue arises whether the application of (b)(6) is limited to those persons listed in (B), or does it apply to anyone over whom the governing body has jurisdiction. As to Mr. Morelock's concerns regarding confidential information, Mr. Eakins provided that information disclosed in a (b)(6) executive session is not necessarily "confidential" or "protected information" simply because it is received by the Council at an executive session.

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 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).

In order for the ODL to apply, the meeting must be held by a governing body of a public agency. 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)

There is no dispute that the Committee is appointed directly by the Council. Mr. Morelock has provided that the Committee’s sole function is to act as a conduit between the Council, police chief, and members of the police department. Further, the Committee in the past has held an executive session to receive information about and interview prospective employees, engaged in deliberations, and thereafter presented its recommendations to the Council. In light of said factors and the ODL’s broad definition of “official action”, it is my opinion that the Committee is a governing body pursuant to I.C. § 5-14-1.5-2(b)(3). As such, the Committee would be required to comply with all requirements of the ODL.

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). Notice of an executive session must be given 48 hours in advance of every session, excluding holidays and weekends, 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.* 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. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001). “Final action” is defined as a vote by a governing body on a proposal, motion, resolution, rule, regulation, ordinance or order. *See* I.C. § 5-14-1.5-2(g).

As applicable here, the Council held an executive session pursuant to I.C. § 5-14-1.5-6.1(b)(6)(A), in order to receive information concerning an Council member’s alleged misconduct, as the Council believed it maintained jurisdiction over the member. Mr. Morelock advised that the grievances were completely unrelated to the Committee and were filed by employees of the Town against certain Council members. Thus, the issue arises whether it was proper for the Council to conduct an executive session pursuant to (b)(6)(A) in order to receive information about the alleged misconduct of one of its members. The parties do not dispute that the Council has not made any decision regarding the grievances that were received and Mr. Morelock has advised that if any decision is made, it will be done in an open, public meeting.

I.C. § 5-14-1.5-6.1(b)(6) provides that:

- “(b) Executive sessions may held only in the following instances:
- (6) 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:
 - (i) a physician; or
 - (ii) a school bus driver.”

The Court of Appeals has noted that (b)(6) is written in the conjunctive; therefore in order to meet in executive session pursuant to (b)(6), the governing body must satisfy both parts of the subsection. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 (Ind. Ct. App. 2001); *see also Opinion of the Public Access Counselor 05-FC-9.* Here, the Council specifically met in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(6)(A), which it cannot do pursuant to the holding in *Baker*. Further, even if it can be demonstrated that the Council has jurisdiction over its members, it has not been argued that the Council members are employees, students, or independent contractors who serve as physicians or school bus drivers. The term “public official” is defined for purposes of section 6.1 of the ODL as a person who is a member of a governing body of a public agency or whose tenure and compensation are fixed by law and executes an oath. *See* I.C. § 5-14-1.5-6.1(a). The members of the Council meet the definition of a “public official” pursuant to 6.1(a). Since the members of the Council do not qualify as employees, students, or as those specified independent contractors pursuant to (b)(6)(B), and the Court of Appeals has held that a governing body must satisfy both subsections in

order to meet in executive session pursuant to (b)(6), it is my opinion that the Council may not meet in executive session pursuant to (b)(6) regarding the alleged misconduct of one of its members.

Mr. Morelock has cited I.C. § 5-14-3-10 to support the position of the that the Council has the authority to meet in executive session pursuant to (b)(6) regarding the alleged misconduct one of its members. I.C. § 5-14-3-10 provides that a public employee or public official who knowingly or intentionally discloses information classified as confidential by state statute, commits a Class A Infraction. However, Mr. Morelock has failed to cite to the relevant state statute that would deem confidential a grievance filed against an agency employee or public official. The APRA distinguishes between records that are confidential and those which may be disclosed at the agency's discretion. *See* I.C. §§ 5-14-3-4(a), (b). In regards to personnel records, the APRA provides that certain personnel records may be withheld from disclosure:

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(8) Personnel files of public employees and files of applicants for public employment, except for:

- (A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) information relating to the status of any formal charges against the employee; and
- (C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion. If the Council was able to cite to a specific statute that would deem grievances filed against a member of the body to be confidential, the Council would be allowed to meet in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(7), which allows for an executive session to be held for the discussion of records classified as confidential by state and federal statute. The

application of (b)(7) though would have no impact on the inability of the Council to meet in executive session pursuant to (b)(6) regarding one of its members.

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". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor