



STATE OF INDIANA

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December 23, 2013

Ms. Margaret Fosmoe
C/o South Bend Tribune
225 Colfax Ave.
South Bend, IN 46626

Re: Informal Inquiry 13-INF-65; Executive Session Notice

Dear Ms. Fosmoe:

This is in response to your informal inquiry regarding Executive Sessions of the Ivy Tech Community College of American ("College"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Open Door Law, Ind. Code § 5-14-1.5-1 *et seq.*

BACKGROUND

You allege Ivy Tech Community College published notice of an Executive Session to take place on or about November 26, 2013. The notice included discussions of some or all of the following subject matters during the meeting:

- Initiation of litigation or litigation which is either pending or has been threatened specifically in writing. As used in this clause, "litigation" includes any judicial action or administrative law proceeding under federal or state law.
The implementation of security systems.
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.
- For discussion of the assessment, design, and implementation of school safety and security measures, plans, and systems.
- To receive information about and interview prospective employees.
With respect to any individual over whom the governing body has jurisdiction:
to receive information concerning the individual's alleged misconduct;

- For discussion of records classified as confidential by state or federal statute.
- 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.
- To train school board members with an outside consultant about the performance of the role of the members as public officials.

No other description was given, however, all other notice requirements of Ind. Code § 5-14-1.5-5 was met.

Your question is whether the College has an obligation to list precisely which subject matters will be discussed in an executive session, or is the enumerated listing of statutes in the above notice sufficiently specific under the Open Door Law.

ANALYSIS

It is the intent of the Open Door Law (ODL) 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 Ind. Code § 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 Ind. Code § 5-14-1.5-3(a).

Ind. Code § 5-14-1.5-6.1(d) states 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. All of the subject matters intended to be discussed fall under the permissible discussion topics for a closed door executive session under the ODL.

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.

The Open Door Law uses the terms "specific reference" and "enumerated instance **or instances**" (emphasis added) when describing the notice of an executive session. It is clear the General Assembly intended to allow public agencies to hold an executive session wherein multiple subject matters may be discussed.

There is no formal format under Indiana statute or case law of which I am aware, which specifies how a public notice of an executive session should look. Certainly it is in the public’s interest to know with as much specificity as possible what an agency is discussing behind closed doors, but there is no prohibition on citing multiple reasons for the session.

The troubling aspect of the notice is the inclusion of the language “some or all”. This indicates the College is posting notice that would capture any discussion that may come up during the meeting as long as it is under the enumerated posting. I do not believe this complies with the purpose of the executive session notice requirement; however, the law does not specifically prohibit the practice. Without the benefit of an explanation from the College, I cannot determine if this is common practice. The regular use of a “catch-all” notice is poor practice for a public agency when notifying the public an executive session will be held. If this were an Advisory Opinion, I would likely find an agency in violation of the ODL if this practice were done on a regular basis.

The difference between an executive session and a public meeting is that public agencies are allowed to discuss certain matters behind closed doors during executive session. The caveat is the public has an interest in what is specifically being discussed. If all of the items on the agenda were to be discussed, then that would be acceptable, but to pick and choose from a list of topics does not conform to the spirit of transparency. When in public meetings, if an agenda is posted, the public agency does not have to stick to that particular agenda. That is different with executive sessions. The notice is operatively a constructive agenda to which the agency must conform. The College may very well plan to discuss all of those items. However, I would strongly caution all public agencies to refrain from using a boilerplate, generic notice for their executive sessions.

The remedy for the public is that memoranda and minutes must be prepared and made available to the public as to executive sessions and identify the subject matter discussed. This must be done by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

While I cannot say if the College’s notice was violative as written, I discourage the use of a standard notice listing all of the executive session exceptions and then picking which ones to discuss behind closed doors.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a large, sweeping flourish at the end.

Luke H. Britt
Public Access Counselor