



# STATE OF INDIANA

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*Via email transmission*

September 14, 2016

Ms. Debbie Lowe  
Via email

*Re: Informal Inquiry 16-INF-25; Executive Sessions*

Dear Ms. Lowe:

This is in response to your informal inquiry regarding whether the Delphi Community School Corporation ("School") violated the Open Door Law.

## **BACKGROUND**

You seek a determination as to whether the Delphi Community School Corporation is properly conducting executive sessions.

The School has held a number of executive sessions in 2016. Based on the information provided, they are generally held after the regularly scheduled public meetings. In the notice for the executive sessions, several reasons are cited, including "board training". You assert the consultant for the training is the attorney for the Board, who is copied on this Opinion. You take exception with the number of executive session held throughout the year and the decrease in substantive discussions on school matters during regularly scheduled public meetings. You also express concern regarding the notice given for the executive sessions. The citations are summarized and, in some cases, inaccurate.

The School submitted a response to your inquiry, which is attached to this Opinion.

## **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 Indiana Code § 5-14-1.5-3(a).

"Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of

taking official action upon public business. *See Indiana Code 5-14-1.5-2(c)*. “Public business” means “any function upon which the public agency is empowered or authorized to take official action.” *See Indiana Code § 5-14-1.5-2(e)*. “Official action” is very broadly defined by our state legislature to include everything from merely “receiving information” and “deliberating” (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. *See Indiana Code § 5-14-1.5-2(d)*.

Section 6.1 of the Open Door Law provides an exception to the public meeting element of governing bodies, allowing public agencies to conduct executive sessions which are closed to the public in order to discuss strategies with respect to certain specified topics. The exceptions to this policy are called executive sessions. Executive sessions are subject-matter-contingent scenarios, which have heightened sensitivity above and beyond regular public business. The Indiana General Assembly has recognized the need for privacy when it comes to these very narrow situations and has carved out executive sessions as instances when it is appropriate for a governing body to meet behind closed doors.

This Office scrutinizes executive sessions closely due to their very nature. While there are certainly justifications for having sensitive discussions behind closed doors, they should be invoked judiciously and notice requirements be followed to the exact letter of the law. Holding unauthorized private discussions behind closed door as a majority of a governing body only serves to erode the public trust and cast doubt on the transparency of the public agency. When regular meetings take place with little-to-no substantive public discussion, the public is left in the dark as to governing bodies’ decision-making process. This can cause confusion and suspicion and often leads to the perception the board is not being a good steward of the public’s trust and resources. Governmental representatives and boards upon which they serve should be particularly mindful the government is the servant of the people and not its master.

It is true I am a “stickler” for the letter of the law when it comes to executive sessions. 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 Indiana Code § 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 Indiana Code § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. In my opinion, a summary or paraphrase of the subsection is not enough – the full breadth of the subsection should be recited.

When scrutinizing most public meetings, a court would likely look to see if the actions of the Board were in "substantial compliance" with the Open Door Law. *See, Turner v. Town of Speedway*, 528 N.E. 2d 858 (Ind. App. 1988). "Substantial compliance" includes: (1) the extent to which the violation denied or impaired access to a meeting; and (2) *the extent to which the public knowledge or understanding of the public business conducted was impeded*. (Emphasis added.) *Town of Merrillville v. Blanco*, 687 N.E. 2d 191 (Ind. App. 1998). My expectation for executive sessions, however, is technical compliance when it comes to notice.

In regard to these considerations, I recommend the School tighten-up its practices when it comes to holding these closed-door meetings. I do not think, however, the School is too far off course or intentionally attempting to subvert the Open Door Law or its provisions. By the same token, you suggest

the School's attorney may be an inappropriate consultant to the Board or somehow unqualified to conduct board trainings. Generally, a lawyer must not advertise him or herself to be a 'specialist' in any one field of the practice of law – including school law (see Indiana Rules of Professional Conduct 7.4(d)). That being said, I am familiar with Mr. Otis' representation of other school corporations in the state and have always found him to be a competent, zealous advocate in regard to school matters and extremely cooperative with this Office -even in cases when I disagree with him on a legal interpretation. I am quite sure the Delphi School Corporation is in good hands and receives excellent training from him and I am confident he will take my aforementioned recommendations under thoughtful consideration.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a stylized flourish extending from the bottom.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Nicholas Otis, Esq.