



STATE OF INDIANA

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August 22, 2011

Mr. Jack L. Potts
Box 203
Harlan, Indiana 46743

*Re: Formal Complaint 11-FC-197; Alleged Violation of the Open Door Law
by the Maysville Regional Water and Sewer District*

Dear Mr. Potts:

This advisory opinion is in response to your formal complaint alleging the Maysville Regional Water and Sewer District ("District") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* The Commissioner's response is enclosed for your reference.

BACKGROUND

In your complaint you allege that the District failed to provide proper public notice for an executive session that occurred on July 11, 2011 and a normal business meeting on July 25, 2011. You further allege that the District continued to "conduct business" on July 25, 2011 after the meeting had been adjourned. You finally maintain that the public was asked to leave the July 25, 2011 when the issue of "Umbaugh's Contract Status" came before the District, in violation of the ODL.

In response to your formal complaint, the District admitted that proper public notice was not made for the July 11, 2011 executive session. To rectify this error, the District will "re-introduce and vote on the issues discussed at the July 11th meeting during the August 25th regular meeting." The District maintained that proper notice was given for the July 25, 2011 regular meeting in that notice was published in the weekly paper and at door of the District's office for several months prior to July 25, 2011. The District denied that additional business was conducted after the July 25, 2011 meeting, and the only activity that occurred was the inspection and signing of the Voucher and Check Register as required by the State Board of Accounts. The District finally advised that no members of the public attending the July 25, 2011 were made to leave the meeting during a discussion regarding the "Umbaugh contract status" and/or the rate study report.

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).

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). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. §§ 5-14-1.5-6.1(b)(5); 5-14-1.5-6.1(b)(9). In addition, certain things may be done in executive session when considering the appointment of a public official. *See* I.C. § 5-14-1.5-6.1(b)(10).

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). 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).

This office has consistently addressed the requirements of notice for an executive session. *See Opinion of the Public Access Counselor 07-FC-64; 08-FC-196; 11-FC-39.* In *Opinion of the Public Access Counselor 05-FC-233*, Counselor Davis wrote the following:

This office has stated on many occasions that “personnel issues” is wholly inadequate under the Open Door Law. First, there are several enumerated instances involving personnel-related matters that are permissible for an executive session. Accordingly, “personnel issues” lacks the required specificity, because the Open Door Law states that notice of an executive session must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. IC 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 IC 5-14-1.5-6.1(b)(9),” for example, would satisfy the notice requirements.

Here, the District has admitted that proper public notice was not given for the July 11, 2011 executive session and to rectify the error, the District will “re-introduce and vote on the issues discussed at the July 11th meeting during the August 25th regular meeting.” As such, the District violated the ODL when it failed to provide notice of the July 11, 2011 executive session. I would note that the ODL defines “Final Action” as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(f). “Final Action” must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). As such, the District would be in violation of the ODL if it were to vote on any matter during an executive session.

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). In addition to providing notice to any news media who by January 1 of the year have requested notice, the agency must post notice at the principal office of the agency or, if there is no office, at the building where the meeting will be held. *See* I.C. § 5-14-1.5-5(b). Notice has not been given in accordance with Section 5 of the ODL if a governing body of a public agency convenes a meeting at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting. *See* I.C. §5-14-1.5-5(h).

Here you allege that the District violated the ODL by not providing any notice of the July 25, 2011 meeting. The District has maintained that proper notice was provided via publication in the weekly paper and posted at the District’s Office for several months prior to July 25, 2011. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. If the District did not provide notice of the July 25, 2011 meeting, it did so in violation of the ODL. If the District posted notice at its office door, including the date, time, and place of the meeting, more than forty-eight (48) hours prior to the July 25, 2011 (excluding Saturdays, Sundays, and legal holidays), then it did not violate the ODL. I would note that the ODL does not require a public agency to post notice of its normal business meetings in the local paper.

As to your allegation that the District continued to conduct business on July 25, 2011 meeting after adjournment, the District stated that the only activity that occurred after adjournment was the inspection and signing of the Voucher and Check Register as required by the State Board of Accounts. The ODL defines “Official action” as to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2. As the ODL defines “Official action” broadly, it would appear that the District technically acted contrary to it when it inspected the Voucher and Check Register (i.e. receive information) after the July 25, 2011 meeting had adjourned.

In regards to your final allegation that the District attempted to make members of the general public leave the July 25, 2011 meeting during a discussion regarding the

“Umbaugh contract status” and/or the rate study report, both parties are in agreement that members of the general public were allowed to stay throughout the duration of the discussion regarding both topics. As to this allegation, it is my opinion that the District did not violate the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that the District violated the ODL when it failed to give proper public notice of the executive session that occurred on July 11, 2011 and when it took official action in regards to the Voucher and Check Register after the July 25, 2011 meeting had adjourned. If the District did not provide notice of the July 25, 2011 meeting it acted contrary to the ODL. However, if proper notice of the meeting was posted at the District’s office door, it is my opinion that it did not violate the ODL. Further, it is my opinion that it did not violate the ODL when no member of the general public was made to leave the July 25, 2011 meeting when the “Umbaugh contract status” and/or the rate study report were discussed.

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage". The signature is stylized with a large initial "J" and "H".

Joseph B. Hoage
Public Access Counselor

cc: Judy James