



STATE OF INDIANA

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June 16, 2009

Michael Garris
529 West Oak Street
Seymour, Indiana 47274

Re: Informal inquiry 09-INF-19 regarding the Jackson County Board of Commissioners

Dear Mr. Garris:

This advisory opinion is in response to your informal inquiry dated June 2, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

BACKGROUND

You write regarding the Jackson County Board of Commissioners ("Board") and its adherence to the requirements of the Open Door Law ("ODL") (Ind. Code 5-14-1.5). You allege the Board has violated the ODL on three counts relative to an April 21, 2009 executive session:

1. The Board violated the ODL by failing to post at the meeting location an executive session notice at least 48 hours in advance of the meeting.
2. The Board violated the ODL by meeting in person or via telephone to make a decision.
3. The Board violated the ODL by failing to include on the executive session notice the reason for which the meeting was being conducted. Specifically, you contend that the meeting could not have been conducted for both I.C. § 5-14-1.5-6.1(b)(6)(A) and (B).

You also contend the sheriff should not have been present for the executive session at issue.

The Board responded to the allegations by letter dated June 12 from attorney Susan Bevers. The Board contends the notice for the April 21 meeting was prepared on April 16 and sent that day to the county auditor and commissioners as well as several news media outlets. The notice was sent to the auditor because the auditor posts all

meeting notices on the door of the courthouse annex, which was the location for the meeting. After the April 21 executive session, the auditor informed Ms. Bevers that she had not posted the notice on the door until the morning of April 20 because she had been out of the office on April 16 and 17 and had not seen the posting sent to her by electronic mail. The Board contends it substantially complied with the ODL by sending notice to the news media and posting notice at the meeting location, albeit later than technically required by the ODL. The Board contends the public was not denied or impaired access by the error.

The Board further contends final action regarding the matter which was the subject of the executive session was taken at a meeting open to the public. Ms. Bevers indicates, "Moreover, final action was taken by the commissioners during the executive session. Final action, which included a vote regarding Mr. Garris' employment status, was taken during the regular meeting of the commissioners, which was held pursuant to the Open Door Law." While these two statements are contradictory, I believe the word "not" is missing from the first sentence. From the context, I understand the Board asserts it did *not* take final action at the executive session.

Regarding your second allegation, the Board contends none of the members met in person or by telephone to discuss the matter at issue in the executive session. The Board contends that prior to your arrival at the executive session, the Board conducted a discussion regarding your employment. Regarding your final allegation, the Board contends it correctly identified the enumerated instance for which the executive session was held. Further, the Board contends the sheriff attended the meeting because the president of the Board has asked him to be present at all meetings, as allowed by I.C. § 36-2-2-15(d).

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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, 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. I.C. § 5-14-1.5-3(a).

Executive sessions are authorized by section 6.1 of the ODL. Notice of an executive session must be posted 48 hours in advance of the meeting, excluding Saturdays, Sundays, and legal holidays. I.C. § 5-14-1.5-5(a). In addition to providing notice to the news media who by January 1 have requested notice, the agency shall post notice at the principal office of the agency holding the meeting. I.C. § 5-14-1.5-5(b). If there is no office, notice shall be posted at the building where the meeting is to be held. I.C. § 5-14-1.5-5(b).

Here, you allege the meeting notice was not posted at the meeting location at least 48 hours prior to the meeting. The Board concedes that the meeting notice was not

posted at the location until the morning of April 20. Neither party mentions posting notice at the principal office. If the Board maintains a principal office, that office is where notice must be posted, pursuant to I.C. § 5-14-1.5-5(b). The Board may post notice at the meeting location, but notice must be posted at the principal office. If the Board has no office, notice at the meeting location is sufficient.

The Board contends that it substantially complied with the ODL. The Board sent notice to the news media on April 16. The Board sent the notice to the county auditor on April 16, but the auditor failed to post notice until April 20. The Board indicates you were invited to appear before the Board at the executive session, as your employment was the subject of the meeting. Since you were invited to and attended a portion of the meeting, your rights were not impaired by the late posting of notice. And since no other member of the public is afforded the right to attend an executive session, no rights were impaired by the late posting.

As the Board contends, this matter is similar to that in *Riggin v. Bd. of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. Ct. App. 1986), wherein the Indiana Court of Appeals found the agency had substantially complied with the ODL. The Board should have posted notice 48 hours in advance of the meeting at the principal office of the Board or, if there is no office, at the location where the meeting was held. In not doing so, the Board technically violated the ODL. But the Board did provide notice to the news media. Further, the Board did invite you to the executive session since your employment was the subject of the meeting. And you did appear at the executive session. Because no person was denied access to the meeting who was entitled to attend the meeting and because no person was denied access to the notice of the meeting, it is my opinion the Board substantially complied with the ODL.

You also allege at least two members of the Board met prior to the executive session to discuss the matter at issue in the executive session. You do not, though, provide any evidence to support this allegation. And the Board contends any discussion regarding the matter of your employment took place during the executive session. I do not see sufficient evidence to indicate the Board met outside of the April 21 executive session.

You further allege that the executive session notice was insufficient in that the Board did not provide the specific instance for which the meeting was held. The ODL provides that the notice for an executive session must state the subject matter by specific reference to the instance(s) for which an executive session may be held. I.C. § 5-14-1.5-6.1(d). Here, the Board's notice indicated the meeting was being held "pursuant to IC 5-14-1.5-6.1(b)(6) to discuss personnel over whom the Commissioners have jurisdiction." The specific instance listed contains two subsections, "to receive information concerning the individual's alleged misconduct" and "to discuss, before a determination, the individual's status as an employee, . . ." In my opinion, a governing body citing I.C. § 5-14-1.5-6.1(b)(6) has stated the enumerated instance as required by I.C. § 5-14-1.5-6.1(d). Under this provision, the governing body may receive information concerning

misconduct, discuss the individual's status, or both. In my opinion, the Board was not required to further expand on the instance.

Finally, you allege the sheriff should not have been present for the executive session. An executive session, by definition, is a "meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." I.C. § 5-14-1.5-2(f). Members of the governing body may admit any person the body needs to help carry out its business. Further, I.C. § 36-2-2-15(d) provides that "[t]he county sheriff or a county police officer shall attend the meetings of the executive, if requested by the executive, and shall execute its orders." Based on these provisions, it is my opinion the Board did not violate the ODL by having the sheriff present at the April 21 executive session.

CONCLUSION

For the foregoing reasons, it is my opinion the Jackson County Board of Commissioners has not violated the ODL.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Susan Bevers, Lorenzo Law Office