



STATE OF INDIANA

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June 13, 2013

Mr. Michael R. Johnson
408 West Main Street
Bloomfield, Indiana 47424

*Re: Formal Complaint 13-FC-149; Alleged Violation of the Open Door Law by
the Greene County Board of Commissioners*

Dear Mr. Johnson:

This advisory opinion is in response to your formal complaint alleging the Greene County Board of Commissioners (“Board”) violated the Open Door Law (“ODL”), Ind. Code § 5-14-1.5-1 *et seq.* Marilyn Hartman, Attorney, responded in writing to your formal complaint. Her response is enclosed for your reference.

BACKGROUND

You allege that the Board failed to provide timely notice for an executive session that was held on May 17, 2013. On said date, Commissioners Edward Michael and Nathan Abrams met and informed the county maintenance supervisor (“Supervisor”) that his employment with the county was being terminated. You do not believe the provision for “emergency meetings” provided in the ODL is applicable here. You believe that further evidence of the Board’s illegal actions can be found in the May 21, 2013 edition of the *Greene County Daily World*, where an article detailed that the Board had wished to replace the Supervisor since the beginning of the year and that interviews had already been conducted.

In response to your formal complaint, Ms. Hartman advised that pursuant to I.C. § 36-2-24(a), the Board, as the county executive, is specifically charged with the duty to maintain the county courthouse and other public buildings. The Board did not conduct an executive session on May 17, 2013; rather an administrative functions meeting was held. The requirements of public notice do not apply to an administrative functions meeting. The Supervisor’s job description designates the Board alone as the supervising authority to which the Supervisor must answer with respect to his job performance. Commissioners Abrams and Michael were elected in November 2012, but did not take office until January 1, 2013. Prior to taking office, the two met with Commissioner Graves in a planning session in which discussions were held regarding how they felt the administrative duties of the Board should be handled. At that time, there was an

agreement that given the wide scope of the Board's responsibilities, each commissioner should be delegated responsibility for making administrative decisions in specific areas. Commissioner Abrams agreed that upon taking office, he would assume direct responsibility for the maintenance of the courthouse and other public buildings. Since taking office in January, the Board has functioned by either formally or tacitly delegating certain specific administrative responsibilities to one member of the Board.

On May 17, 2013, Commissioners Michael and Abrams acknowledge that they both met with the Supervisor at approximately 1 p.m. The meeting occurred in the maintenance shop on the ground floor of the Green County Courthouse. The purpose of the meeting was to terminate the Supervisor. Commissioner Michael agreed to be present with Commissioner Abrams when the Supervisor was informed of his termination. The meeting lasted approximately 5 minutes. No parties were excluded from the room during the meeting and other parties entered the room during the discussions. The commissioners were engaged in carrying out the Board's administrative function that occurred in a public building during regular business hours. Accordingly, notice was not required to be posted as the Board was conducting an administrative functions meeting.

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 a gathering of a majority of the governing body of a public agency for the purpose of taking official action on 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 any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14-1.5-2(e). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). The ODL does not instruct governing bodies as to what actions require final action. *See Opinions of the Public Access Counselor 08-FC-136; 12-FC-144; 13-FC-74.*

The ODL requires that 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). The notice must be posted at the principal office of the agency, or if no 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).

The requirements for posting notice do not apply when the executive of a county or the legislative body of a town meets, if the meeting is held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. *See* I.C. § 5-14-1.5-5(f)(2). Administrative functions do not include the awarding of contracts, the entering into contracts or any other action creating an obligation or otherwise binding a county or town. *Id.* Even though notice is not required, the administrative meetings must be held in the public, since the notice provision of the ODL is the only provision that does not apply to an “administrative function” meeting. *See* I.C. § 5-14-1.5-5(f)(2).

Previous counselors addressing administrative function meetings have noted that said meetings are limited in scope and cannot be used to bind or obligate the county in any way. *See Opinions of the Public Access Counselor 00-FC-09, 01-FC-82; 12-INF-36.* Counselor Neal opined:

I would urge the Commissioners to be mindful of the subject matter of the administrative function meetings. It appears the meetings at the highway garage have become routine, and I would urge the Commissioners to consider carefully, before every meeting, whether the meeting is being held *solely* to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit, as allowed by I.C. § 5-14-1.5-5(f)(2). If at any point the subject matter reaches beyond administrative function, the meeting should be a properly noticed public meeting. *See Opinion of the Public Access Counselor 09-FC-30.*

Counselor Neal addressed the issue of whether an administrative function meeting could be conducted in order to terminate an employee. *See Opinion of the Public Access Counselor 07-FC-250.* Counselor Neal opined:

“Second, the ODL sets forth thirteen instances in which executive sessions may be held. I.C. §5-14-1.5-6.1(b). Of those thirteen instances, four address specific personnel issues. One specifically addresses an executive session to discuss an individual’s alleged misconduct, which I believe to be the issue here. I.C. §5-14-1.5-6.1(b)(6). Since there are only thirteen instances for which an executive session may be held, it is my opinion these thirteen functions rise to a level beyond that of an administrative function carried out by an agency, as they address sensitive issues that the General Assembly has indicated a governing body must be able to discuss privately. In my view, the administrative functions exception may be used to carry out every day or routine tasks necessary to manage the office of

the agency. I do not view termination of an employee as an everyday or routine task but rather one that often requires deliberation and sometimes final action of the governing body. Previous opinions from this office are consistent with this approach. In *Opinion of the Public Access Counselor 03-FC-05*, Counselor O'Connor opined that a discussion how to handle the Clerk-Treasurer's absence at a meeting where the Clerk-Treasurer was responsible for keeping minutes was an administrative function." *Id.*

I would agree with the analysis provided by Counselor Neal and it is my opinion that the Board could not hold an administrative functions meeting in order to terminate an employee. As applicable here, had a sole member of the Board informed the Supervisor of the termination, no violation of the ODL would occur as a majority of the governing body would not have been present. As a majority of the Board was present, it is my opinion that it acted contrary to the requirements of the ODL by failing to provide proper notice for the meeting. As noted *supra*, notice is the only provision of the ODL that does not apply to an administrative function meeting. There has been no allegation that the Board failed to comply with any other requirements of the ODL as it relates to the May 17, 2013 meeting.

CONCLUSION

Based on the foregoing, it is my opinion that the Board acted contrary to the requirements of section 5 of the ODL by failing to provide proper notice for the meeting held on May 17, 2013.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Marilyn Hartman