

March 30, 2001

Ms. Grace Schneider
Courier Journal & Times
Southern Indiana Office
2500 Lincoln Drive
Clarksville, IN 47129

Re: *Advisory Opinion 01-FC-16*; Alleged Violation of the Indiana Open Door Law by the Harrison County Board of Commissioners.

Dear Ms. Schneider:

This is in response to your formal complaint, which was received on March 8, 2001. You have alleged that the Harrison County Board of Commissioners ("Commissioners") has violated the Indiana Open Door Law ("ODL") Indiana Code chapter 5-14-1.5. According to your complaint, the Commissioners provided notice that they would hold an executive session to discuss "pending litigation" under the ODL. You contend, however, that the actual discussion was related to a pending administrative hearing, not a case filed in a court and was inappropriate for discussion in executive session. Mr. David Layson, attorney for the Commissioners responded in writing to your complaint.¹ A copy of his response is enclosed for your reference.

It is my opinion that the notice of the executive session held on March 5th should have included a specific reference to Indiana Code section 5-14-1.5-6.1(b)(2)(B). In addition, it is my opinion that Indiana Code section 5-14-1.5-6.1(b)(2)(B) provides authority for governing bodies to meet to discuss pending litigation, but that under the rules of statutory construction, this exception did not permit the Commissioner to discuss a pending administrative hearing in executive session.

BACKGROUND

In your complaint, you stated that on March 5, 2001 the Commissioners posted notice of a public meeting and an executive session to discuss "pending litigation." You attended the public meeting and were informed that the executive session concerned a Caesars Indiana Casino tax appeal hearing before the Indiana State Board of Tax Commissioners ("State Tax Board") scheduled for March 14, 2001. The attorney for the Posey Township Assessor-Trustee requested permission to attend the executive session and was advised that she could attend and participate.

You then asked the Commissioners why they believed they could conduct an executive session on this matter under the auspices of "pending litigation" when no law suit has been filed and the Commissioners are unable to appeal any ruling issued by the State Tax Board in the tax appeal hearing.

The former county attorney and Mr. Layson advised you that the Commissioners considered this subject matter appropriate for executive session because both the Casino and the County have threatened to appeal any rulings from the State Tax Board that would be unfavorable. Mr. Layson, according to your complaint, also added that the mere threat of litigation is enough to justify an executive session under the ODL. It is your understanding that the County cannot, however, appeal any ruling of the State Tax Board in this matter so they could not even claim that this executive session would be to discuss strategy with respect to the initiation of litigation. In any event, you were not permitted to attend the executive session and filed your formal complaint with this Office on March 8, 2001.

As his response to your complaint, Mr. Layson stated that the Commissioners did meet in executive session and it is his position that the administrative appeal hearing conducted by the State Tax Board does constitute pending litigation for the purposes of the ODL. Such hearings are litigation because witnesses are sworn, testimony and exhibits are taken and recorded just as in any litigation. Mr. Layson also cited to authority from another state holding that that an executive session is permissible to discuss an appeal of a property tax adjustment.²

ANALYSIS

The intent and purpose of the ODL is 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." Ind. Code § 5-14-1.5-1. The provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Board of Commissioners is a public agency and a governing body subject to the ODL. Ind. Code §§ 5-14-1.5-2(a) and (b).³

A meeting for the purposes of the ODL is defined as "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business." Ind. Code §5-14-1.5-2(c). As noted above, the general rule is that meetings of public agencies are to be held openly, so that the public may "observe and record them." Ind. Code §5-14-1.5-3(a). The exception to the general rule that a meeting of the governing body must be open to the public is an executive session. Executive session is defined as a meeting "from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." Ind. Code §5-14-1.5-2(f). The two questions raised by your complaint concern the notice of the March 5th executive session and whether the discussion of a pending administrative hearing in that executive session would be permissible under Indiana Code section 5-14-1.5-6.1(b)(2)(B).

Notice of the March 5th Executive Session

Notice of the date, time and place for an executive session must be provided at least forty-eight (48) hours in advance, not including Saturdays, Sundays or legal holidays. Ind. Code §5-14-1.5-5(a). The notice must also "state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under" Indiana Code section 5-14-1.5-6.1(b). Ind. Code §§5-14-1.5-5(a) and 5-14-1.5-6.1(c).

The Commissioners did post notice that they would meet in executive session, however, the purpose was listed only as "pending litigation." As noted above, governing bodies are to provide a specific reference to the exception or exceptions at Indiana Code section 5-14-1.5-6.1(b) that would permit a meeting that excludes the public. It appears that the Commissioners intended to conduct this executive session under Indiana Code section 5-14-1.5-6.1(b)(2)(B), which permits an executive session to discuss "strategy with respect to . . . initiation of litigation or litigation that is either pending or threatened specifically in writing." Ind. Code §5-14-1.5-6.1(b)(2)(B). Certainly, it was not difficult to determine which executive session exception was being used with respect to the March 5th meeting. It is my opinion, however, that the Commissioners should have included in this notice a specific reference to one or more of the purposes for an executive session as required under Indiana Code section 5-14-1.5-6.1(c).

What is "Litigation" for the Purposes of Indiana Code §5-14-1.5-6.1(b)(2)(B)?

Since it is the public policy of the ODL that it is to be construed liberally in favor of disclosure, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-1.5-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . "[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted.], quoting, *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted].

According to your complaint and the Commissioners' response, the March 5th executive session was held to discuss an upcoming administrative tax appeal hearing under the auspices of "pending litigation." It is your contention that this hearing does not constitute litigation as that term is used in Indiana Code section 5-14-1.5-6.1(b)(2)(B).⁴ In his response, Mr. Layson focused only on his position that a pending administrative appeal is "litigation" as contemplated under the ODL.⁵

There are no court cases in Indiana interpreting Indiana Code section 5-14-1.5-6.1(b)(2)(B), therefore, we must rely upon the rules of statutory construction to interpret this provision.

In construing statutes, words and phrases will be taken in their plain or ordinary and usual sense unless a different purpose is clearly manifest by the statute itself, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

Indiana State Dept. of Revenue v. Colpaert Realty Corp., 109 N.E.2d 415, 418-419. The term "litigation" is clearly a legal term and is defined as a "lawsuit" or a "contest in a court of law for the

purpose of enforcing a right or seeking a remedy." BLACK'S LAW DICTIONARY, 841 (1979).

Clearly, under this definition of "litigation," administrative hearings are not contemplated despite the fact that these proceedings are quasi-judicial in nature. An "administrative hearing" is defined as

an oral proceeding before an administrative agency consisting of argument or both. Procedural rules are more relaxed at such hearings as contrasted with civil or criminal trials.

BLACK'S DICTIONARY ON-LINE (WEST 2001). Certainly, administrative proceedings are often conducted like court proceedings, but this does not mean that they constitute "litigation" for the purposes of the ODL.

Another longstanding rule of statutory construction provides that courts will "assume the legislature is mindful of both court decisions and existing law" when enacting legislation. *Burke v. Town of Schererville*, 739 N.E.2d 1086, 1092 (Ind. App. 2000) citing *Pea v. Pea*, 498 N.E.2d 110 (Ind.Ct. App.1986), trans. denied. When the General Assembly enacted the ODL, administrative proceedings did exist. The General Assembly enacted the Administrative Adjudication Act, Acts 1947, c.365, and repealed and replaced that Act with the Administrative Orders and Procedures Act, Indiana Code chapter 4-21.5, in 1986.

Based upon the facts presented and the foregoing analysis of the law, it is my opinion that under a narrow reading of the exception set forth at Indiana Code section 5-14-1.5-6.1(b)(2)(B) for executive sessions, the discussion of a pending administrative proceeding would not be appropriate. If the General Assembly had used language different from "litigation" in this exception, my opinion may have differed, but ultimately I must interpret the ODL as written.

CONCLUSION

It is my opinion that the notice of the Harrison County Board of Commissioners for their March 5, 2001 executive session should have included a specific reference to Indiana Code section 5-14-1.5-6.1(b)(2)(B). It is also my opinion that Indiana Code section 5-14-1.5-6.1(b)(2)(B) provides authority for governing bodies to meet to discuss pending litigation, but that under the rules of statutory construction, this exception does not permit the Commissioners to discuss a pending administrative hearing in executive session.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. David Layson, Attorney

¹ Mr. Layson did not receive this Office's request for a response by March 15, 2001 until March 19th. His response to your formal complaint takes the form of copies of a March 8th letter to him concerning this matter from your attorney, Ms. Kimberly Greene and his response to that letter, which was dated March 12th .

² Houman v. Pompton Lakes, 382 A.2d 413 (NJ ___, 1977).

³ Since only the Commissioners had a majority of their members present at the December 12, 2000 gathering, this opinion is limited to whether or not the Commissioners were required to comply with the ODL.

⁴ You also stated that you did not believe the Commissioners could rely upon Ind. Code §5-14-1.5-6.1(b) (2)(B) to discuss the initiation of litigation, namely to appeal the final decision of the State Tax Board, because the Commissioners are allegedly not in a position to file an appeal. The Commissioners stated that their purpose was to discuss "pending litigation" and not the initiation of litigation. This Opinion, therefore, focuses solely on the stated purpose of the executive session-to discuss pending litigation.

⁵ Mr. Layson, in response to your formal complaint, did not renew the argument that the mere threat of litigation is sufficient to use the executive session exception at Ind. Code §5-14-1.