



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
HEATHER NEAL

Indiana Government Center South
402 West Washington Street, Room W460
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

May 5, 2009

Tom Callahan
Via facsimile transmission to 812.966.2339

Re: Informal inquiry 09-INF-18 regarding audio recording of executive session

Dear Mr. Callahan:

This advisory opinion is in response to your informal inquiry dated April 30, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write regarding the Open Door Law (“ODL”) (Ind. Code 5-14-1.5). You inquire whether an individual who was interviewed during an executive session may tape record conversations held during the executive session. As I understand it, the interviewee recorded the executive session and has either considered distributing or has already distributed the recording to other individuals.

The ODL provides the following:

Except as provided in section 6.1 of this chapter, 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).

Generally, then, members of the public must be allowed to record the meetings of governing bodies. The Indiana Supreme Court has said that recording includes video recording as well. *Berry v. Peoples Broadcasting Corp.*, 547 N.E.2d 231 (Ind. 1989).


Here, though, the meeting at issue is an executive session. Executive sessions are authorized by section 6.1 of the ODL. 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. Executive sessions are specifically excluded from the requirements of I.C. § 5-14-1.5-3(a). Because executive sessions are excluded from I.C. § 5-14-1.5-3(a) and because a governing body has the discretion to invite any individual into an executive session, it is my opinion a governing body may restrict an individual from recording the meeting. This opinion is

further supported by the Access to Public Records Act (“APRA”), which gives the public agency the discretion to withhold any records prepared for discussion or developed during discussion in an executive session. *See* I.C. § 5-14-3-4(b)(12).

Here, though, it is my understanding the governing body did not prohibit the individual from recording the discussion held during the portion of the executive session he attended. And since he was not prohibited from doing so, he recorded the conversation. The question now is whether the individual may distribute that recording. As I indicated, the APRA affords a public agency the discretion to withhold from disclosure records it maintains which were prepared for discussion or developed during discussion in an executive session. *See Id.* Nothing in the APRA, though, declares such records confidential. And nothing prohibits a person who has made such a recording from distributing the recording. For the foregoing reasons, it is my opinion the person has not violated the public access laws by recording an executive session to which he was invited but not prohibited from recording nor has he violated the public access laws by distributing that recording.

Please do not hesitate to contact me if I can provide any further assistance.

Best regards,



Heather Willis Neal
Public Access Counselor