

July 26, 2004

Greta Sanderson  
The Lebanon Reporter  
117 E. Washington St.  
Lebanon, IN 46052

George Piper  
Noblesville Daily Times  
152 S. Ninth St.  
Noblesville, IN 46060

Re: Consolidated Advisory Opinion 04-FC-105 and 04-FC-106; Alleged Violation of the  
Open Door Law by the Marion-Adams School Board

Dear Ms. Sanderson and Mr. Piper:

This is in response to your formal complaints, which were received on June 24, 2004. In those complaints, you both allege that the Marion-Adams School Board ("School Board") has violated the Indiana Open Door Laws ("ODL"), Indiana Code 5-14-1.5. Specifically you both claim that the School Board held an executive session in which budget cuts were discussed in violation of the ODL, that the School Board failed to prepare memoranda setting forth the information required by Ind. Code 5-14-1.5, and that the notice for the executive session referenced the wrong Indiana Code section. Because these complaints allege the same violations against the same entity, I have consolidated these matters for disposition.

We forwarded a copy of your complaints to the School Board, and Dr. Patrick Mark, Superintendent, responded on behalf of the School Board by telephone.

#### BACKGROUND

On June 24, 2004, you submitted complaints to our office in which you allege that on May 26, 2004, the School Board held an executive session, citing "collective bargaining" as the exception under which that executive session was held. Several people present at that meeting later confirmed that during the meeting, budget issues were discussed. You also allege that the School Board failed to prepare memoranda for that meeting "confirming when and why the meeting took place, and that no business," other than that cited, was discussed during the

meeting. Furthermore, you note that the notice of the executive session referenced I.C. 5-14-1.5-6.1(2)(a), omitting the “(b)” after 6.1 as indicating the exception for collective bargaining. You allege that this omission taints the notice.

I forwarded a copy of the complaints to the Marion-Adams School Board. During a telephone conversation with Dr. Patrick Mark, he stated that the notice of the meeting was a printing error, that the meeting was meant to be open to the public, and that the School Board planned to discuss budget cuts related to a school closing during that meeting.

## ANALYSIS

### Executive Session

The School Board is a governing body subject to the provisions of the Open Door Law. A meeting for the purpose 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). 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 the executive session. An executive session is defined as a meeting “from which the public is excluded, except the governing body may admit those person necessary to carry out its purpose.” Ind. Code §5-14-1.5-2(f).

“Executive sessions are governed by Indiana Code 5-14-1.5-6.1, and may only be conducted under very limited circumstances.” *Opinion of the Public Access Counselor 03-FC-64*. The purposes for which executive sessions may be held are limited to the twelve situations listed at Indiana Code section 5-14-1.5-6.1(b). The governing body of a public agency bears the burden of showing that its gathering is an executive session within one of several strict statutory exceptions. *Opinion of the Public Access Counselor 00-FC-12*.

During our office’s telephone conversation with the Dr. Mark, he acknowledged that budget cuts were discussed and that the meeting was intended to be a public meeting. He stated that there was a publishing error and the meeting was inadvertently advertised as an executive session. Notwithstanding that an error was freely admitted, we reiterate that budget items are not listed as one of the enumerated instances for which an executive session may be held. Therefore, the discussion of the budget items was a violation of the Open Door Law.

### Notice

Your complaints allege that the notice given for the May 26, 2004 executive session violates the Open Door Law. The ODL requires public agencies to provide notice of public meetings and executive sessions. Specifically, Ind. Code §5-14-1.5-5(a) provides that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meetings shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. In addition, such notices must state the

“subject matter by specific reference to the enumerated instance or instances” for which executive sessions may be held under Ind. Code 5-14-1.5-6.1(b). Ind. Code §5-14-1.5-6.1(d).

“The statute is clear and unambiguous. Indiana Code Section 5-14-1.5-6.1 requires the Board to identify the subject matter by specific reference to subsection (b).”  
*Gary/Chicago Airport Board of Authority v. Charles Maclin*, 772 N.E.2d 463, 467 (Ind. App. 2002)

“It is clear that the General Assembly intended that public agencies provide the public with detailed information as to the purpose of their executive session so that the public would be ‘fully informed,’ despite the fact that the public is lawfully excluded from executive sessions. The General Assembly has also recognized that a governing body may have more than one item to discuss during the executive session and that notice must be provided of any of the exceptions that permit an executive session.” *Opinion of the Public Access Counselor 00-FC-31*.

It should first be noted that it appears that the Indiana Code cite referenced on the notice of the executive session was a scrivener’s error as it refers to I.C. 5-14-1.5-6.1(2)(A), which, in fact, is an incorrect code section. We note that the notice also states that the meeting is being held to discuss collective bargaining, which indicates the School Board likely intended to reference I.C. 5-14-1.5-6.1(b)(2)(A), the “collective bargaining” exception.

“The Indiana General Assembly and the Indiana Court of Appeals have recognized that a notice that does not meet all of the technical requirements may still be valid under a substantial compliance approach.” *Opinion of the Public Access Counselor 00-FC-6*, citing *Town of Merrillville v. Blanco*, 687 N.E.2d 191 (1997). In *Town*, the Court held that substantial compliance with the Open Door Law may in some cases be sufficient. “Several factors are considered, including the extent to which the violation denied or impaired access to a meeting, and prevented or impaired public knowledge or understanding of the business conducted in the meeting.” *Id at 197*.

In *Opinion of the Public Access Counselor 04-FC-55*, this office held that a public notice which did not cite to the code section but rather referenced the subject matter of the meeting in a narrative form, was certainly a “technical violation” but was sufficiently specific to be in substantial compliance with the law. Similarly, it is my opinion that while accidentally omitting “(b)” from the code cite is technically a violation, the subject matter of the notice was specific enough to be substantially compliant, and it was not, by itself, a violation of the Open Door Law’s notice requirements.

### Memoranda

A governing body must keep memoranda for both public meeting and executive sessions. For public meetings, the memoranda must include information on (1) the date, time and place of the meeting; (2) the members of the governing body who were present or absent; (3) the general substance of all matters that were proposed, discussed, or decided; (4) a record of all votes taken

(by individual members if there was a roll call); and (5) any additional information required under Ind. Code §5-1.5-2-2.5 or Ind. Code §20-12-63-7. Ind. Code §5-14-1.5-4(b).

The memoranda for an executive session requires a great deal of the same information except that instead of setting out the general substance of all matters discussed, the governing body must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. Ind. Code §5-14-1.5-6.1(d). Additionally, the governing body must certify by a statement in the memoranda that no subject matter was discussed in the executive session other than the subject matter specified in the public notice. Ind. Code §5-14-1.5-6.1(d). The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. Ind. Code §5-14-1.5-4(c).

Your complaints indicate that the School Board did not provide any memoranda for the May 26, 2004 meeting. I find that failing to provide memoranda for the May 26, 2004 meeting was a violation of the Open Door Law by the Marion-Adams School Board.

#### CONCLUSION

The Marion-Adams School Board violated the Open Door Law when it discussed budget issues during an executive session and when it failed to provide memoranda within a reasonable time following the meeting.

Sincerely,

Karen Davis  
Public Access Counselor

cc: The Lebanon Reporter and The Noblesville Daily Times: w/out enclosures