

August 25, 2004

Mr. LeVon Whittaker
c/o Lemuel Stigler, Esq.
7895 Broadway, Suite D
Merillville, IN 46410

Re: Advisory Opinion 04-FC-124; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Gary Community School Corporation/School Board

Dear Mr. Whittaker:

This is in response to your formal complaint alleging that the Gary Community School Corporation/School Board ("School") violated the Access to Public Records Act ("APRA"), I.C. §5-14-3, and the Open Door Law ("ODL"), I.C. §5-14-1.5. Specifically, you allege that the School Board has failed to properly advise the public of the intent to discuss offering an employment contract to the interim superintendent and has failed to keep minutes of matters discussed in executive session. The School Board has responded to your complaint, a copy of which is enclosed for your reference. I find that to the extent that the School failed to keep memoranda of the May 24, 2004 executive session, the School violated the Open Door Law; however, I decline to find that the notice of the May 24, 2004 executive session failed to comply with the notice requirements of the Open Door Law.

BACKGROUND

On July 12, 2004, your attorney, Mr. Lemuel Stigler, submitted a request for records from the Gary Community School Board and the Gary Community School Corporation. Specifically, he asked for copies of the notices of the executive session in which the contract offered to the interim superintendent was discussed, copies of minutes from those executive sessions, and copies of the minutes from the open School Board meetings in which the School Board voted to approve the contract. Having received no records, Mr. Stigler faxed the School on July 19, 2004 asking whether its delay in forwarding those records indicated a denial of his request. That same day, Ms. Rochelle Moody, Attorney for the School, sent a letter to Mr. Stigler advising him that the records he requested were being gathered, and that they would be sent shortly. On July 20, 2004,

Ms. Moody forwarded to Mr. Stigler a copy of the notice of the executive session held May 24, 2004, as well as the minutes from the open School Board meeting in which the Board voted to offer the superintendent a contract. Ms. Moody also sent a letter to Mr. Stigler in which she advised him that the minutes from the executive session would not be forthcoming, as the School does not keep minutes for executive sessions. On July 26, 2004, Mr. Stigler faxed Ms. Moody again to advise her that he had not received all of the requested documents, and that he was therefore filing a formal complaint with this Office. Mr. Stigler filed a formal complaint on your behalf alleging that the School failed to properly notify the public of the intent to discuss the superintendent's contract during an executive session and failed to keep minutes of the matters discussed in executive session.

I received the formal complaint on July 26, 2004, and forwarded a copy of it to the School. Ms. Moody responded on behalf of the School. Her response states that the executive sessions were noticed as required by I.C. §5-14-1.5-5, and that the School was not required to keep minutes of executive sessions.

ANALYSIS

Minutes and Memoranda

The School Board and School Corporation are public agencies and governing bodies subject to the Open Door Law. I.C. §§ 5-14-1.5-2(a) and 5-14-1.5-2(b). The Open Door Law requires a governing body of a public agency to prepare memoranda both for public meetings and executive sessions, as those meetings progress. I.C. §5-14-1.5-4. The memoranda for a public meeting must include the following information: (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 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 I.C. §5-1.5-2-2.5 or I.C. §20-12-63-7. I.C. §5-14-1.5-4(b).

The memoranda required for an executive session must include the same information as required for a public meeting, with two exceptions. First, rather than include the general substance of all matters proposed, discussed, or decided, the governing body must identify the subject matter considered by specific reference to the enumerated instance, or instances, for which public notice was given. I.C. §5-14-1.5-6.1(d). Also, the governing body must certify by a statement in the memoranda of that executive session that no subject matter was discussed in the executive session other than the subject matter specified in the public notice. I.C. §5-14-1.5-6.1(d).

While there is no statutory deadline for producing the memoranda for either an executive session or a public meeting, the memoranda are to be available "within a reasonable time after the meeting" for the purpose of informing the public of the governing body's proceedings. I.C. §5-14-1.5-4(c). What constitutes a reasonable time will vary, as a case by case analysis is required.

During a telephone conversation, Ms. Moody verified to this Office that the School does not keep separate memoranda for executive sessions. Rather, the School's procedure is to include the executive session information in the minutes of the following public meeting. In this instance, the executive session information was kept in the public meeting minutes in such a manner that it is difficult to determine that the information is meant to be the executive session memoranda, or that the required information has, in fact, been included in those minutes. For example, the required certification appears in the minutes of the open meeting. What is contemplated by the Open Door Law, in terms of executive session memoranda, is a document that can clearly be identified as the memoranda for that meeting. In other words, there should be no question that the document is the memoranda for that particular executive session, and the memoranda should clearly contain all information required by I.C. §§5-14-1.5-4 and 5-14-1.5-6.1(d). To the extent that the School failed to keep memoranda of its executive session, I find a violation of the Open Door Law. It should, however, be noted that during that telephone conversation, Ms. Moody has verified to this office that she will be putting together an executive session memoranda format designed to better comply with the Open Door Law.

While the Open Door Law requires that a governing body keep memoranda of its meetings, it does not require that a public agency keep minutes of meetings. However, if minutes are created, those minutes must be made available for inspection and copying by the public. I.C. §5-14-1.5-4(c). If minutes are kept for an executive session, those minutes must identify the subject matter considered by specific reference to the enumerated instance, or instances, for which the executive session may be held, and the governing body must certify by statement that no subject matter was discussed in the executive session other than the subject matter specified in the public notice. I.C. §5-14-1.5-6.1(d).

We note that while minutes and memoranda are addressed separately for purposes of the Open Door Law, many people use those terms interchangeably. Because the terms minutes and memoranda are sometimes used interchangeably, a requestor may ask for minutes but actually mean memoranda. When responding to a request for minutes that do not exist, an agency should advise the requestor that memoranda are kept and that those memoranda are available to the public.

Notice of Executive Session

Mr. Stigler's formal complaint alleges that the School failed to properly advise the public of the intent to discuss offering a contract to the interim superintendent during the May 24, 2004 executive session. Your complaint can be taken to raise two issues, the adequacy of the notice of the executive session and the propriety of holding an executive session to discuss the superintendent's contract.

Pursuant to I.C. §5-14-5-7, a person who chooses to file a formal complaint with this Office must do so no later than thirty (30) days after: (1) the denial; or (2) the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. A complaint alleging a violation with respect to the content of the notice of an executive session or the propriety of

holding an executive session should be filed within thirty days of that executive session. The meeting in question occurred on May 24, 2004 and our office received the formal complaint on July 26, 2004. Therefore, the complaint with regard to this issue was not timely filed, and we make no finding regarding a violation of the Open Door Law. However, we address generally the issue of the adequacy of notices of executive sessions and the propriety of holding an executive session to discuss a contract.

The Open Door Law requires public agencies to provide notice of public meetings and executive sessions. Specifically, I.C. §5-14-1.5-5(a) provides that public notice of the date, time, and place of any meetings, executive sessions, or 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, notices of executive sessions must state the “subject matter by specific reference to the enumerated instance or instances” for which the executive session may be held. I.C. §5-14-1.5-6.1(d).

The notice of the May 24, 2004 executive session advertises the date, time, and place of the executive session, and specifically lists several enumerated instances under which the School intended to hold the executive session. Those enumerated instances are included among those under which governing bodies may hold executive sessions.

Executive sessions are governed by I.C. §5-14-1.5-6.1, and may only be conducted under very limited circumstances. The purposes for which executive sessions may be held are limited to twelve situations listed at I.C. §5-14-1.5-6.1(b). The governing body bears the burden of showing that its gathering is an executive session within one of the several strict statutory exceptions. *Opinion of the Public Access Counselor 00-FC-12*. We note that contract discussions are not one of the enumerated instances for which an executive session may be held.

Timeliness of Response

Although not specifically alleged in Mr. Stigler’s formal complaint, his correspondence with Ms. Moody indicates that he believes the School’s failure to provide the requested documents within seven days constitutes a denial of that records request. It is the responsibility of the public agency to respond to requests for public records within a specified time period. A public agency is required to make a response to a mailed request within seven (7) days after it is received. Failure to do so constitutes a denial under the Access to Public Records Act. I. C. §5-14-3-9(b). The Access to Public Records Act does not set any specific deadlines for producing requested public records. What is contemplated in terms of that response is a communication to the requestor. For example, a public agency may advise whether there are any records that will be produced, that the records requested are confidential or otherwise nondisclosable, or that the public agency needs more time to compile the records requested. A response might also provide the records requested, or notify the requestor that the public records requested are available for his or her inspection.

On July 19, 2004, the School sent a letter to Mr. Stigler in response to his July 12,

2004 records request advising him that the records were being gathered and would be sent to him shortly. As the issue was not raised by your complaint, we decline to make a determination as to the timeliness of the production of records. However, we do note that Ms. Moody's response to Mr. Stigler was made within seven days of her receipt of the request, and as such, was timely.

CONCLUSION

To the extent that the School failed to keep memoranda of the May 24, 2004 executive session, I find a violation of the Open Door Law. However, I decline to make any finding with respect to the adequacy of the executive session notice or the propriety of the May 24, 2004 executive session because those issues are untimely.

Sincerely,

Karen Davis
Public Access Counselor

cc: Rochelle Moody; w/out enclosures