

June 7, 2004

Mr. Chris W. Schnepf
2870 South 1200 East
Zionsville, Indiana 46077

Re: Formal Complaint 04-FC-77; Alleged Violation of the Open Door Law by the Boone County Board of Commissioners

Dear Mr. Schnepf:

This is in response to your formal complaint alleging that the Boone County Board of Commissioners (Commissioners) violated the Indiana Open Door Law (Ind. Code §5-14-1.5) (Open Door Law) when all of the members of that governing body gathered together on April 27, 2004, without notice, and attended a meeting of the Boone County Council. The Commissioners' response to your complaint is enclosed for your review. In their response, the Commissioners challenge your standing to bring this complaint. The Commissioners further assert that they did not take official action on their own public business, and therefore did not violate the Open Door Law by attending a properly noticed meeting of a different governing body. For the reasons set forth below, I find that you have standing to bring this complaint, but I further conclude that your complaint fails to establish that the Commissioners met in violation of the Open Door Law.

BACKGROUND

On April 27, 2004, the Boone County Council held a meeting of that governing body. At issue before the Council was the payment of legal fees incurred by the Boone County Commissioners during the first part of 2004, particularly regarding Boone County's attempt to purchase the Boone County Utilities. The fees were alleged to be excessive, and well more than the amount that had been budgeted by the Council for the Commissioners for legal fees for the entire year. Prior to the meeting, the Council solicited updated bills from each law firm or attorney that had provided representation to the Commissioners in the utility matter. That solicitation and the April 27, 2004, meeting were triggered by "taxpayer concerns expressed at a meeting of the Boone County Council regarding possible large sums of unsubmitted bills," and

promised that no payment would be made by the Council for any charges not appearing on the updated bills. The April 27, 2004, meeting was, by the Council President's words, intended to dispel the rumors and provide the public with an accurate accounting of what was incurred and owed by the County. After reading a list of the fees, the Council invited and heard public comment on the fees and whether and how they would be paid.

Each of the members of the Boone County Board of Commissioners attended the April 27, 2004, Boone County Council meeting. In addition, the Commissioners' attorney was present, and provided prepared testimony to the Council concerning the history of the litigation that resulted in the fees at issue. One Commissioner rose to address the Council, but whatever substantive testimony she had to provide was lost in a seemingly meaningless and inefficient debate with the Council President on which governing body was more at fault for any lack of communication between the two governing bodies. In response to a direct question from one of the Council members, the Commissioner labeled the attorney fees "legitimate," but noted that the Commissioners were scheduled to have a public meeting the following week to discuss the justification for the fees incurred. Another Commissioner rose to make a generic plea for better communication with the Council on matters that affect each body jointly. Members of the general public also rose and addressed the Council regarding the fees. The Council did not make any decisions and did not take any votes, but adjourned after discussing their own planned attendance at the upcoming meeting of the Commissioners.

This complaint followed. You allege that the Commissioners' attendance at the April 27, 2004, Council meeting constituted a "meeting" of the Commissioners, and required that they post notice of their own meeting in accordance with the notice provisions of the Open Door Law. Although you were present for the April 27, 2004, meeting, you assert that the Commissioners' failure to provide notice of their intent to gather as a majority on April 27, 2004, violated the Open Door Law. In response, the Commissioners assert that you were not denied the right to attend the April 27, 2004, meeting, and therefore lack standing to bring a formal complaint asserting a violation of the notice provisions of the Open Door Law. The Commissioners further contend that the meeting did not involve the public business of the Commissioners inasmuch as the question of whether and how to pay the legal fees fell wholly within the jurisdiction of the Council as the fiscal body for the county. The Commissioners further assert that they did not otherwise take any official action on their own public business while then gathered together.

ANALYSIS

I first address the issue of standing. Indiana Code 5-14-5-6 sets forth the grounds for filing a formal complaint with the Office of the Public Access Counselor and provides that a complaint may be filed by any person or public agency denied (1) the right to inspect or copy records under Indiana Code 5-14-3; (2) the right to attend any public meeting of a public agency in violation of Indiana Code 5-14-1.5; or (3) any other right conferred by Indiana Code 5-14-3 or Indiana Code 5-14-1.5 or any other statute or rule governing access to public meetings or public records. IC 5-14-5-6.

The Commissioners note that you were in attendance at the meeting and therefore you were not denied the right to attend the meeting about which your complaint is based. True enough, but while that might preclude you from asserting that you were denied the right to observe and record the meeting in violation of Indiana Code 5-14-1.5-3, in my opinion it does not preclude you from asserting the denial of “any other right conferred by ... Indiana Code 5-14-1.5.” See IC 5-14-5-6(3). Indeed, in addition to your right to observe and record public meetings, the Open Door Law contains other provisions and confers upon you other actionable rights, including the right to a properly and timely posted notice (IC 5-14-3-5), a properly and timely posted agenda (if used) (IC 5-14-1.5-4(a)), a memoranda of the meeting with specific content and made available within a reasonable period after the meeting (IC 5-14-1.5-4(b)), a meeting location that is accessible to persons with disabilities (IC 5-14-1.5-8), and other miscellaneous rights related to the conduct of public meetings. Certainly, it cannot be the intent of the legislature that, for example, a disabled constituent faced with barriers to accessibility actionable under Indiana Code 5-14-1.5-8, but who nonetheless endures and overcomes them to attend the meeting and be fully informed of the business of the governing body, is without standing to assert a violation of the law.

In my opinion, Indiana Code 5-14-1.5-6(3) provides you with the vehicle to prosecute violations of all of your Open Door Law rights notwithstanding the fact that you may have attended any meeting at issue. Your complaint alleges a notice violation. Indiana Code 5-14-1.5-5 requires that notice be posted for every meeting of a governing body within a specific time of the meeting, at a specific place, and that it contain specific information. Deficiencies in any of these items constitute violations of the statute whether or not you attended the meeting at issue, and it is my opinion that you have standing to assert these alleged violations of the notice provisions.¹

Turning to the merits, I find that your complaint fails to establish a violation of the Open Door Law. The intent and purpose of the Open Door Law 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.” IC 5-14-1.5-1. Toward that end, except under very limited circumstances, all meetings of the governing body of a public agency must be open for the purpose of permitting members of the public to observe and record the meetings. IC 5-14-

¹ In reaching this conclusion, I am aware that this office has previously opined that a complainant who attends a meeting alleged to be held in violation of the Open Door Law does not have standing to file a formal complaint challenging the validity of the meeting. See *Advisory Opinion 03-FC-32, Grounds to File a Formal Complaint with the Office of the Public Access Counselor for Alleged Violations of the Indiana Open Door Law when the Complainant Received Notice of and Attended the Meeting*, issued May 29, 2003, <http://www.state.in.us/pac/advisory/2003/2003fc32.html>; *Advisory Opinion 00-FC-11, Grounds to File a Formal Complaint with the Office of the Public Access Counselor for Alleged Violations of the Indiana Open Door Law when Complainant Attended the Meeting*, issued April 19, 2000, <http://www.state.in.us/pac/advisory/2000/2000fc11.html>. To the extent that this opinion is in conflict with these prior advisory opinions, it is my intention that this opinion controls. If it is subsequently determined in any civil action you later file in this matter that you did not have standing to bring this formal complaint, it is my intention that this opinion serve as an informal inquiry response to your claims pursuant to Indiana Code 5-14-4-10(5), and that it have the full force and effect of an informal opinion of the Public Access Counselor under Indiana Code 5-14-3-9(i).

1.5-3(a). A “meeting” 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.” IC 5-14-1.5-2(c). “Public business” means “any function upon which the public agency is empowered or authorized to take official action.” IC 5-14-1.5-2(e). “Official action” is very broadly defined by our state legislature to include merely “receiving information” and “deliberating” (defined by Indiana Code 5-14-1.5-2(i) as a discussion which may reasonably be expected to lead to a recommendation, policy, decision or vote of that governing body), to actually making recommendations, establishing policy, making decisions, or taking a vote. IC 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. IC 5-14-1.5-5(a). The notice must be posted at the principal office of the public agency at issue, or if no principal office exists, at the location where the meeting is to be held. IC 5-14-1.5-5(b). Notice must also be provided to media, but there is no requirement that the media or the governing body “publish” the notice, and publication does not satisfy the posting requirements of the statute. *See* IC 5-14-1.5-5(b).

In this matter, there is no dispute that the Commissioners gathered together as a majority on April 27, 2004, to attend the meeting of the Boone County Council. Neither is there any dispute that the Commissioners did not post a notice stating that they were going to gather together at that date, time and place. It seems equally clear that the Commissioners and their attorney intended to gather at the Council meeting to hear the Council’s deliberations on the payment of the Commissioners’ legal fees, and the Commissioners’ counsel was just as certainly prepared for and intended to present testimony to the Council at that time. Indeed, the Council President stated his understanding at the beginning of the meeting that the Commissioners’ attorney had some comments to make, and in making his comments the attorney stated that he was summarizing what the Commissioners had said to him. While all of these facts are not disputed, I do not believe that they end the inquiry of whether the Commissioners’ attendance at the Council meeting constituted their own meeting in violation of the Open Door Law.

In *Formal Complaint 04-FC-72; Alleged Violation of the Open Door Law by the City of Anderson*, issued May 20, 2004, <http://www.state.in.us/pac/advisory/2004/04-FC-72.pdf>, I recently set forth the standards I believe are applicable to determine whether a governing body gathered together in violation of the Open Door Law:

[I]t is not enough that a majority of the governing body was gathered together. The simple gathering of a majority is not a “meeting.” Indeed, the Open Door Law expressly recognizes exceptions to the meeting definition in several circumstances where the General Assembly anticipated that a majority could be gathered together. These include social or chance gatherings (*e.g.*, dinner, community events, and so on), on site project inspections, traveling to and attending meetings of organizations devoted to the betterment of government (*e.g.*, seminars hosted by the Indiana Association of Cities and Towns, and so on), and political caucuses. IC 5-14-1.5-2(c)(1), (c)(2), (c)(3), (c)(4). Neither in my opinion would the simple gathering of a majority of a governing body in any other context be a “meeting” as that term is defined by the Open Door Law without that

body also taking “official action” *on that body’s* “public business.” IC 5-14-1.5-2(c). To find otherwise ignores the plain language of the statute and the practical realities of government, particularly in local and smaller communities where community leaders are fewer, tend to know one another and run in the same circles, and routinely attend functions and meetings of a variety of entities and other governing bodies. I think too that any such interpretation would infringe on the civil and other constitutional rights of our elected and public officials to assemble and participate in representative government as citizens.

Formal Complaint 04-FC-72, at 3.

In that matter, a majority of the Anderson City Council attended a “Town Hall” meeting hosted by the presiding officer of the council with that councilman’s constituents. While the majority of that body and the councilman hosting that meeting did not, in my opinion, intend to have a meeting of the council where they took official action on the public business of that governing body, it was clear from the facts that a meeting as defined by the statute nonetheless occurred. The majority of the members of the governing body gathered at that time and openly discussed and received information from one another and the assembled constituents about such city issues as the enactment of a proposed city ordinance, the construction of a new police station, the city budget and city departmental budgets, the condition of the city streets, and the diversity of the city’s workforce. In my opinion, these matters clearly comprised the “public business” of the city council as functions over which the city council was empowered or authorized to take some form of official action. *Formal Complaint 04-FC-72*, at 3-4 (citing IC 5-14-1.5-2(e)); see also *Advisory Opinion 00-FC-44*; *Alleged Violation of the Indiana Open Door Law by the Hamilton County Board of Commissioners*, (January 9, 2001), (<http://www.state.in.us/pac/advisory/2000/2000fc44.html>) (finding violation of Open Door Law where Hamilton County Commissioners took official action “*concerning road projects in Hamilton County [that] clearly fall within the definition of what constitutes the public business of the Commission*”) (emphasis added).

Here, the Commissioners attended a meeting of the Council where the sole issue before the Council was payment of legal fees incurred by the County. While it may well be that the Commissioners were responsible for the decisions that led to the County incurring those legal fees, once incurred, whether and how payment would be made for those fees was the sole responsibility of the Council as the county fiscal body. See IC 36-2-3.5-3 and generally; IC 36-2-5-12(a). Indeed, the Council made that abundantly clear during the course of the meeting, and prior to the meeting alerted the attorneys responsible for the fees that their failure to provide a full accounting in updated bills would result in fees not being paid by the Council. In short, the April 27, 2004, meeting of the Council did not involve the public business of the Commissioners, even if the Commissioners had an interest in the outcome of that meeting. The Commissioners had no power or authority to take official action on any matter before the Council or otherwise at issue at the April 27, 2004, Council meeting. Because the Council meeting did not involve the Commissioners’ public business, the Commissioners were not in a “meeting” of their own for purposes of the Open Door Law, and they were not therefore required to give notice that they were gathering together as a majority at that time.

CONCLUSION

For the reasons set forth above, I find that the Commissioners did not meet in violation of the notice provisions of the Open Door Law when they gathered together at the April 27, 2004, meeting of the Boone County Council.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Wayne C. Turner