February 10, 2005

Sent Via Facsimile

Ms. Julie A. Wheeland
502 Eagle Court
Valparaiso, IN 46383

Re: Formal Complaint 05-FC-12; Alleged Violation of the Open Door Law by The Board of Trustees of Porter, A County Hospital

Dear Ms. Wheeland:

This is in response to your formal complaint alleging that the Board of Trustees of Porter ("Porter") violated the Open Door Law ("ODL") when it posted a faulty notice of an executive session. I find that Porter violated the Open Door Law with respect to its January 11, 2005 notice.

BACKGROUND

Porter posted a notice of a January 11, 2005 executive session.[1] The notice contains the date, time and place of the executive session. The notice is a preprinted list of some of the executive session instances contained in Ind.Code 5-14-1.5-6.1(b), as well as the instances for which a county hospital may have an executive session under IC 16-22-3-28. The January 11 notice shows a check next to ten of the listed instances. One of the selected instances is under IC 5-14-1.5-6.1(b)(2), without any more specificity with respect to which of the subparts, (A) through (D), are pertinent to that executive session.

Your formal complaint alleges that this lack of specificity in the notice is a violation of the Open Door Law.

I sent a copy of your complaint to Porter attorney Gregg Wallander. He responded in writing, a copy of which is enclosed for your reference. In its response, Porter claims that the

[1] Your complaint states that the meeting notice pertaining to your complaint was for a January 5, 2005 executive session, but you refer to the notice in Attachment A, which is for a January 11 executive session.

notice is sufficiently specific under the Open Door Law requirements and is consistent with advisory opinions of this office that refer to twelve instances for which executive sessions are permitted. Mr. Wallander reasons that because the Public Access Counselor has referred to twelve instances for which executive sessions may be held under the Open Door Law, and the entire (b)(2) instance, including its four subparts is but one of those twelve instances, Porter's notice is sufficient. He also states that under the provision for executive sessions for county hospital boards to engage in strategic planning, that purpose is subsumed under the strategic discussions of (b)(2) of the ODL, and hence any strategic discussions were proper without the more specific notice. Finally, he argues that even if there was a technical violation of the Open Door Law, Porter substantially complied with the ODL.

ANALYSIS

The intent and purpose of the Indiana 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." Ind. Code 5-14-1.5-1. The provisions of the Open Door Law are to be "liberally construed with the view of carrying out its policy." IC 5-14-1.5-1. Porter is clearly a public agency and its Board of Trustees a governing body subject to the requirements of the Open Door Law. IC 5-14-1.5-2.

The general rule of the Open Door Law is that all meetings of the governing body of a public agency are to be conducted openly for the purpose of permitting the public to attend and observe them. IC 5-14-1.5-3(a). The exception to this rule is an executive session, defined as a meeting from which the public is excluded, which may be held under Indiana Code section 5-14-1.5-6.1(b). IC 5-14-1.5-2(f).

The Open Door Law requires public agencies to provide notice of public meetings and *executive sessions*. Specifically, Indiana Code section 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 meeting shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting.

Public notice of the date, time and place of an executive session, therefore, must be provided at least forty-eight (48) hours in advance of the executive session. 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 Indiana Code section 5-14-1.5-6.1(b)." IC 5-14-1.5-6.1(d). Under IC 5-14-1.5-6.1(b)(2) a governing body may meet in executive session:

> (2) For discussion of strategy with respect to any of the following:
> (A) Collective bargaining.
> (B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing.
> (C) The implementation of security systems.

(D) The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

The question presented is whether the January 11, 2005 notice of Porter's executive session conforms to Indiana Code section 5-14-1.5-6.1(d), where it failed to differentiate among the above four subparts of subsection 6.1(b)(2).

The Open Door Law uses the terms *"specific reference"* and *"enumerated instance or instances"* when describing the notice of an executive session. 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. *See* IC 5-14-1.5-1.

Public agencies may produce unique notices for each executive session that conform to the requirements of the ODL. The notices in question, however, are in a checklist format, listing the exceptions that would permit Porter to conduct an executive session, but requiring an affirmative indication of the specific purpose or purposes for the executive session. The Office of the Public Access Counselor has accepted his type of checklist format for an executive session notice as one means to supply the required notice. *Opinion of the Public Access Counselor 00-FC-34*. The checklist format is easy to use and has been utilized by other governing bodies. This format ensures that the public is notified of the specific purpose or purposes for which the governing body plans to conduct an executive session and that the notice conforms to the other requirements of Indiana Code sections 5-14-1.5-5(a) and (b) and 5-14-1.5-6.1(d).

While it is my opinion that a "checklist" notice that requires an affirmative indication of the specific statutory exception or exceptions claimed by that governing body for the particular meeting does not violate the notice requirements of the ODL, the particular checklist style notice of the January 11 meeting does not comply with the Open Door Law. This is because it does not contain a means of separately checking the discrete instances under IC 5-14-1.5-6.1(b)(2).

The advisory opinions cited by Mr. Wallander, *Opinion of the Public Access Counselor 04-FC-170* and *Opinion of the Public Access Counselor 00-FC-6* do not stand for the proposition that the subparts of (b)(2) are not in themselves discrete instances. Rather, those opinions merely note that there are twelve numbered subsections in section 6.1(b) (or eleven under previous law). Nothing in those opinions endorses the view that less specificity was intended by the legislature rather than more. In fact, the language of the statute contains no such limitation, since it states that executive session notice must 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)." The plain wording of the statute omits the numeric limitation advanced by Mr. Wallander.

I believe the January 11 preprinted notice is more like the notice in *Opinion of the Public Access Counselor 00-FC-31*, where this office disapproved a preprinted notice that listed all

possible instances that might apply to the governing body, without a means of indicating by a checkmark what instance or instances applied to that particular executive session. In *Opinion of the Public Access Counselor 00-FC-34,* the counselor approved a preprinted notice that contained lines for inserting a checkmark for each of the executive session instances, *including* the four subparts of subsection 6.1(b)(2). Also, page 45 of the Public Access Counselor handbook contains a preprinted executive session notice that provides for a checkmark next to each of the four subparts of subsection 6.1(b)(2).

Mr. Wallander also argues that because a county hospital may meet in executive session to engage in strategic planning, and all the subparts of subsection 6.1(b)(2) fit within "strategic planning" under the county hospital law, the January 11 notice actually provided more detail than is required. By this argument, Mr. Wallander opines that if a county hospital is discussing strategy with respect to pending litigation, or collective bargaining, or leasing real property, or implementation of security systems, those discussions are actually "strategic planning" under IC 16-22-3-28(c)(4). I do not agree that "strategic planning" subsumes the types of strategy discussions in subsection 6.1(b)(2). This argument is without merit.

A technical violation of the ODL nevertheless may result in a finding that the governing body "substantially complied" with the ODL. In determining whether to declare any policy, decision, or final action void, a court shall consider the following factors among other relevant factors:

(1) The extent to which the violation:

(A) affected the substance of the policy, decision, or final action;

(B) denied or impaired access to any meetings that the public had a right to observe and records; and

(C) prevented or impaired public knowledge or understanding of the public's business.

IC 5-14-1.5-7(d).

While access to the executive session would not have been impaired by the lack of specificity in the January 11 notice since the public does not have the right to attend an executive session (assuming it is properly held in the first place), I believe that the January 11 notice prevented or impaired public knowledge or understanding of the public's business.

Mr. Wallander did not indicate in his response what specific strategy discussions were to be undertaken at the January 11 executive session. However, his February 3 correspondence to you, a copy of which was provided to me, states that the Board of Trustees of Porter did not actually have any discussion with respect to any matters in subsection 6.1(b)(2) on January 11. If this is true, it would ameliorate the extent to which this violation impaired public understanding of public business.

I have spoken to Mr. Wallander about the executive session notices, and I believe that he intends to be more specific with respect to executive session notices in the future.

CONCLUSION

For the foregoing reasons, I find that The Board of Trustees of Porter violated the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Gregg Wallander