

October 17, 2005

Edward L. Long  
920 Weller Avenue  
LaPorte, IN 46350

*Re: Formal Complaint 05-FC-185; Alleged Violation of the Open Door Law by the  
LaPorte County Public Library Board of Trustees*

Dear Mr. Long:

This is in response to your formal complaint alleging that the LaPorte County Public Library Board of Trustees ("Board") violated the Open Door Law ("ODL") by holding a meeting that was not open to the public.

#### BACKGROUND

You state that on September 8, 2005 the Board held a public meeting. After the meeting the Board disseminated a nine (9) page letter in response to an objecting petition filed by the Concerned Citizens Action Coalition ("CCAC"). You believe that the Board must have met to draft its response sometime between receiving the CCAC's petition on September 1, 2005 and September 8, 2005 when the Board adopted and disseminated its response. As all of the Board members' names appear on the letter you believe they must have met to draft the response.

Mr. Robert Burns, the Board President, and Ms. Judy R. Hamilton, the Library Director, responded to your complaint on behalf of the Board by letter dated September 22, 2005. A copy of that letter is enclosed for your reference. The Board is comprised of seven (7) members; Ms. Hamilton is not a member of the Board. The Board asserts that it did not hold any meeting between August 25, 2005 and September 8, 2005 for any purpose including the drafting of, or discussion of, a response to the petition.

The Board states that Ms. Hamilton drafted the response and mailed it to the Board on September 2, 2005. Between September 6, 2005 and September 8, 2005 some of the Board members provided input for revisions to the response via e-mails sent to Ms. Hamilton. Ms. Hamilton forwarded the e-mails to all members of the Board. My staff attorney spoke with Ms. Hamilton to clarify the written response. Ms. Hamilton indicated that after she forwarded a copy of her draft response to the Board members, one Board member e-mailed her, suggesting a change. She then forwarded this e-mail to the full Board. Approximately 3-4 Board members responded to say that the change proposed by the one member was acceptable. Thereafter, the

Board officially adopted the response at the public meeting held on September 8, 2005. Although you have not indicated any concern that the September 8, 2005 meeting was improperly held, the Board asserts that the September 8, 2005 meeting was properly noticed in accordance with the Open Door Law.

#### ANALYSIS

The intent and purpose of the ODL 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 ODL are to be “liberally construed with the view of carrying out its policy.” IC 5-14-1.5-1. All meetings of a governing body of a public agency must be open at all times for the purpose of permitting members of the public to observe and record them, except as provided in section 6.1. IC 5-14-1.5-3(a). A meeting for the purposes 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.” IC 5-14-1.5-2(c). The Board is a public agency and a governing body subject to the ODL. IC 5-14-1.5-2(a) and (b).

While you believe that the Board must have met in order to draft the response, the Board asserts that no meeting took place. The Library Director, Ms. Hamilton, wrote the draft response for the Board. Hence, taking the Board’s response as true, a majority of the Board did not gather, physically or otherwise, for the purpose of drafting the response. However, the Board stated that some e-mail communication occurred between September 6, after the draft was mailed to individual Board members by Ms. Hamilton, and September 8, when the Board met in public to officially adopt the draft response. The question is whether these communications could have constituted a gathering of a majority of the Board. There seems no question that the communication concerned the public business of the Board.

This office has previously addressed the issue of whether communication via e-mail constitutes a “gathering” for purposes of the ODL in *Opinion of the Public Access Counselor 05-FC-115*. In *Opinion of the Public Access Counselor 05-FC-115* this office was asked to determine whether e-mail communication between members of the Lawrence Board of Public Works and Safety (“Board of Public Works”) regarding information that had been individually received constituted a meeting in violation of the ODL. As the issue had not been previously addressed by Indiana courts or formal advisory opinions of this office, it was necessary to consider case law from other states as instructive in construing the ODL. The Supreme Court of Virginia addressed whether e-mail communications would constitute a meeting for purposes of the Virginia Freedom of Information Act (“VFOIA”), an act similar to Indiana’s ODL, in *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004). The VFOIA states in relevant part:

“‘Meeting’ or ‘meetings’ means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.”

Va. Code Ann. § 2.2-3701. The Supreme Court of Virginia analyzed the definition of “meeting” using principles of statutory construction. The court stated:

“[T]he key to resolving the question before us is whether there was an ‘assemblage.’ The term ‘assemble’ means ‘to bring together’ and comes from the Latin *simul*, meaning ‘together, at the same time.’ The term inherently entails the quality of simultaneity. While such simultaneity may be present when e-mail technology is used in a ‘chat room’ or as ‘instant messaging,’ it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission.”

*Id.* at 198. The court, under the circumstances presented, declined to find that a meeting had occurred via e-mail.

There are no court cases in Indiana interpreting IC 5-14-1.5-2(c); therefore, we must rely upon the rules of statutory construction to interpret this provision. The primary goal of statutory construction is to determine and give effect to the intent of the legislative body. *Freeman v. State*, 658 N.E.2d 68, 70 (Ind. 1995). “In construing statutes, words and phrases will be taken in their plain or ordinary and usual sense unless a different purpose is clearly manifest by the statute itself . . .” *Indiana State Dept. of Revenue v. Colpaert Realty Corp.*, 109 N.E.2d 415, 418-419. The ODL defines a “meeting” 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). The definition of “gather” is “to bring together.”<sup>1</sup> The definition of “gathering” is “assembly” and “meeting.”<sup>2</sup> Given the similarities between the VFOIA and the ODL, and the interchangeable usage of the terms “gathering” and “assembly” it is instructive to note that the Virginia Court found that the issue turned on the relationship in time, or the “simultaneity,” of the communications.

This office has held that it is wholly consistent with the ODL to interpret the term “gathering” to require some amount of simultaneous discussion. *Opinion of the Public Access Counselor* 05-FC-115. The determination of whether electronic communication would constitute a meeting for purposes of the ODL is dependent upon the circumstances of the e-mail communication and should include consideration of the timing of the communications.

The Board consists of seven (7) members; therefore, a gathering of four (4) members or more would constitute a majority for purposes of the ODL. The e-mail communications in question consisted of 1) one e-mail from a lone Board member to the Library Director, proposing a change to the response; 2) an e-mail from the Library Director to the seven Board members sharing that members’ change, and 3) e-mails from three (3) to four (4) members agreeing to the proposed change of the single Board member. Static, or single, e-mail communications directly to an individual who is not a member of the governing body does not constitute a gathering of a majority of the Board. However, this situation involves more than just a static e-mail to or from each Board member to the Library Director. In my opinion, e-mail communications that are accomplished through a third person rather than directly among members of the governing body,

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<sup>1</sup> *Merriam-Webster Online Dictionary* (visited July 5, 2005) <<http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=gathering>>.

<sup>2</sup> *Id.*

if otherwise deemed to be a “gathering,” (*see* discussion above), would be in violation of the Open Door Law, despite the communication not being carried out directly between a majority of members of the governing body.

The timing of the e-mail communications is unknown. If the e-mail communications occurred over a number of days, or even several hours, the communication may have lacked the necessary simultaneity to constitute a “gathering” as contemplated by the ODL.

It is evident from my office’s communications with the Board that no violation of the Open Door Law was intended. In fact, depending upon whether an Indiana court would adopt the reasoning of other jurisdictions to find that e-mail communications between and among a majority of a governing body *could* constitute a meeting, the Open Door Law may not have been violated. I often caution public agencies to use e-mail only to send a single, static e-mail to or from the governing body members. I would further caution public agencies that a third party sharing one or more members’ e-mail with other members of the governing body, whose members then react to that e-mail, could constitute a meeting, even though the e-mail is only indirectly communicated. In any event, such communications are inconsistent with the spirit of the Open Door Law, which requires that official action of public agencies be conducted and taken openly.

#### CONCLUSION

For the foregoing reasons, I cannot determine whether the LaPorte County Public Library Board of Trustees’ e-mail communications constituted a “gathering” for purposes of the definition of a “meeting” under the Open Door Law.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Robert E. Burns