

November 21, 2005

Sent Via Facsimile

Mr. Daniel Stockman
c/o *The Journal Gazette*
600 W. Main Street
Fort Wayne, IN 46802

Re: Formal Complaint 05-FC-221; Alleged Violation of the Open Door Law by the Fort Wayne Board of Park Commissioners

Dear Mr. Stockman:

This is in response to your formal complaint alleging that the Fort Wayne Board of Park Commissioners ("Park Commissioners") violated the Open Door Law by taking a vote in an executive session to hire the Director of Parks and Recreation. I find that under the facts before me, the Park Commissioners did not violate the Open Door Law.

BACKGROUND

You filed your formal complaint with the Office of the Public Access Counselor on October 20, 2005. You allege that the Park Commissioners met in executive session on October 7, 2005, and took final action to approve the hiring of the Director of Parks and Recreation. You enclosed a copy of the notice stating that the Park Commissioner would meet in executive session to receive information about and interview prospective employees, under Ind. Code 5-14-1.5-6.1(b)(5). You further allege that Park Commissioners President Charles McNagny told you that the vote to approve the Director was taken during the October 7 executive session. A search committee appointed, you believe, by the Park Commissioners earlier in the year to advise the Park Commissioners was also in attendance at the October 7 meeting. You contend that whether the meeting was of the full Board of Park Commissioners or its search committee, the law prohibits votes being taken in an executive session.

I sent a copy of your complaint to the Park Commissioners. Fort Wayne City Attorney Timothy A. Manges responded by letter, a copy of which is attached for your reference. Mr. Manges averred that the search committee was appointed by the Mayor, not by the Park

Commissioners. The committee included two members of the Park Commissioners, Mr. McNagny and Anita Dortch, as well as three others members who were not Park Commissioners. Mr. Manges confirmed that the October 7 executive session included all Park Commissioners as well as members of the search committee. The purpose of the October 7 executive session was to interview the candidate Al Moll and discuss the merits of hiring Moll. The Mayor invited the remaining two Park Commissioners, Rikki Goldstein and Rick Samek, to participate in the interview and discussion. At the executive session, the candidate Al Moll was interviewed, then excused from the room. After the discussion was concluded, McNagny asked the members of the search committee, which did not include Goldstein and Samek, whether there were any objections to the candidate; there were none.

With the search committee's input, the Mayor selected Moll as the Director of the Parks Department. The Mayor decided to submit his choice to the Park Commissioners at their public meeting on October 14, 2005. After a motion and discussion, the Park Commissioners voted to approve Moll. Mr. Manges argues that the search committee is not a public agency under the Open Door Law; hence, its meetings are not subject to the Open Door Law. He also asserted that both the Park Commissioners and the search committee posted notice of the executive session. Further no "final vote" was taken at the executive session by the search committee because the vote resulted merely in a recommendation to the Mayor, who was free to reconsider and reject the recommendation.

ANALYSIS

Except as provided in Ind. Code 5-14-1.5-6.1, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. Ind. Code 5-14-1.5-3(a). "Meeting" means 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). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. IC 5-14-1.5-2(d). An "executive session" is a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f). A final action must be taken at a meeting open to the public. IC 5-14-1.5-6.1(c). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. IC 5-14-1.5-2(g).

A "governing body" includes, among other things, two (2) or more individuals who are "any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated." IC 5-14-1.5-2(b)(3).

The City of Fort Wayne avers that the Board of Park Commissioners did not appoint the search committee; the Mayor appointed the members of the committee. Mr. Manges is correct that no other definition of "public agency" or "governing body" would apply to the search committee. Also, although two members of the Park Commissioners were members of the search committee, no majority of the four-member Board of Park Commissioners participated on the search committee. Accordingly, the search committee is not subject to the Open Door Law.

Although the search committee appeared to submit itself to the notice requirements of the Open Door Law for its October 7 executive session, the search committee was not required to post a notice for the gathering of the search committee.

However, as the City admits, the full Board of Park Commissioners was in attendance at the October 7 executive session, necessitating the Park Commissioners' notice of executive session. You do not take issue with the adequacy of the notice or appropriateness of the executive session of the Park Commissioners. Rather, your complaint takes issue with the vote taken at the executive session.

As you point out, a final action must be taken at a public meeting. The City states that the vote was taken by the members of the search committee only, not by the Board of Park Commissioners, although the full Board was present to witness the vote of the search committee. Two provisions of the Open Door Law relevant to this analysis are: 1) a "final action" means a vote *by the governing body* on any motion, proposal, resolution, rule, regulations, ordinance, or order; and 2) a *final action* must be taken at a meeting open to the public. Hence, reading the two provisions together, a vote by a governing body must be taken at a meeting open to the public. Under the facts as averred by the City, the vote was not taken by the Board of Park Commissioners, the only governing body present at the executive session. Rather, the vote was witnessed by the Park Commissioners, but taken by the search committee, which is not a governing body of a public agency.

I hasten to point out to the City of Fort Wayne that the distinction drawn by the City that a vote of the search committee was not a "final vote" because it led only to a recommendation to the Mayor is unavailing. Had the search committee been formed by the Park Commissioners or its President, the committee would have been a governing body, and its vote in an executive session to recommend a candidate for the Director would have violated the Open Door Law. The Open Door Law prohibits "final *action*," in an executive session, not a "final *vote*" as Mr. Manges argues. A final action is a vote, even a vote to merely recommend. The only reason that the vote on October 7 passed muster under the Open Door Law is that the search committee that took the vote was not a governing body of a public agency as defined in the Open Door Law.

CONCLUSION

For the foregoing reasons, the Fort Wayne Board of Park Commissioners did not violate the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Timothy Manges