

June 22, 2005

Rodney A. Margison
The Brown County Democrat
P.O. Box 277
Nashville, IN 47448

*Re: Formal Complaint 05-FC-99; Alleged Violation of the Open Door Law by the
Brown County Board of Commissioners.*

Dear Mr. Margison:

This is in response to your formal complaint alleging that the Brown County Board of Commissioners (“Board”) violated the Open Door Law (“ODL”) by holding an emergency executive session that did not qualify as an emergency or an executive session, and by not properly noticing the meeting.

BACKGROUND

On May 23, 2005 you filed a formal complaint with the Office of the Public Access Counselor alleging violations of the ODL by the Board. Your formal complaint was assigned # 05-FC-99. You stated that on Friday, May 20, 2005 your newspaper received notice of an emergency executive session of the Board. The notice stated,

“NOTICE OF EMERGENCY EXECUTIVE SESSION

The Brown County Board of Commissioners will hold an Emergency Meeting on Monday May 23, 2005 at 8:30 a.m. at the County Annex meeting room on the 2nd floor. The purpose of the meeting is to discuss water damaged [sic] caused by the rain on May 19, 2005.

Mari H. Miller
Brown County Auditor
P.O. Box 37
Nashville, IN 47448
812-988-5485

May 20, 2005”

Minutes later a second fax was received which amended the notice to add the line, “Addition: Also to be discussed Personnel Issues.”

Your complaint specifically identified five (5) issues that you believe are violations of the ODL. They are as follows:

- 1) “The purpose of the meeting does not qualify as an emergency under this law;
- 2) We do not believe there to be an allowance in Indiana Law for an ‘emergency executive session’;
- 3) The original purpose of the meeting does not qualify as an executive session;
- 4) Proper notice stating of [sic] the reason for the executive session was not given;
- 5) Discussion of personnel issues are not an emergency and therefore not allowable even if the meeting were allowable for other reasons.”

A copy of your complaint was forwarded to the Board. Ms. Stephanie Yager, President of the Board, responded on behalf of the Board by letter dated May 24, 2005. In addition, responses were also provided by Commissioner Amy Couch via e-mails dated May 24, 2005 and June 3, 2005; and by Ms. Mari H. Miller, County Auditor, via e-mail dated June 9, 2005. Copies of those responses are included for your reference. It appears that there is some dispute regarding who amongst the various entities was responsible for the notice and the actions of the Board. That is not an issue for the Public Access Counselor to decide, nor does it have any bearing on my decision.

The pertinent information from the responses is as follows. Ms. Yager indicated that the purpose of the meeting was to discuss flooding from heavy rainstorms that occurred May 19th and May 20th. The flooding affected the basement area of a new jail structure. It also caused damage to a substantial quantity of new computers and other electronic equipment. She stated that she was concerned as to the remedies that the Board might be required to pursue in order to protect the new jail from future damage and to protect the County’s rights under its contracts with the builder, the engineers, and the insurance carrier. She indicated that she was concerned that these matters could lead to the initiation of litigation.

Ms. Yager stated that during this “high water crisis” another matter was called to her attention that involved allegations of misconduct of an employee that could potentially put the county and county property at great risk. Ms. Yager also stated, “[w]e are aware that the forty-eight hour notice period does not include Saturdays, Sundays or legal holidays. However, since these matters were of an emergency nature involving a risk of danger to county property, I believe the exception created by I.C. 5-14-1.5-5(d) for emergencies would apply and that the timing of the notice was ‘as soon as possible’ and sufficient.”

Ms. Couch added that she believes that the personnel matter was an “administrative emergency” justifying waiver of the 48 hour notice requirement. She also indicated that she did not believe that the rain damage was an appropriate subject for executive session. She stated that she shared these concerns with the rest of the Board and that as a result, no discussion of that topic took place during the meeting in question. She stated that the rain discussion was held in a subsequent, properly noticed, special meeting.

Ms. Miller’s response addresses the concern about the technical content of the notice. She stated that the task fell to an inexperienced deputy who expended every effort to provide an adequate notice. She also noted that the deputy read the notice to Commissioner Wolpert over the phone and that the second notice was based on a phone call from Ms. Yager expressly requesting the addition.

ANALYSIS

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.” Ind. Code 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 5-14-1.5-3(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 everything from merely “receiving information” and “deliberating” (defined by IC 5-14-1.5-2(i) as discussing), to 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 Board is the governing body of a public agency. IC 5-14-1.5-2(a)(2). Therefore, it is subject to the Open Door Law.

Initially, I will note that the responsibility for compliance with the ODL lies with the governing body of the agency. The ODL states,

“Public notice **shall be given by the governing body of a public agency** by:

- (1) posting a copy of the notice at the principle office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and
- (2) delivering notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency. **The governing body shall give notice** by one (1) of the following methods . . . “

IC 5-14-1.5-5(b) (*emphasis added*). It is against the agency which suit may be brought for failure to comply with the ODL. IC 5-14-1.5-7. Therefore, while many boards, councils and commissions may rely on a county clerk or auditor's office to provide the administrative duty of posting notice, the ultimate responsibility for the notice falls directly on the public agency in question.¹

Now I will address the issues that you raised in your complaint. I will consolidate and restate the issues as follows:

- 1) Did the Board's discussion meet an executive session instance?
- 2) Was the executive session an emergency meeting?
- 3) Does the Open Door Law allow for "emergency executive sessions"?
- 4) Was the notice of the executive session proper?

1. Did the Board's discussion meet an executive session instance?

It is the intent of the Open Door Law that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute. The Open Door Law's provisions for open meetings are to be liberally construed, and any exceptions narrowly construed. IC 5-14-1.5-1. Accordingly, 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. IC 5-14-1.5-3(a). The Board is a governing body for purposes of the Open Door Law. IC 5-14-1.5-2(b).

One exception to the requirement that meetings be conducted in public is called an executive session. A governing body may meet in executive session for any of the purposes stated in IC 5-14-1.5-6.1(b). An executive session is a meeting from which the public may be excluded. IC 5-14-1.5-2(f). A governing body may meet in executive session to discuss initiation of litigation. IC 5-14-1.5-6.1(b)(2)(B).

Ms. Couch was correct to be concerned that the meeting to discuss rain damage in an executive session would have violated the Open Door Law. Ms. Yager stated, "[t]here was concern in my mind as to the remedies that we might be required to pursue to protect the county's new jail from future damage and to protect the county's rights under its contracts with the builder of the jail, its engineers, and our insurance carrier, which matters could lead to the initiation of litigation."

The executive session would have been proper only if the members discussed strategy with respect to initiation of litigation as a result of rain penetrating the new jail building. However, it appears that no discussion of the rain damage actually ensued.

¹ I express no opinion as to the practice of having other government employees or officials prepare the notice for a governing body of a public agency. It is a common and efficient practice. However, the governing body must be aware that it bears the ultimate responsibility for the notice.

The amended notice included the topic of “personnel issues” as an additional matter to be discussed in the executive session. There are several provisions in the executive session instances that could pertain to discussion of “personnel matters,” including receiving information about and interviewing prospective employees; receiving information concerning alleged employee misconduct and discussing, before a determination, an individual’s status as an employee; and, discussing the job performance evaluation of an employee. IC 5-14-1.5-6.1(b)(5), (6), and (9). All three instances are discrete instances of the executive session provisions that must be specifically referenced in the notice. It would have been proper for the board to conduct a discussion for any of these specific instances in an executive session.

2. *Was the executive session an emergency meeting?*

Under the ODL, a public agency must post a public notice of a meeting or executive session, outside the principal office or meeting location, at least 48 hours before the meeting is to be held. IC 5-14-1.5-5(a) and (b). In addition, any news media that make written requests for notices of the public agency's meetings before January 1 of any calendar year will also receive notice of any meetings held by the public agency. As a general rule, therefore, public agencies must provide at least forty-eight (48) hours’ notice of any meeting in order to comply with the ODL.

There is an exception to the time requirement if an agency calls a meeting "to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of governmental activity under the jurisdiction of the public agency by any event." While the ODL does not define "emergency," separately from the emergency provision itself, the General Assembly has provided some guidance within the text of IC 5-14-1.5-5(d). A governing body may call a meeting with less than the forty-eight (48) hour notice required under IC 5-14-1.5-5(a) when there is an emergency that involves "actual or threatened injury to person or property, or actual or threatened disruption of governmental activity under the jurisdiction of the public agency by any event." IC 5-14-1.5-5(d). If an emergency exists, the governing body must provide notice to any news media that have requested notices of their meetings in the same manner as was given to the members, and must post a public notice in the same manner as described in IC 5-14-1.5-5(a).

Under the facts presented, this notice was provided to you as news media and presumably posted for the public in accordance with IC 5-14-1.5-5(d). It is your position, however, that the subject matter did not qualify under the ODL as an emergency meeting.

The Board has not alleged that the flooding posed an actual or threatened injury to person or property or an actual or threatened disruption of governmental activity. In fact, it appears that the damage was already done. While Ms. Yager asserts that some electronic equipment was damaged she does not state that this was a disruption to governmental activity. She also does not state that the meeting was necessary to avert further property damage. In fact, four days elapsed between the actual flooding and the date of the meeting. Additionally, if the Board’s intention was to discuss in executive session a strategy for the initiation of legal action as claimed by Ms. Yager, then it is not apparent how that type of discussion would constitute an emergency.

Based upon the information presented by the Board, I do not find that the flood constituted an emergency such that a meeting could not have been properly noticed. Therefore, the emergency exception to the requirement that the Board post notice 48 hours in advance does not apply. However, Ms. Couch stated that the discussion of the rain damage did not occur at the meeting; therefore the Board did not violate the Open Door Law for failure to properly notice the meeting to discuss rain damage. Had the Board actually discussed the rain damage at the meeting as intended, and no other emergency purpose existed for the meeting, a violation of the Open Door Law would have occurred.

Similarly, the Board has not justified an emergency session for the personnel issue. Again, in order to rely on the emergency notice requirements the Board must indicate that the personnel issue constituted an emergency situation that posed an actual or threatened injury to person or property or an actual or threatened disruption of governmental activity. While Ms. Yager stated that these matters “were of an emergency nature involving a risk of danger to county property,” Ms. Yager provided no information as to the nature of the personnel issue or the threat posed by that issue.

I find that the Board could not rely upon the emergency exception to the 48-hour notice requirement based upon the information presented. Therefore, the Board was required to provide notice of the meeting 48 hours prior to the meeting, excluding weekends and legal holidays. The Board provided notice on Friday at 2:50 pm for a meeting to be held Monday morning at 8:30 am. I find that the notice was not timely and therefore the Board violated the Open Door Law.

3. Does the Open Door Law allow for “emergency executive” sessions?

Notice must be given of an executive session at least 48 hours prior to the executive session, excluding Saturdays, Sundays, and legal holidays. The Open Door Law does not expressly prohibit emergency executive sessions. If an action that may appropriately be taken in an executive session also constitutes an emergency under IC 5-14-1.5-5(d), then a public agency may post notice in accordance with the time frames and in the manner specified in that section.

4. Was the notice of the executive session proper?

An executive session notice must state the subject matter by specific reference to the enumerated instance or instances for which the governing body may meet in executive session. IC 5-14-1.5-6.1(d). This office has long held that public agencies must provide both the language of the exception and the specific citation of the exception upon which the agency is relying to meet in executive session.

The Board’s Friday, May 20, 2005 executive session notice was not proper under the ODL. The Board did not cite to any specific exemption when it posted the first notice stating that the “purpose of the meeting is to discuss water damaged caused by the rain on May 19, 2005.” The notice failed to identify any exemption that would allow it to meet in executive session. The Board should have provided both the statutory language and the pinpoint citation to the statute that it believed would allow it to hold an executive session.

Regarding the addition to the notice to discuss “personnel issues,” the notice was still deficient. The Board failed to provide the statutory language and to properly cite to a specific exemption under IC 5-14-1.5-6.1(b). If the discussion was regarding misconduct of an employee the notice should have set out the text and the specific citation to IC 5-14-1.5-6.1(b)(6).

The notice provided by the Board failed to conform to the requirements of IC 5-14-1.5-6.1 and therefore constitutes a violation of the Open Door Law.

CONCLUSION

For the foregoing reasons, I find that the Brown County Board of Commissioners failed to provide timely notice of its May 23, 2005 executive session. In addition, the text of the notice failed to conform to the requirements of the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Stephanie Yager
Amy Couch
Mari H. Miller