



STATE OF INDIANA

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September 15, 2011

Ms. Alice J. Butler
1773 Summerlin Place
Jeffersonville, Indiana 47130

Ms. Becka Christenson
2112 Utica Sellersburg Road
Jeffersonville, Indiana 47130

*Re: Consolidated Formal Complaints 11-FC-212 and 11-FC-215; Alleged
Violations of the Open Door Law by the Greater Clark County School Board*

Dear Ms. Butler and Christenson:

This advisory opinion is in response to your formal complaints alleging the Greater Clark County School Board ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Sandra Lewis, General Counsel, responded on behalf of the Board. Her response is enclosed for your reference.

BACKGROUND

The complaints allege a violation of the ODL with respect to an executive session that was held by the Board on August 18, 2011 and a public meeting that occurred on August 22, 2011.

In regards to the August 18, 2011 executive session, the alleged purpose of the executive session was to narrow the candidates for an existing open Board seat from seven candidates to three. The executive session was conducted after a public meeting of the Board, where the prospective candidates were interviewed. The Board conducted an initial exclusion at the executive session that narrowed the field to three candidates.¹ Following the initial exclusion, it is alleged a discussion occurred amongst the Board

¹ The ODL permits a governing body to make an initial exclusion of prospective candidates from further consideration during an executive session when considering the appointment of a public official. *See* I.C. § 5-14-1.5-6.1(b)(10). The parties to the complaint have occasionally substituted the phrase "vote" for "exclusion" in the formal complaint and response. Pursuant to the ODL, a vote is considered a "Final action" and must be taken place at a meeting open to the public. *See* I.C. 5-14-1.5-6.1(c) & (g). In the interest of clarity, I will substitute "vote" for "exclusion" in reference to the alleged actions that occurred at the August 18, 2011 executive session.

members regarding the three remaining candidates. Mr. Christenson, a member of the Board, stated that the Board actually only discussed two of the remaining three candidates. Following the discussion, a second vote was allegedly taken, but only the two discussed candidates were considered.

In regards to the August 22, 2011 public meeting, it has been alleged that no public discussion of the candidates for the open Board seat occurred. The Board simply nominated and voted to select the candidate who had been the subject of the Board's alleged second vote at the August 18, 2011 executive session. The Board also failed to discuss any of the other candidates for the open Board seat at the public meeting.

In response to your formal complaints, the Board advised it held a public meeting on August 18, 2011, whereupon the Board interviewed six candidates for the existing open Board seat. Following the open meeting, the Board conducted a properly noticed executive session in accordance with I.C. § 5-14-1.5-6.1(b)(10). The Board provided that the following was discussed at the executive session:

1. Discussed the candidates interviewed;
2. Discussed the strengths and weaknesses of the candidates;
3. Reduced the candidates from an original pool of seven to three;
4. Discussed whether additional candidates interviews were needed; and,
5. Discussed which of those three candidates had the strongest qualifications.

The Board advised that considerable debate took place at the executive session, but no member of the Board was asked who they planned on voting for after the initial reduction of candidates from seven to three. No member of the Board was informed that the candidate they favored had to be their choice when a nomination was made at the upcoming public meeting. The members were reminded at the conclusion of the meeting that information discussed during the executive session was confidential and that the opinions expressed on the candidates were not binding as any type of final endorsement. No request for a second vote was made and no such vote was taken in the executive session after the initial reduction of candidates from seven to three.

In response to Ms. Christenson's complaint, specifically that the only purpose of the executive session was to narrow the candidates from seven (7) to three (3), the Board published notice of the session and stated that it would held in accordance with I.C. § 5-14-1.5-6.1(b)(10). If Ms. Christenson thought that the discussion was going to be limited to an initial reduction, it was due to communication problems among the Board's members. The Board advised that Ms. Christenson wanted the Board to do second interviews of the three candidates, but with the exception of one other Board member, the remaining Board members felt that no purpose or benefit could be gained due to the individuals had already submitted their resumes and been publicly interviewed. The Board advised that Ms. Christenson became very upset after it had been decided that another round of interviews would not be conducted and left the executive session prior to its completion. The Board denied Mr. Christenson's allegation that a second vote was taken after the initial reduction of candidates from seven to three.

In response to Ms. Butler's complaint, the Board provided that there is nothing in the ODL or any other state law that requires a specific procedure to be followed for the appointment of a new School Board member. The Board determined that it would conduct open interviews of those qualified individuals, which occurred on August 18, 2011. Following the open meeting, an executive session was held that complied with the requirements of I.C. § 5-14-1.5-6.1(b)(10) and all other aspects of the ODL.

At the August 22, 2011 public meeting, Board Member Kevin Satterly made a motion to appoint Mr. Jerry White to fill the open Board seat. The motion was seconded and discussion was allowed. Mr. Christenson expressed her objection to the process during the discussion and alleged that a second vote had been taken at the executive session on August 18, 2011 that was in violation of the ODL. After further discussion, the Board voted in favor of Mr. White to fill the open Board seat.

The Board provided that it followed all applicable state and local guidelines in filling the open Board seat. As the Board did not go beyond the requirements of the ODL concerning an initial reduction of the candidates from seven (7) to three (3) and no second vote was taken, it did not violate the ODL. Further, nothing prevented any member of the Board from discussing or nominating the two (2) non-nominated candidates for the open Board seat during the August 22, 2011 meeting.

ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, 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. *See* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). I.C. § 5-14-1.5-6.1(b)(10) provides that an executive session may be held:

- (10) When considering the appointment of a public official, to do the following:
 - (A) Develop a list of prospective appointees
 - (B) Consider applications
 - (C) Make one (1) initial exclusion of prospective appointees from further consideration.

Notwithstanding IC 5-14-3-4(b)(12), a governing body may release and shall make available for inspection and copying in accordance with IC 5-14-3-3 identifying information concerning prospective appointees not initially excluded from further consideration. An initial exclusion of

prospective appointees from further consideration may not reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3) prospective appointees. Interviews of prospective appointees must be conducted at a meeting that is open to the public.

A “public official” means a person who is a member of a governing body of a public agency or whose tenure and compensation are fixed by law and who executes an oath. *See* I.C. § 5-14-1.5-6.1(a). There is no dispute that the person appointed to the open Board seat would be considered a public official within the meaning of the ODL or that the Board violated the ODL in reducing the candidates from seven to three at the August 18, 2011 executive session.

There is nothing in the ODL that requires a governing body to interview prospective candidates. What the ODL does require is that if a governing body is going to interview prospective candidates, it must be conducted at a meeting that is open to the public. The Board can conduct the process of interviewing candidates in whatever fashion it chooses, so long as the procedures comply with state and federal law. The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001). “Final action” means a vote by a governing body on a proposal, motion, resolution, rule, regulation, ordinance or order. *See* I.C. § 5-14-1.5-2(g).

The first issue that has been raised is that the sole purpose of the August 18, 2011 executive session was to narrow the candidates for the open Board seat from seven to three; any discussion beyond the initial exclusion of candidates was done in violation of the ODL. The Board has responded that it provided proper notice of the executive session and any belief by Ms. Christenson that the sole purpose of the executive session was to make an initial exclusion of candidates was due to miscommunication. I would note that Ms. Christenson has not alleged that the Board failed to provide proper notice for the executive session. Further, I.C. § 5-14-1.5-6.1(b)(10) allows a public agency in executive session to develop a list of prospective appointees, consider applications, and make one initial exclusion of the prospective appointees from further consideration. The ODL does not specify or mandate the order in which the three allowable actions under subsection (b)(10) are conducted. Therefore, as long as the discussion held at the August 18, 2011 executive session dealt solely with matters allowed by subsection (b)(10), it is my opinion that the Board did not violate the ODL.

The second issue presented is whether the Board conducted a second vote at the executive session at August 18, 2011 after the initial exclusion of candidates. Mr. Christensen has alleged that after the candidates were narrowed from seven to three, a second vote was taken. The Board has denied that a second vote.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor*

11-FC-80. As such, I express no opinion of whether a second vote was taken at the August 18, 2011 executive session after the initial exclusion of candidates. If a second vote did occur, then it is my opinion that the Board acted contrary to the requirements of the ODL. However, if the Board did not conduct a second vote, it is my opinion that it did not violate the ODL.

In regards to nomination and discussion that occurred at the August 22, 2011 open meeting, I would observe that there is no requirement in the ODL that a governing body conduct a discussion of matters before it takes a vote, or that it permit public comment on those matters. See *Opinions of the Public Access Counselor 04-FC-15; 04-FC-16*. As Counselor Neal noted in Formal Complaint 08-FC-149, Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. See *Opinion of the Public Access Counselor 08-FC-149, citing Brademas v. South Bend Cmty. Sch. Corp.*, 783 N.E.2d 745, 751 (Ind. Ct. App. 2003), *trans. denied*, 2003; see also I.C. § 5-14-1.5-3 (“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.”). “Indiana law does require a governing body to allow public testimony in certain instances (e.g. a hearing on a proposed budget), but as a general rule the ODL does not guarantee the right to speak at a meeting.” *Opinion of the Public Access Counselor 08-FC-149*. As such, it is my opinion that the Board did not violate the ODL in regards to the discussion and nomination of candidates at the August 22, 2011 public meeting.

CONCLUSION

For the foregoing reasons, if a second vote occurred at the August 18, 2011 executive session regarding the candidates for the open Board seat, it is my opinion that the Board acted contrary to the requirements of the ODL. However, if a second vote was not conducted, then it is my opinion that the Board did not violate the ODL. In all other aspects, it is my opinion that the Board did not violate the ODL.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Sandra W. Lewis