



STATE OF INDIANA

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May 22, 2012

Steven D. Harkness
3195 W. Bradford Rd. NE
Palmyra, Indiana 47164

*Re: Formal Complaint 12-FC-108; Alleged Violation of the Open Door Law
by the Harrison County Board of Commissioners*

Dear Mr. Harkness:

This advisory opinion is in response to your formal complaint alleging the Harrison County Board of Commissioners (“Board”) violated the Open Door Law (“ODL”), Ind. Code § 5-14-1.5-1 *et seq.* John Colin, Attorney, responded on behalf of the Board. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you allege that the Board provided improper notice for an executive session held on April 23, 2012. You further allege that the topics of discussion at the April 23, 2012 executive session were not allowable pursuant to I.C. § 5-14-1.5-6.1(b).

In response to your formal complaint, Mr. Colin advised that a meeting of the Board, as defined by I.C. § 5-14-1.5-2(b), did not occur on April 23, 2012. No member of the Board was present on April 23, 2012, by any means or in any manner. The Harrison County Auditor, pursuant to I.C. § 36-2-2-8, called a special meeting of the executive and set the meeting for April 23, 2012 at 4:30 p.m. However, a majority of the members of the Board were unable to attend and the Auditor subsequently cancelled the special meeting of the executive and no meeting subject to the ODL was held. Nothing in the law prevents a scheduled executive session from being cancelled. *See Opinion of the Public Access Counselor 07-FC-331.*

The claimed presence of three (3) members of the seven (7) members of the Harrison County Council (“Council”) does not alter the analysis set forth, because there was not a majority of the Council present. The Council did hold its regularly scheduled meeting at 7 p.m. on April 23, 2012, but the Council is not the subject of the formal complaint that has been filed. A similar situation had arisen in a previous formal

complaints filed with the Public Access Counselor in 2006. In those instances, the Counselor advised that, “[T]he executive session notices were not compliant with the plain dictates of the ODL. If the Board had met outside the public pursuant to these notices, the Board would have violated the ODL.” *See Opinion of the Public Access Counselor 06-FC-46*. As applicable here, since the Board did not conduct a meeting pursuant to I.C. § 5-14-1.5-2(c), no violation of the ODL occurred.

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).

A “meeting” is defined by the ODL as a gathering of the majority of the governing body of a public agency for the purpose of taking official action upon public business. *See* I.C. § 5-14-1.5-2(c). 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). Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

This office has consistently addressed the requirements of notice for an executive session. *See Opinion of the Public Access Counselor 07-FC-64; 08-FC-196; 11-FC-39; 11-FC-170*. In *Opinion of the Public Access Counselor 05-FC-233*, Counselor Davis wrote the following:

This office has stated on many occasions that “personnel issues” is wholly inadequate under the Open Door Law. First, there are several enumerated instances involving personnel-related matters that are permissible for an executive session. Accordingly, “personnel issues” lacks the required specificity, because the Open Door Law states that notice of an executive session must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. IC 5-14-1.5-6.1(d). *This requires that the notice recite the*

language of the statute and the citation to the specific instance; hence, “To discuss a job performance evaluation of an individual employee, pursuant to IC 5-14-1.5-6.1(b)(9),” for example, would satisfy the notice requirements. (emphasis added).

In addition, I.C. § 36-2-2-8 provides that if public interest requires a special meeting of the executive, such a meeting may be called by the county auditor, county clerk, or county records. *See* I.C. § 36-2-2-8(a). An officer who has called a special meeting of the executive shall give at least six (6) days notice of the meeting unless the meeting is called to deal with an emergency situation as provided in I.C. § 5-14-1.5-5. *See* I.C. § 36-2-2-8(b). The notice must include a specific statement of the purpose of the meeting and the executive may not conduct any unrelated business at the meeting. *Id.*

As referenced in the Board’s response, the Public Access Counselor’s Office has addressed identical factual allegations in previous formal complaints. *See Opinions of the Public Access Counselor 06-FC-01, 06-FC-12, and 06-FC-46.* Counselor Davis advised, “As the Board admits, the executive session notices were not compliant with the plain dictates of the Open Door Law. If the Board met outside the public pursuant to these notices, the Board violated the Open Door Law.” *See Opinion of the Public Access Counselor 06-FC-01 and 06-FC-12.* In a separate opinion, Counselor Davis opined “Had the Board met on February 18 under a notice of executive session that stated only “personnel,” it would have violated the Open Door Law.” *See Opinion of the Public Access Counselor 06-FC-46.* Both opinions are based on the premise that in order for notice violation to be alleged or found, an actual meeting, as defined by I.C. § 5-14-3-2(c), must occur.

Mr. Colin advised that the Board did not conduct a meeting on April 23, 2012. No member of the Board was present at the alleged gathering and the meeting was canceled by the Auditor. Contrary to the Board’s assertions, you allege that an executive session of the Board was conducted on April 23, 2012. 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 applicable here, the Board would have violated the ODL if it held an executive session on April 23, 2012 for which it failed to provide proper notice to and if the executive session was not held pursuant to one of the instances listed in I.C. § 5-14-1.5-6.1(b). However, if no such executive session occurred on April 23, 2012, then the Board did not violate the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Board conducted an executive session on April 23, 2012 for which it failed to provide proper notice and was not held pursuant an instance found in I.C. § 5-14-1.5-6.1(b), then it violated the ODL. However, if no such executive session occurred on April 23, 2012, 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". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: John E. Colin