



STATE OF INDIANA

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May 29, 2012

Terry L. Jones
2279 S. Finley Firehouse Road
Scottsburg, Indiana 47170

*Re: Formal Complaint 12-FC-112; Alleged Violations of the Open Door Law by
the Scott County School District 2*

Dear Mr. Jones:

This advisory opinion is in response to your formal complaint alleging the Scott County School District 2 ("School Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Our office forwarded a copy of your formal complaint to the School. As of today's date, we have yet to receive a response.

BACKGROUND

In your formal complaint, you allege that the School Board committed a series of ODL violations in its executive session and public meeting held on April 24, 2012. At the opening of the public meeting, School Board President, Teresa Cozart, announced that there was a change to occur to the agenda. At that point, School Superintendent Dr. Deardoff stated he would like to modify the original agenda that had been posted and sought approval for various changes. The School Board then unanimously voted to allow for the changes to be made to the agenda.

At this point, you spoke with Mike Cater, the School Board's attorney. You explained to Mr. Cater that with the change to the agenda, those individuals who attended the meeting with the intent on speaking on behalf of an Elementary School Principal who had been dismissed, would now not be given an opportunity. You stated that you hoped that this change was not discussed at the School Board executive session, held prior to the public meeting, as such discussion would violate the ODL. Mr. Cater responded that he advised the Board to amend the agenda due to the large crowd who had attended the public meeting and to not allow discussion by the public.

After your discussion with Mr. Cater, he addressed the members of the public who had attended the public meeting. Mr. Cater explained that he was aware that certain individuals were present in order to discuss the Principal's dismissal; however no discussion would be taking place. Several members of the public quickly spoke up, at

which point Ms. Cozart recessed the meeting. The School Board members exited the meeting room and convened for twenty minutes. You allege that if the School Board conducted an executive session at that time, the ODL would prohibit such a meeting and that the topic of discussion was not allowable in an executive session. Thereafter, the School Board reconvened and finished the public 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).

A governing body of a public agency is not required to use an agenda, but if it chooses to utilize one, the agency must post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. *See* I.C. § 5-14-1.5-4(a). If a public agency utilizes an agenda, the ODL does not prohibit it from changing or adding to the agenda during the meeting. *See Opinion of the Public Access Counselor 04-FC-166; 09-FC-40; and 12-FC-43*. The ODL provides no guidelines for the content or structure of a meeting agenda, and this office has indicated that an agenda can take essentially any form. *Opinion of the Public Access Counselor 04-FC-02 and 08-FC-17*. However, a rule, regulation, ordinance, or other final action adopted by reference to the agenda number or item alone is void. *See* I.C. § 5-14-1.5-4(a). As such, it is my opinion that the School Board did not violate the ODL by amending its agenda for the April 24, 2012 public meeting.

Indiana law 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.” *Opinions of the Public Access Counselor 08-FC-149 and 10-FC-240*. Thus, it is my opinion that the School Board did not violate the ODL by failing to allow members of the public to speak at the April 24, 2012 public meeting.

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). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation,

ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). A governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. *See* I.C. § 5-14-1.5-6.1(e). A meeting may not be recessed and reconvened with the intent of circumventing this subsection. *Id.*

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). 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 I.C. § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.*

Without the benefit of a response from the School Board, it is difficult for me to issue an opinion as to whether the School Board complied with the requirements of the ODL as to the remaining allegations provided in your formal complaint. I would note that the agenda provided by the School Board for its executive session fails to recite the language of the statutes found in 6.1(b) that would allow for it to meet in executive session. The language provided in the agenda states that the executive session was held for “Consideration of Personnel Matters – IC 5-14-1.5-6.1(5) (6B).” It is not evident if the School Board utilized the agenda as its Notice for the executive session on April 24, 2012, or if it posted a separate Notice. If the School Board did utilize the agenda as its Notice for the April 24, 2012 executive session, then it is my opinion that it violated the ODL by failing to provide proper notice for the executive session.

In interpreting the agenda that you have provided, it would appear that the School Board intended to meet in executive session on April 24, 2012 to receive information about and interview prospective employees with respect to any individual over whom the School Board has jurisdiction, to discuss, before a determination, the individual’s status as an employee, student, or independent contractor who is a physician or school bus driver. *See* I.C. §§ 5-14-1.5-6.1(b)(5) and (6)(B). For example, if the Principal that you referenced in your formal complaint had already been dismissed prior to the April 24, 2012, then the School Board would have been prohibited from meeting pursuant to I.C. § 5-14-1.5-6.1(b)(6)(B) to discuss the Principal, if a determination on the Principal’s status had already been made. If the School discussed issues beyond those found in the notice for the executive session or it failed to comply with the language of the specific exemptions that were cited by the School Board in its notice, it is my opinion that it violated the ODL.

As provided, a governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. *See* I.C. § 5-14-1.5-6.1(e). Accordingly, if the School Board recessed its meeting on April 24, 2012 in order to conduct an executive session as you have alleged, it is my opinion that it violated the

ODL as the School Board has failed to provide any applicable statute that would allow for such conduct.

CONCLUSION

Based on the foregoing, it is my opinion that the School Board violated the ODL if it used the agenda provided in your formal complaint as its Notice for the April 24, 2012 executive session, as the agenda failed to recite the language of the applicable statute and only referred to "The Consideration of Personnel Matters". It is my opinion that if the School Board discussed issues in the April 24, 2012 executive session that went beyond what is allowable under I.C. 5-14-1.5-6.1(b)(5) and (6)(B), then it violated the ODL. It is my opinion that the School Board violated the ODL when it recessed its meeting on April 24, 2012 to hold an executive session, as it has failed to provide any applicable statute that would allow for such conduct. As to all other issues, it is my opinion that the School 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 long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Scott County School District #2