



STATE OF INDIANA

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December 27, 2012

Nancy L. Barsic
2450 E Lakeshore Drive
Crown Point, Indiana 46307

Re: Formal Complaint 12-FC-364/12-INF-53; Alleged Violation of the Open Door Law by the Indiana Professional Licensing Agency

Dear Ms. Barsic:

This advisory opinion is in response to your formal complaint alleging Indiana Professional Licensing Agency ("Agency") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Jeffrey D. Collins, Attorney, responded on behalf of the Agency. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that a group of predominantly cosmetology schools and cosmetologists formed the Indiana Cosmetology and Barbering Association ("ICBA"). Soon after formation, the ICBA received an invitation for only their representative to attend a closed-door meeting on September 17, 2012 with the Agency to discuss possible 2013 legislation that would affect cosmetologists, barbers, and the entire school industry. As a member of the ICBA, you provide that it was made clear that only select persons were invited to the meeting, the meeting was not open to the public, and the Agency had conducted a similar meeting prior.

In response to your formal complaint, Mr. Clark advised that neither the Agency or the State Board of Cosmetology and Barber Examiners ("Board") held a closed-door meeting in violation of the ODL. As a way of background, the Agency is a state public agency. The Board is a seven-member governing body charged with regulating the practice of cosmetology and barbering in Indiana. The Board receives administrative services from the Agency, but Agency staff does not have authority to take official action upon the Board's business.

You have alleged that one member of the Board, three Agency employees, the President of the ICBA, and one lobbyist not affiliated with either the Agency or the Board attended the September 17, 2012 meeting. Mr. Clark provided that the meeting held on September 17, 2012 was not required to be open to the public because it does not

meet the definition of a “meeting” pursuant to I.C. § 5-14-1.5-2(c). “Meeting” is defined as a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. The meeting held on September 17, 2012 was not attended by a majority of the members of the Board. Only a single Board member was alleged to have been at the meeting. One member of a seven-member body does not constitute a “majority” of that body. As such, the meeting held on September 17, 2012 was not subject to the ODL.

ANALYSIS

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the Public Access Counselor must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. Your formal complaint was received by our office regarding the Agency’s alleged misconduct on December 19, 2012. The meeting alleged to have been held by the Agency occurred on September 17, 2012. You do not allege that the Agency secretly conducted the meeting and you were aware of the meeting prior to its occurrence. As such, you would not have standing to file a formal complaint regarding the September 17, 2012 meeting as more than thirty days has elapsed between the date of the meeting and the date your formal complaint was filed. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your complaint will thus be addressed as an informal inquiry. *See* I.C. § 5-14-4-10(5).

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 under the ODL as a gathering of a 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). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). “Public business” means to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. 5-14-3-2(e).

In order for the ODL to apply, the meeting must be held by a governing body of a public agency. A governing body is defined as:

- (b) "Governing body" means two (2) or more individuals who are:
 - (1) a public agency that:
 - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and

- (B) takes official action on public business;
- (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
- (3) 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. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter. *See* I.C. § 5-14-1.5-2(b)

The Indiana Court of Appeals analyzed the provisions of the ODL and determined that the ODL would not apply to meetings of staff members of public agencies if the staff members themselves do not constitute a governing body:

As originally enacted, the Open Door Law applied only to meetings at which "a majority of the governing body" of a public agency was in attendance. The legislature never intended Sec. 3 to apply to gatherings of agency employees conducting the "internal staff operations of public agencies." *See The Open Door Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 Val.U.L.Rev. 295, 309 (1979-80). Gatherings of employees of public agencies were not then and are not now specifically mentioned as being covered by the Act.

Indiana State Bd. of Health v. State Journal-Gazette Co., 608 N.E.2d 989, 991 (Ind. Ct. App. 1993). The Court of Appeals reasoned that if the result were otherwise, large state agencies would have to convene a majority of their staff members -- which would often number in the hundreds or even thousands -- in order to conduct a "meeting" under the ODL. *Id.* at 993 (internal citations omitted). In *Indiana Department of Health*, two employees of a state agency gathered and engaged with other individuals while taking action upon public business. However, neither employee was a member of the 11 member Indiana State Board of Health ("ISBH"), the governing body of the agency, nor were the employee's members of any advisory committee directly appointed by that board. As a result, the Court of Appeals determined that the meeting was not one conducted by a "governing body" of the agency, nor was it a meeting of any advisory committee directly appointed by the ISBH. As a result, the meeting was not subject to the ODL. *Id.*

As applicable here, the Agency is considered to be a public agency pursuant to I.C. § 5-14-1.5-2(a). The Board would be considered a governing body pursuant to I.C. § 5-14-1.5-2(b)(A). Only one member of the Board was alleged to have been in attendance at the September 17, 2012 meeting. It is my opinion that the Board would not have been in violation of the ODL as a majority of the Board was not present on September 17, 2012 and thus a "meeting" as defined by the ODL would not have occurred. As provided

in *Indiana Department of Health*, if the staff members of the Agency that gathered are not members of a governing body of the Agency and no majority of any other governing body was present, the ODL would not apply. No showing has been made that the Agency employees that were present comprised a majority of a governing body; thus it is my opinion that the ODL would not be applicable to the meeting held by the Agency on September 17, 2012.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Jeffrey D. Collins