

October 6, 1999

Mr. Michael L. Redell
9219 Indianapolis Boulevard, Suite B
Highland, Indiana 46322

Re: *PAC Advisory Opinion 99-FC-4*;

Compliance with the Open Door Law and Access to Public Records Act/Indiana Hypnotist Committee.

Dear Mr. Redell:

This is in response to your complaints¹, which were received in the Office of Public Access Counselor on September 7, 1999. You have alleged that the Indiana Hypnotist Committee of the Medical Licensing Board (hereinafter, "Committee,") and the Indiana Health Professions Bureau (hereinafter, "Bureau,") violated the Indiana Open Door Law on a number of occasions. While you have listed a number of incidents, the issues raised in your complaints can be described as follows:

1. Minutes and Memoranda-You allege that the Committee violated the Open Door Law by failing to include information in minutes of its meeting of May 4, 1998. In addition, you allege that the Committee failed to prepare memoranda or minutes for its July 10, 1998 executive session and public meeting, and executive sessions held on August 3, 1998, October 9, 1998, November 2, 1998, November 11, 1998, January 15, 1999, March 26, 1999, April 12, 1999, April 30, 1999 and May 17, 1999.
2. Executive Sessions-You allege that the Committee held executive sessions in violation of the Open Door Law on July 10, 1998, August 3, 1998 and some time before April 1999.
3. Notice Problem-You allege that the Committee failed to provide notice under the Open Door Law of its executive session on July 10, 1998 and a public meeting on that same day.

Ms. Angela Smith-Jones, Deputy Director of the Bureau, responded to your complaints in a memorandum with attachments that was received by the Office of Public Access Counselor on September 14, 1999. A copy of her response is enclosed for your reference.

ANALYSIS

1. Minutes and Memoranda

The Committee is a public agency and a governing body subject to the Open Door Law. Ind. Code §§ 5-14-1.5-2(a), 5-14-1.5-2(b) and 25-20.5-1-7. Under Indiana Code section 5-14-1.5-4 of the Open Door Law, a governing body of a public agency is required to prepare memoranda as meetings progress. The memoranda must include the following information:

1. The date, time, and place of the meeting.
2. The members of the governing body recorded as either present or absent.
3. The general substance of all matters proposed, discussed, or decided.
4. A record of all votes taken, by individual members if there is a roll call.
5. Any additional information required under IC 5-1.5-2-2.5 or IC 20-12-63-7.

IC 5-14-1.5-4.²

Indiana Code §5-14-1.5-4(b). Memoranda of meetings must be made available for public inspection and copying within a reasonable time after the meeting takes place. Ind. Code §5-14-1.5-4(c). Memoranda must also be prepared for executive sessions, but the requirements are modified to require that these memoranda:

Identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

Indiana Code §5-14-1.5-6.1(d). Minutes are not required to be prepared under the Open Door Law, but if minutes are created, these minutes must be made available for inspection and copying by the public. Ind. Code §5-14-1.5-4(c).

In your complaint, you allege that the Committee failed to include information concerning a discussion of advertising by hypnotists schools in its May 4, 1998 public meeting minutes. The Bureau's response on behalf of the Committee was that the minutes of May 4, 1998 were prepared in accordance with the Open Door Law.

As noted above, the Open Door Law does not require public agencies to keep minutes, only to make them available for inspection and copying if created. Consequently, there is no provision in the Open Door Law that dictates what must be included in the meeting minutes. The failure of the Committee to include the information you thought should have been included in its minutes of May 4, 1998, is not a violation of the Open Door Law.

You also allege that the Committee failed to prepare memoranda and minutes of its July 10, 1998 executive session and public meeting, and failed to produce memoranda for 9 other executive

sessions during 1998 and 1999. The Bureau's responses to these allegations were that no memoranda or minutes were prepared for the July 10, 1998 public meeting or executive session, but the Bureau denied any violations concerning the preparation of memoranda for the other dates you provided.³

Memoranda of the Committee's meetings and executive sessions were required to be prepared under the Open Door Law, Indiana Code sections 5-14-1.5-4(b) and 5-14-1.5-6.1(d), but minutes are not required under the Open Door Law. Therefore, the failure to create memoranda for the public meeting of July 10, 1998 and the executive sessions conducted on July 10, 1998, August 3, 1998, October 9, 1998, November 2, 1998, November 11, 1998, January 15, 1999, March 26, 1999, April 12, 1999, April 30, 1999 and May 17, 1999 violated the Open Door Law.

2. Executive Sessions

Executive sessions are an exception to the general rule that meetings of governing bodies of public agencies must be open for the public to attend, observe and record them. Ind. Code 5-14-1.5-3(a). Indiana Code section 5-14-1.5-6.1 provides that a governing body of a public agency may conduct executive sessions, or meetings from which the public may be excluded, in a limited number of circumstances. Ind. Code 5-14-1.5-2(f) and 5-14-1.5-6.1(b).

One of the exceptions to the general rule of openness is an executive session to "prepare or score examinations used in issuing licenses, certificates, permits or registrations under . . . IC 25." Ind. Code 5-14-1.5-6.1(b)(11). Since there is no case law to provide guidance on the meaning of this exception, we must turn to the rules of statutory construction.

"Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99, 103 (Ind. 1998), citations omitted. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), citations omitted. The plain meaning of "prepare" is to "put together or make by combining various elements or ingredients; manufacture; (or) compound." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1981, AT 1034. "Score" is defined as "to evaluate and assign a grade to." *Id.* at 1164.

In your complaints, you allege that the Committee violated the Open Door Law, specifically Indiana Code section 5-14-1.5-6.1, by illegally discussing items in executive session that exceeded the exception for preparing or scoring examinations on July 10, 1998 and August 3, 1998, and some time before April, 1999. You allege that the Committee conducted a general discussion of an examination, the procedures for setting up and administering an examination and the scheduling of a pilot examination. You state that you know that the Committee discussed these matters outside of a public meeting because there is no record of any discussion at public meetings and that you have attended many if not all of the Committee's public meetings and heard no such discussion.

The Bureau's response to your allegations is that no such violations occurred. On July 6, 1998, the Committee met in a public meeting and in its minutes included a discussion of the conduct of an executive session on July 10, 1998 to prepare an examination. Copies of the minutes of the July 6, 1998 meeting were attached to the Bureau's written response. As to the allegations concerning further violations of the Open Door Law by discussing matters outside of the scope of Indiana Code section 5-14-1.5-6.1(b)(11) on August 3, 1998 and some time prior to April, 1999, the Bureau denies any violations occurred.

The exception which would allow the Committee to "prepare" or "score" examinations for the certification of hypnotists in executive session would permit the Committee to formulate questions for an examination or grade the examinations. Any discussion of general matters concerning examinations, including the procedures for administering the examination and the scheduling of a pilot examination should have taken place in a public meeting. From the minutes of the Committee that were created, there are a number of instances when the examination was discussed openly. See, Meeting Minutes of the Committee, May 4, 1998, June 8, 1998, July 6, 1998, May 17, 1999 and August 5, 1999. It is difficult for the Committee to prove that it did not violate the law by discussing inappropriate matters in an executive session since no memoranda were created for their executive sessions.

It is my opinion, therefore, that, to the extent that the Committee discussed the preparation or scoring of an examination for certification as a hypnotist, the executive sessions conducted on July 10, 1998 and August 3, 1998 were appropriate under the Open Door Law. If the Committee discussed matters beyond the preparation or scoring of an examination in an executive session at any time, it is my opinion that the Committee did violate the Open Door Law, specifically, Indiana Code section 5-14-1.5-6.1.

2. Notice Problem

Under Indiana Code section 5-14-1.5-5(a), a governing body of a public agency must post a notice of the date, time and place of any public meeting or executive session at least forty-eight hours before the conduct of the meeting or executive session. Notices must be posted at the principal office of the public agency and sent to any media who made a request for such information prior to January 1 of the calendar year. Ind. Code §5-14-1.5-5(b).

You allege that the Committee failed to provide notice in accordance with the Open Door Law of its executive session and public meeting of July 10, 1998 because you received a copy of the notice on July 11, 1998, in an envelope postmarked on July 9, 1998. The Bureau's response to this complaint was to deny that there was a violation of the Open Door Law, and that it was posted in accordance with Indiana Code section 5-14-1.5-5(a) and (b). The Bureau also noted that you were present at the July 6, 1998 public meeting and had actual notice of both the executive session and the public meeting scheduled for July 10, 1998. A copy of the meeting notice for both the executive session and the public meeting that the Committee intended to have after the executive session was attached to the Bureau's response.

Since the Open Door Law does not require a governing body to send notice by mail to you, it was not a violation for the Bureau to mail a notice to you less than forty-eight hours in advance. While it is always the better course to ensure that persons who request notice be provided notice in a timely manner, the Open Door Law only requires posting and mailing or facsimile to the media at least forty-eight hours in advance of a public meeting or executive session. It is of no consequence under the Open Door Law that you were in attendance at the July 6, 1998 public meeting of the Committee and may have heard of the planned July 10, 1998 events. The Bureau still was required to post notice and notify the media as required under Indiana Code section 5-14-1.5-5(b). There is no evidence to indicate that the Bureau did not comply with Indiana Code section 5-14-1.5-5(b) with respect to posting and providing notice for the July 10, 1998 public meeting and executive session. It is my opinion, therefore, that the Committee did not violate Indiana Code section 5-14-1.5-5(b).

While you did not raise this in your complaints, in the notice of the July 10, 1998, the Committee did not expressly state the time and place of the public meeting to occur after the close of the executive session. The notice only states that "(u)pon adjournment of the executive session a regularly scheduled committee meeting will immediately follow." Under Indiana Code section 5-14-1.5-5(a), the Committee the date, time and place of any meeting or executive session. The notice of the July 10, 1998 executive session was clear, but the time and place information for the public meeting was not. For this reason, it is my opinion that the notice of the July 10, 1998 public meeting did not satisfy the requirements of Indiana Code section 5-14-1.5-5(a).

CONCLUSION

The failure of the Indiana Hypnotist Committee to include certain information in its minutes of May 4, 1998, is not a violation of the Open Door Law. The Committee's failure to create memoranda for the public meeting of July 10, 1998 and the executive sessions conducted on July 10, 1998, August 3, 1998, October 9, 1998, November 2, 1998, November 11, 1998, January 15, 1999, March 26, 1999, April 12, 1999, April 30, 1999 and May 17, 1999 violated the Open Door Law.

The Committee did not violate the Open Door Law when it discussed the preparation or scoring of an examination for certification as a hypnotist in during executive sessions conducted on July 10, 1998 and August 3, 1998. To the extent that the Committee discussed matters beyond the preparation or scoring of an examination during any executive session, it is my opinion that the Committee did violate the Open Door Law, specifically, Indiana Code section 5-14-1.5-6.1.

While the Committee did not violate Indiana Code section 5-14-1.5-5(b) when the notice was sent less than forty-eight hours in advance to you, it is my opinion that the Committee did violate the Open Door Law in that the notice of the July 10, 1998 public meeting did not satisfy the requirements of Indiana Code section 5-14-1.5-5(a).

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Ms. Angela Smith-Jones, HPB w/o enclosure

¹You filed 6 different complaint forms, all against the Indiana Hypnotist Committee and the administrative agency for the Committee, the Indiana Health Professions Bureau. For this reason, only one advisory opinion is being issued that incorporates all of the issues raised in your complaints.

²Indiana Code sections 5-1.5-2-2.5 and 20-12-63-7 concerns telephone meetings conducted by the Indiana Bond Bank and the Indiana Educational Finance Authority.

³While Ms. Smith-Jones' response indicates that memoranda are attached for the executive sessions in questions, there were no attachments to that effect. A telephone call to the Bureau confirmed that there are no memoranda.