



STATE OF INDIANA

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August 1, 2011

Ms. Kim Irwin

Via email: kirwin@acsm.org

Re: *Informal Inquiry 11-INF-40; Indiana Department of
Transportation*

Dear Ms. Irwin:

This is in response to your informal inquiry regarding the Indiana Department of Transportation ("INDOT"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.*

Your inquiry seeks advice regarding the notice posted and delivered by INDOT for a meeting held at the Greenfield District on Tuesday, March 29, 2011 to hear public commentary concerning INDOT's Statewide Transportation Improvement Program ("STIP") and the Long Range Transportation Plan ("LRTP"). You include a copy of INDOT's meeting notice. You indicate that INDOT initially announced the March 29th meeting on March 25, 2011 at 4:50pm. A press release was later posted at 6:43pm on INDOT's website. You state that INDOT had communicated this meeting through several facets, particularly through email communications and a flyer distribution at a "Road School Conference on March 8 & 9 [sic] 2011." You affirm that not only do all of INDOT's communications regarding the Greenfield meeting constitute untimely notices, but INDOT failed to properly deliver such notices to the public and to its subscribers on its "legal notices listserv."¹

Mr. Gabe Paul, staff attorney for INDOT, responded to your inquiry via letter dated July 15, 2011. In his response, Mr. Paul states that the Greenfield District Meeting on March 29, 2011 was not a "meeting" under the ODL because it was not a gathering of INDOT's governing body. Rather, the gathering was of various individual INDOT staff members

¹ You note in your inquiry that an "email was sent from the [INDOT] Greenfield District Office on Wednesday, March 23, 2011 at 10:35am announcing its Annual District Public Meeting." You claim this meeting was not only improperly noticed by INDOT to key stakeholders but INDOT also failed to include that the meeting was to discuss both the STIP and LRTP. Because your initial inquiry relates primarily to the Greenfield District Meeting held on March 29, 2011, this office will not address the District's Annual Meeting notice or potential lack thereof. Note that nothing in the ODL requires the notice to include an indication of the subject matter to be discussed at the meeting (except when the meeting is an executive session).

who were designated to receive and record public feedback regarding INDOT's future transportation projects.

The General Assembly enacted the ODL intending that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, so that the people may be fully informed. I.C. § 5-14-1.5-1. Accordingly, the ODL requires that, except for those situations where an executive session is authorized, "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." I.C. § 5-14-1.5-3(a). The plaintiff in a lawsuit under the ODL has the burden of proving that the defendant entity is a "public agency" within the meaning of the statute. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999).

By its terms, the ODL applies only to meetings of "governing bodies" of public agencies:

- (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.

I.C. § 5-14-1.5-2(b). The ODL defines a "meeting" as "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business." I.C. § 5-14-1.5-2(c). The Indiana Court of Appeals has analyzed these provisions of the ODL and determined that they do 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:

If the definitions [of “governing body” and “meeting”] were to be literally applied in the case before us, it would require the presence of 544 of the ISBH's 1,087 full time state employees to convene a “meeting” subject to the Open Door Law. Such an interpretation in this or any similar case is clearly absurd. The legislature did not intend such a result. . . . Clearly, the amendment is inartfully worded. Because the amendment is ambiguous and of doubtful meaning, we must construe it to give effect to the true intent of the legislature in this regard.

Id. at 993 (internal citations omitted). In *Indiana Department of Health* (“IDH”) case, two employees of the IDH 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 IDH, nor were they 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 any “governing body” of the IDH, nor was it a meeting of any advisory committee directly appointed by the ISBH. As a result, it was not subject to the ODL. *Id.*

Similarly here, if staff members gathered are not members of a governing body of INDOT or some other public agency, and no majority of any other governing body was present at the meeting, the ODL did not apply to the meetings. That is also true if non-employees attend the meeting, because the fact that one or more non-employees attended the meeting along with INDOT employees does not automatically subject the meeting to the ODL. Consequently, if no majority of any “governing body” attended the Greenfield District meeting, it is my opinion that INDOT did not violate the ODL.

In regards to your inquiry as to whether the deliver of email communications and flyer distributions noticing the Greenfield District Meeting were inadequate under the ODL, Mr. Paul advised that such communications were a courtesy of INDOT and not required by the ODL. Nothing in the ODL requires the governing body to deliver personal notice to any individual. Public notice of a meeting shall be given by posting a copy of the notice at the principal office of the governing body or at the building where the meeting will be held if no office exists. Further, the governing body must deliver to all news media (who have requested notice by January 1 of the year) a copy of the notice. See I.C. § 5-14-1.5-5(b). Therefore, if the meeting was, and it was not, of a governing body, notice only needed to be posted at either the principal office of the governing body or at the building where the meeting was to be held.

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If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with a large initial "J" and a distinct "Hoage" at the end.

Joseph B. Hoage
Public Access Counselor

cc: Mr. Gabe Paul, Indiana Department of Transportation