



STATE OF INDIANA

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Via email transmission

December 30, 2016

Mr. Joe Craig
Via email

Re: Informal Inquiry 16-INF-34; Executive Sessions

Dear Mr. Craig:

This is in response to your informal inquiry regarding whether the Jefferson County Council ("Council") violated the Open Door Law.

BACKGROUND

You seek a determination as to whether County Council is properly conducting executive sessions. The President of the Council and the Jefferson County Board of Commissioners received an email from a State Board of Accounts field examiner regarding concerns over differences in reconciled bank balances. You question whether this is a preliminary report subject to be discussed in executive session under Indiana Code 5-14-1.5-6.1(b)(7). Additionally, you ask whether a county council can discuss personnel matters regarding an individual over whom the Council has jurisdiction pursuant to Indiana Code § 5-14-1.5-6.1(b)(6). You reason that due to the fact the Council sets compensation, it has 'jurisdiction' over any county employee, including other elected offices. The Presidents of the Board of Commissioners and the County Council replied to your inquiry. Those responses are enclosed for your review.

ANALYSIS

It is the intent of the Open Door Law (ODL) 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 Indiana Code § 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 Indiana Code § 5-14-1.5-3(a)*.

"Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. *See Indiana Code 5-14-1.5-2(c)*. "Public business" means "any function upon which the public agency is empowered or authorized to take official action." *See Indiana*

Code § 5-14-1.5-2(e). “Official action” is very broadly defined by our state legislature to include everything from merely “receiving information” and “deliberating” (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. *See Indiana Code § 5-14-1.5-2(d)*.

Section 6.1 of the Open Door Law provides an exception to the public meeting element of governing bodies, allowing public agencies to conduct executive sessions, which are closed to the public in order to discuss strategies with respect to certain specified topics. The exceptions to this policy are called executive sessions. Executive sessions are subject-matter-contingent scenarios, which have heightened sensitivity above and beyond regular public business. The Indiana General Assembly has recognized the need for privacy when it comes to these very narrow situations and has carved out executive sessions as instances when it is appropriate for a governing body to meet behind closed doors.

This Office scrutinizes executive sessions closely due to their very nature. While there are certainly justifications for having sensitive discussions behind closed doors, they should be invoked judiciously and notice requirements be followed to the exact letter of the law. Holding unauthorized private discussions behind closed door as a majority of a governing body only serves to erode the public trust and cast doubt on the transparency of the public agency.

You interpret the email from a State Board of Accounts field examiner to be akin to the materials referenced in Indiana Code § 5-11-5-1. That particular statute states that if a field examiner makes a determination as to a misappropriation or diversion of funds, a preliminary report shall be created and forwarded to the State Examiner at the State Board of Accounts. This preliminary report is confidential until such a time as the examination becomes a final action by the State Examiner through several different means. Confidential information may be discussed in an executive session under Indiana Code 5-14-1.5-6.1(b)(7).

In this case, there was simply an email sent to the Presidents of the local boards over some discrepancies in the County Treasurer’s Office. It came directly from the field examiner and, based on the information provided, was not part of any preliminary report or determination. While this Office has not been made privy to that document, it is certainly not analogous to the documentation referenced in Indiana Code § 5-11-5-1 and could not be used as a basis to hold an executive session under Indiana Code 5-14-1.5-6.1(b)(7). A preliminary report is an official document used for decision-making purposes by the State Examiner. An email to the governing bodies of a council by a field examiner of SBOA is not.

Furthermore, a County Council would have not the right to hold an executive session pursuant to Indiana Code §5-14-1.5-6.1(b)(6), where it publicly states the executive session is to be held with respect to any individual over whom the governing body has jurisdiction in order to receive information concerning the individual’s alleged misconduct. The individuals in question are the County Auditor and County Treasurer. These are separately elected officials. They do not report to, nor are they managed by, the County Council or Board of Commissioners. There is no doubt all of these public officials are inextricably linked, but to suggest those governing of bodies have “jurisdiction” over a separately elected official is an erosion of the separation of powers between the local legislative and executive branches. It is my opinion that Indiana Code § 5-14-1.5-6.1(b)(6) could not be a basis for holding an executive session to discuss the conduct of another County office. There may be other justifications for holding an executive session depending on the factual circumstances, but not the personnel misconduct subsection.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Norbert Schafer; Ms. Laura Boldery