

October 18, 2006 Alleged Violation of the Open Door Law by the Indiana Council on Independent Living

October 18, 2006

Richard L. Simers
3380 East County Road 500 N.
Osgood, IN 47037

Re: Informal Inquiry Response

Dear Mr. Simers:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request, dated October 12, 2006 and received on October 17.

You allege that on September 1, 2006, during a meeting of the Executive Committee of the Indiana Council on Independent Living (“ICOIL” or “Executive Committee”), you observed that member Emas Bennett participated by telephone. You state that he cast a vote as well as listened to the proceedings although not physically present. You included a copy of what appears to be the minutes of the Executive Committee for September 1, 2006. The members present were Jodi James, Chair, Keith Coros, Treasurer, and Ramona Harvey, Secretary. The “Member Present by Telephone” was Emas Bennett, Vice Chair. Also noted in the minutes was one absent member, Lisa Coffman, Member at Large.

Included in the minutes under “Cancellation of September 13th ICOIL meeting” is a note that Jodi James asked for a vote on the cancellation and that Emas Bennett voted “nay.” All others voted “aye,” and the motion carried. You requested that I give an opinion regarding whether the actions taken with respect to the absent member participating by telephone was consistent with the Open Door Law.

The Open Door Law requires that except as provided in section 6.1 of this chapter, 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. Ind. Code 5-14-1.5-3(a). ICOIL is a governing body of a public agency. See IC 5-14-1.5-2(b)(1); IC 12-12-8-6. For purposes of

this opinion, I assume that the Executive Committee of ICOIL is a committee established by ICOIL or its presiding officer, and is therefore a governing body. *See* IC 5-14-1.5-2(b)(3).

A secret ballot vote may not be taken at a meeting. IC 5-14-1.5-3(b). A meeting conducted in compliance with Indiana Code 5-1.5-2-2.5 does not violate section 3. IC 5-14-1.5-3(c). Under IC 5-1.5-2-2.5, the Indiana Bond Bank may consider an absent member of its Board of Directors present at a meeting under the following conditions:

- (a) This section applies to a meeting of the board at which at least four (4) members of the board are physically present at the place where the meeting is conducted.
- (b) A member of the board may participate in a meeting of the board by using a means of communication that permits:
 - (1) all other members participating in the meeting; and
 - (2) all members of the public physically present at the place where the meeting is conducted;to simultaneously communicate with each other during the meeting.
- (c) A member who participates in a meeting under subsection (b) is considered to be present at the meeting.
- (d) The memoranda of the meeting prepared under IC 5-14-1.5-4 must also state the name of each member who:
 - (1) was physically present at the place where the meeting was conducted;
 - (2) participated in the meeting by using a means of communication described in subsection (b); and
 - (3) was absent.

IC 5-1.5-2-2.5.

A meeting is defined as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. IC 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions or take final action. IC 5-14-1.5-2(d). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. IC 5-14-1.5-2(g).

The issue or question presented by your informal inquiry is whether a governing body subject to the Open Door Law may hold a public meeting where one or more of the participating members are absent from the meeting, and instead participate by telephone. Under these specific facts, a majority of the ICOIL Executive Committee did gather physically at Purdue University North Central in Westville and took official action on its public business on September 1. Hence, a meeting occurred, and was open to the public. Three members of the five-member Executive Committee were physically present.

There are no court cases that have undertaken an analysis of whether it is a violation of the Open Door Law when a member of a governing body is physically absent but participates telephonically in a public meeting as a member of the governing body. The Open Door Law

does not directly speak to this method of holding a meeting. Unless the participation of the absent member or members infringes some right of the public under the Open Door Law, the Open Door Law would not be violated by the absent member's participation. It is my opinion that the participation of the absent member or members *does* violate the Open Door Law, in the absence of specific statutory authority to allow absent members to participate.

The Open Door Law provides the public with the right to observe and record official action taken by the governing body during a public meeting, and this is the right that is denied when a member of the governing body participates in the meeting but is not physically present for the public to witness or record his or her actions or speech. This conclusion is supported by IC 5-14-1.5-3(c) which states that a meeting conducted in compliance with IC 5-1.5-2-2.5 does not violate section 3. Implicitly, then, a meeting in which an absent member so participates *does* violate IC 5-14-1.5-3 unless specific statutory authority exists. Indiana Code 5-1.5-2-2.5, applying only to the Bond Bank, does not apply to ICOIL or its Executive Committee.

There are other statutes that specifically provide for the governing body of a public agency to hold a meeting by alternate means of communication under certain circumstances.¹ In my opinion, when statutory authority exists for some public agencies to meet by alternate means of communication, including by telephone, the absence of specific statutory authority to do so means that the public agency may not hold a meeting in that manner.

Here, not only did the Executive Committee allow one member to participate by telephone, that person cast a vote, according to the minutes. This may not have violated the prohibition on secret ballot voting because the minutes do record how the absent member voted as well as how the other members voted. However, it implicates concerns about how the vote was communicated and whether members of the public could observe and record the absent member's vote.

It is my opinion that allowing Board member Emas Bennett to participate and vote by telephone during the September 1, 2006 Executive Committee meeting was without statutory authority and violated the Open Door Law.

Please feel free to contact me if you have any additional questions.

Sincerely,

Karen Davis
Public Access Counselor

¹ Currently, in addition to the Bond Bank, the following public agencies may hold meetings via alternate means of communication: Board for Depositories, under IC 5-13-12-2.5; Education Finance Authority, under IC 21-9-4-5; PERF and TERF Boards of Directors, under IC 5-10.2-2-16; and the Advisory Committee of the Family and Social Services Administration, under IC 12-8-3-7.

cc: Carol Baker