

January 10, 2006; Alleged Violation of Open Door Law by the Jackson County Board of Zoning Appeals; Secret Ballot Voting

January 10, 2006

*Sent Via Facsimile*

John F. Rothring  
Attorney at Law  
115 West Tipton Street  
Seymour, Indiana 47274

*Re: Informal Inquiry Response; Alleged Violation of the Open Door Law by the Jackson County Board of Zoning Appeals*

Dear Mr. Rothring:

By letter dated January 5, 2006 you requested an informal opinion from the Office of the Public Access Counselor. I received your letter on January 9, 2006. Pursuant to Ind.Code 5-14-4-10(5), I am issuing this letter in response to your request.

Specifically, you have requested guidance with respect to an alleged violation of the Open Door Law by the Jackson County Board of Zoning Appeals ("Board"), whom you represent. You state that someone has alleged that the Board has taken a secret ballot vote, and that the person received advice from the Public Access Counselor's office that the Board had violated the Open Door Law's prohibition on secret ballot votes, since the previous guidance of the Public Access Counselor has disapproved a procedure where the members of the governing body are permitted to leave the ballot unsigned or un-initialed. This same person also alleges that because there is a time lag between the time the votes are made and the time it takes to turn them in, tally them, and orally announce the individual votes by the Board secretary, the prohibition on secret ballots is violated.

The Board, when taking official action, marks written ballots which are signed or initialed by each member. The members must sign or initial their ballot so that it is absolutely clear which way they voted. Members do not have the discretion to vote on an unsigned or un-initialed ballot. After the vote is taken, the secretary of the Board counts the votes, announces the final tally, and also announces each member's vote. You enclosed a copy of the votes in a recent case. The votes are also recorded on a separate form, called a roll call form, which shows

each member's name and their vote. You have indicated that the individual referred to above was advised by this office that this procedure violated the Open Door Law's prohibition on secret ballot voting. You have not indicated who sought and received this guidance.

The legislature has declared the policy of the Open Door Law to be that 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. Ind. Code 5-14-1.5-1. Except for executive sessions, 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. IC 5-14-1.5-3(a). A secret ballot vote may not be taken at a meeting. IC 5-14-1.5-3(b). Otherwise, the Open Door Law does not prescribe a particular method of voting. As a meeting progresses, memoranda that include a record of all votes taken, by individual members if there is a roll call, must be kept. IC 5-14-1.5-4(b). The memoranda shall be made available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. IC 5-14-1.5-4(c).

From the description of the process of taking a vote by ballot that you provide, I do not consider the Board to be taking a secret ballot vote in contravention of the Open Door Law. Because the members of the Board must mark their ballot by signing or initialing it, it does not appear that the individual Board member has the discretion to omit the member's identity from the ballot, as disapproved on page 10 of the *Handbook on Indiana's Public Access Laws*. No one currently in the Office of the Public Access Counselor recalls giving contrary advice on these facts to anyone. However, we could investigate this more effectively if we had the name of the person who received the advice.

This person also contends that the Board has taken a secret ballot vote by virtue of the time lag between the marking of the ballots and the announcement of the votes by the Board secretary. You respond that the time lag is no more than 10-15 seconds, and the marking of the ballots by the individual members can be seen and observed by the members of the public who are present. You believe that the marking of the ballots and announcing the votes are virtually contemporaneous, and the process memorializes the votes and ensures accurate record keeping.

I agree that marking a paper ballot that is signed by the member, with the individual votes read to the public after a short time frame, does not constitute a secret ballot vote. Apparently the person inquiring would expect that a member would announce his vote at the same time that he marks his ballot, but I do not read anything in the Open Door Law that requires a precisely contemporaneous casting and announcing of votes by a governing body when utilizing a paper ballot. In fact, a governing body may prefer for some final actions that a paper ballot be used so that each member may cast his or her vote prior to learning how the other members voted. This can be accomplished only with a paper ballot (or by means of an electronic gadget that does the same thing). So long as the votes are announced by individual member, and the ballots memorialize the member's vote and become part of the memoranda, no secret ballot vote has occurred. If the law were construed to require simultaneous announcements of each member's vote, as I take the person's position to be, the prohibition on "secret ballots" would become a prohibition on all "paper ballots." If this were the intention of the legislature, the law could have been easily drafted to state this. It was not.

On the facts as you state them, the Jackson County Board of Zoning Appeals has not violated the Open Door Law's proscription on secret ballot voting. Please note that any special zoning statutes prescribing how votes are taken may supersede the Open Door Law's more general provisions.

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

Sincerely,

Karen Davis  
Public Access Counselor