



STATE OF INDIANA

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October 17, 2011

Mr. Michael Walter
320 West 17th Street
Auburn, Indiana 46706-2826

Re: Formal Complaint 11-FC-245; Alleged Violation of the Open Door Law by the DeKalb County Election Board; Converted to Informal Inquiry 11-INF-60

Dear Mr. Walter:

This advisory opinion is in response to your formal complaints alleging the DeKalb County Election Board ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* James P. McCanna, Attorney, responded on behalf of the Board. His response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on September 16, 2011, the Board met to consider adopting the "vote center" method of locating polling places for the November municipal elections. You allege that the Board left the meeting room, after the public hearing, and went into another room to make a decision. Following the private meeting of the Board, County Clerk and Board Member Martha Grimm, announced to those in the original meeting room that the Board voted 2-1 in favor of the vote centers. You provide that you did not attend the September 16, 2011 meeting and learned of the Board's actions via the local newspaper.

In response to your formal complaint, the Board acknowledged that the vote should have been taken during the public meeting on September 16, 2011. However, the Board denies it actually attempted to establish an executive session; rather it was of the mistaken belief that the vote could be conducted behind closed doors as long as the announcement of the election results was made at the public meeting. As a unanimous decision was required of the Board to adopt the "vote center" method, which the Board did not reach as a result of the vote taken on September 16, 2011, the Board does not plan to resubmit the matter for another vote that complied with the ODL.

ANALYSIS

It is the intent of the ODL that 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* I.C. § 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* I.C. § 5-14-1.5-3(a).

A person denied the right to attend any public meeting of a public agency in violation of I.C. § 5-14-1.5 or denied any other right conferred by I.C. § 5-14-1.5 may file a formal complaint with the public access counselor. *See* I.C. § 5-14-5-6. You do not allege that you were denied access to the September 16, 2011 Board meeting and provide that you were informed of the Board's alleged actions via the local newspaper. Because you were not denied access to the meeting, you lack standing to file a complaint with this office. *See Opinions of the Public Access Counselor 00-FC-11, 03-FC-32; 8-FC-168.* However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your complaint, therefore, will be addressed by this Office as an informal inquiry, which I have enclosed for your review. *See* I.C. § 5-14-4-10(5).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001). "Final action" means a vote by a governing body on a proposal, motion, resolution, rule, regulation, ordinance or order. *See* I.C. § 5-14-1.5-2(g).

Here, the Board has admitted that the vote conducted at the September 16, 2011 meeting did not take place at a meeting open to the public. As such, it is my opinion that it violated the ODL by not conducting the vote during the public meeting. The Board has advised that in the future it will make certain that all voting is done in an open public meeting in accordance with the ODL.

I am not able to make a determination from the information that has been provided whether the Board actually attempted to convene an executive session to conduct the vote on September 16, 2011. While it is possible that the Board could have

met in executive session to discuss the issue if it could specifically cite to an exception provided by I.C. § 5-14-1.5-6.1(b), the Board have been allowed to take final action at an executive session.

Finally, I would note that a Court, not the Public Access Counselor, may declare a final action of a governing body of a public agency void. *See* I.C. § 5-14-1.5-7(a). If a complainant continues to believe that a public agency has acted in violation of the ODL following the issuance of an advisory opinion from this office, that complainant may file an action in any court of competent jurisdiction to obtain a declaratory judgment; enjoin continued, threatened, or future violations; or declare void any policy, decision, or final action. *Id*; *See Opinions of the Public Access Counselor 10-FC-327 and 11-FC-11*. In determining whether to declare any policy, decision, or final action void, a court shall consider certain factors, including the extent to which the violation affected the substance of the policy, decision, or final action; denied or impaired access to any meetings that the public had a right to observe and record; and prevented or impaired public knowledge or understanding of the public's business. *See* I.C. §5-14-1.5-7(d). Not all violations of the ODL would result in a court finding that the action should be voided. *See Opinion of the Public Access Counselor 09-FC-193*.

CONCLUSION

For the foregoing reasons, it is my opinion that the Board violated the ODL.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: James P. McCanna