



# STATE OF INDIANA

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January 30, 2012

Mr. Eric P. Krieg  
1938 Somerset Drive  
Munster, Indiana 46321

Mr. Joseph Hero  
P.O. Box 429  
St. John, Indiana 46373

*Re: Consolidated Formal Complaints 11-FC-307 and 11-FC-309; Alleged violations of the Open Door Law by the Indiana Election Division and the Lake County Redistricting Commission*

Dear Mr. Krieg and Hero:

This advisory opinion is in response to your formal complaints alleging the Indiana Election Commission ("IEC") and the Lake County Redistricting Commission ("LCRC") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Trent Deckard and J. Bradley King, Co-Directors of the Indiana Election Division, responded to your complaint. Their response is enclosed for your reference.

## BACKGROUND

On Monday, December 5, 2011, the IEC and the LCRC held a public meeting in Indiana State House Room 404 in Indianapolis, Indiana. Pursuant to the agenda provided with the formal complaints, the meeting was to begin at 10:00 a.m. There were nine items on the agenda, with Item 7 dealing with the LCRC. The IEC has four members. Two members are nominated by the Republican Party and two members are nominated by the Democratic Party. IEC members are appointed by the Governor. IEC members are the voting members of the LCRC. The LCRC also consists of members of the General Assembly who act in an advisory capacity to the LCRC. The IEC and the LCRC however are separate and distinct government agencies.

The formal complaints provide that the meeting was recessed at approximately 11:00 a.m. Board Chairman Dan Dumezich advised that the meeting would reconvene after a fifteen minute recess. The formal complaints further allege that the recess actually lasted two hours and ten minutes and the LCRC did not reconvene until a full three hours

and ten minutes after the legal notice for the meeting that was posted. During the recess, the formal complaints maintain the LCRC held a “back door meeting” in order to redraw the Lake County Council and Commissioner districts. As the LCRC met behind closed doors, the public is unable to know who had influence on the final maps, nor what was traded in order to make the final deal. Mr. Krieg further alleges that phone calls were made during the closed-door meeting to other members of the LCRC in order to circumvent the ODL. After the meeting reconvened, the LCRC unanimously adopted a redistricting plan. When challenged by members of the public at the end of the meeting that the Commission had violated the ODL, Chairman Dumezich, provided that no quorum had ever existed during the meetings that occurred during the recess. Mr. Krieg and Mr. Hero challenge this assertion by providing a photograph of four individuals taken in the hallways at various points during the recess. In sum, the complaints allege that the actions of the LCRC during the recess and the recess itself violated the ODL.<sup>1</sup>

In response to your formal complaints, Mr. Deckard and Mr. King advised that the LCRC was required by state law to establish elections districts during 2011 for the Lake County Commissioners and County Council. *See* I.C. § 36-2-2-4(b), (e); I.C. § 36-2-3-4(b), (e). In order to perform its statutory mandate, the LCRC conducted three meetings on September 29, 2011, November 18, 2011, and December 5, 2011. All of the meetings were webcast.

Three separate plans were proposed for redistricting. Proponents of each plan were given an opportunity to present and advocate adoption of their plan before the LCRC during the November meeting. One of the plans, with modifications, was approved by the LCRC at the December 5, 2011 meeting. Members of the IEC met both as the IEC and the LCRC at the December 5, 2011 meeting and posted proper public notice. A copy of the posted notice is enclosed for your reference. The Notice provides that the meeting of the IEC and LCRC shall commence at 10:00 a.m. on Monday, December 5, 2011 at the Indiana State House, Room 404.

Chairman Dumezich announced a recess at the conclusion of the IEC agenda items. When the meeting reconvened after the recess, the LCRC proceeded with its business and approved the Lake County Commissioner and County Council districts. At no time during the recess did a quorum of three of the voting members of the LCRC meet to discuss or approve election districts. Two members of the LCRC, Chairman Dumezich and Vice-Chairman Anthony Long, did discuss proposals for the election districts, and also conducted separate discussions for the election districts with persons who were not voting members of the LCRC. One member of the LCRC, Bryce Bennett, never left Room 404 during the recess. A copy of an e-mail from Mr. Bennett attesting to this fact is enclosed for your reference. At no time did Chairman Dumezich or Vice-Chairman Long discuss election districts with any voting members of the LCRC other than each other.

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<sup>1</sup> Allegations that the IEC and/or the LCRC violated various elections laws and the State Ethics Code are outside the purview of this office. I will only address those allegations that allege a violation of I.C. § 5-14-1.5-1 *et seq.*

In response to the actual complaints that have been filed, Mr. Deckard and Mr. King provide the following:

- As to the allegation regarding defective notice, the LCRC is made up of the entire membership of the IEC. The Statute that established the LCRC explicitly states that it includes members of the IEC. *See* I.C. § 36-2-2-4(b). The notice posted by the IEC and LCRC for the meeting established that the meeting was to commence at 10:00 a.m. In addition to the notice, the agenda provided by the IEC and LCRC provides that the IEC agenda items are listed first and during the meeting, the IEC members began with the IEC agenda items. The LCRC was then conducted after the IEC business was complete. It also should be noted that both complainants attended and spoke at the December 5, 2011 meeting.
- As to the recess that was taken, the meeting was never adjourned. The ODL recognizes that a governing body may recess and reconvene. *See* I.C. § 5-14-1.5-5(a). The date, time, and place of the reconvened meeting were announced at the conclusion of the IEC business and have been recorded in the proposed minutes. While the recess was longer than originally estimated by Chairman Dumezich, one member of the Commission stayed in Room 404 for the entire duration of the recess. Again, the complainants were not prejudiced by the recess as both were present after the meeting was reconvened.
- As to the allegation that a meeting was conducted of a governing body outside of Room 404, 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. *See* I.C. § 5-14-1.5-2(c). To show a violation of the ODL, it would be necessary to show that at least three members of the four members of the LCRC conducted a meeting for the purposes of taking official action upon public business. With respect to the LCRC, the only public business it was required to take in 2011 was to establish election districts in Lake County for the office of the County Commissioner and Council. Two members of the LCRC met during the recessed meeting on December 5, 2011. As such, no meeting took place pursuant to the ODL and both the IEC and LCRC complied with all other aspects of the ODL during the December 5, 2011 meeting.

#### 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).

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* I.C. § 5-14-1.5-5(a). In addition to providing notice to any news media who by January 1 of the year have requested notice, the agency must post notice at the principal office of the agency or, if there is no office, at the building where the meeting will be held. *See* I.C. § 5-14-1.5-5(b). Notice has not been given in accordance with Section 5 of the ODL if a governing body of a public agency convenes a meeting at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting. *See* I.C. §5-14-1.5-5(h).

As to the recess itself, in reviewing prior opinions of the public access counselor's office, agencies that have commenced meeting more than one hour past the start time provided in the public notice have been deemed in violation of the ODL. *See Opinions of the Public Access Counselor 02-FC-19, 02-FC-21, 05-FC-64, 05-FC-172; 10-FC-54; and 10-FC-60.* Here, the meeting of the LCRC and the IEC began at 10:00; the time that was provided in the public notice. The meeting was recessed at approximately 11:00 a.m. and the public was informed that the meeting would reconvene in approximately fifteen minutes. As alleged in the formal complaints, the meeting was not reconvened until approximately two hours and ten minutes later, at which time the LCRC adopted the redistricting plan by a 4-0 vote.

The ODL does not prohibit an agency from taking a recess during a public meeting. The language of the ODL in section 5(h) provides that proper notice has not been provided if the meeting is *convened* at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observed, and record (emphasis added). Here the meeting commenced at 10:00 a.m., the time provided in the public notice provided by the IEC and LCRC. I am not aware of any case law or prior public access counselor's opinions that have held that an agency violated the ODL by taking an extended recess. Thus, I cannot say that the LCRC violated the letter of the ODL by taking an extended recess. However, it is my opinion that the actions of the LCRC and/or the IEC violated the spirit of the ODL when it held a two hour and ten minutes recess after making a general announcement that the meeting would only recess for fifteen minutes.

In regards to the conduct of the LCRC during the recess, a "meeting" means a gathering of the majority of the governing body of a public agency for the purpose of taking official action upon public business. *See* I.C. § 5-14-1.5-2(c). While the ODL does not define "gathering," this office has generally said that members must be physically present to be considered "gathering." Further, the General Assembly has indicated any member who is not physically present at the meeting but communicates with members by telephone, computer, or other electronic means cannot be considered

present at the meeting and cannot participate in final action. *See* I.C. § 5-14-1.5-3(d). The ODL does require that “final action” be taken at a meeting open to the public. “Public business” means any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14.1.5-2(e). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d).

There are four members of the LCRC. As such, three members of the LCRC must be present in order for a “meeting” to be convened pursuant to the ODL. During the recess, it is alleged that Chairman Dumezich and Vice-Chairman Anthony Long met in a room near the location of the LCRC/IEC meeting to discuss the redistricting proposals. The LCRC/IEC has provided the Chairman Dumezich and Vice-Chairman Long were the only two members of the LCRC/IEC that met during the recess. Thus, it is my opinion that as long as a majority of the LCRC was not physically present during the discussion between Chairman Dumezich and Vice-Chairman Long, the LCRC did not violate the ODL.

With both formal complaints that were filed, a picture was submitted of four individuals alleged to be Chairman Dumezich, Commissioner Riordan, and Lake County Councilmen Dan Dernulc and Mike Repay taken during the meeting recess on December 5, 2011. Without addressing the issue of my inability to discern from the photograph the topic of the group’s conversation, again the majority of the LCRC and/or the IEC were not present in the photo. Therefore, such conduct could not be considered a meeting pursuant to the ODL as a majority of a governing body was not present.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the IEC and the LCRC did not violate the ODL.

Best regards,

A handwritten signature in black ink, appearing to read 'Joe Hoage', written in a cursive style.

Joseph B. Hoage  
Public Access Counselor

cc: Trent Deckard and J. Bradley King