

May 5, 2005

Ralph E. Thompson
9098 Mount Tabor Road
Aurora, IN 47001

Re: Formal Complaint 05-FC-65; Alleged Violation of the Open Door Law by the Dearborn County Commissioners

Dear Mr. Thompson:

This is in response to your formal complaint alleging that the Dearborn County Commissioners (“Commissioners”) violated the Open Door Law by failing to both properly notice an executive session and failing to provide sufficient memoranda of that same session. I find that the Dearborn County Commissioners violated the Open Door Law (“ODL”).

BACKGROUND

On April 5, 2005 the Dearborn County Commissioners met in executive session from 5:30 to 6:00 p.m. preceding a public meeting. The notice of the meeting stated that the meeting was being “held for the sole purpose of IC 5-14-1.5-6.1 (b)2(B), IC 5-14-1.5-6.1 (b)2(C) and discussion of personnel issues.” The memoranda of the meeting, in addition to stating date, time, location and those in attendance, made the following statement, “The Executive Session was pursuant to IC 5-14-1.5-6.1(b)2(B), and IC 5-14-1.5-6.1(b)2(C)-discussion of personnel issues.”

I sent a copy of your complaint to the Dearborn County Commissioners. On April 19, 2005 I received a response from Robert J. Ewbank, attorney for Dearborn County. A copy of that response and attachments are enclosed for your reference. Mr. Ewbank stated that the County believes that it was and is in full compliance with the requirements and the spirit of the Indiana Open Door Law. Mr. Ewbank provided copies of the public notice and minutes for the April 5, 2005 Dearborn County Commissioners’ executive session. Mr. Ewbank also stated that no decisions were made at the executive session.

ANALYSIS

In your complaint you described the denial of access as “Lack of definition or disclosing of purpose,” and refer to the Agenda for the April 5, 2005 meeting. You also stated, “No disclosure of purpose or results of Executive Session,” and referred to a meeting observer’s posting of notes on a public internet forum. I will restate your concerns to be: 1) failure to properly notice the purpose of the executive session; and 2) insufficient memoranda of the executive session.

The intent and purpose of the ODL is 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." Ind. Code § 5-14-1.5-1. The provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Commissioners are a governing body subject to the ODL. Ind. Code §§ 5-14-1.5-2(a) and (b).

A meeting for the purposes of the ODL 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." Ind. Code §5-14-1.5-2(c). As noted above, the general rule is that meetings of public agencies are to be held openly, so that the public may "observe and record them." Ind. Code §5-14-1.5-3(a). The exception to the general rule that a meeting of the governing body must be open to the public is an executive session.

“Executive session” is defined as “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." Ind. Code §5-14-1.5-2(f). The exceptions providing specifically enumerated topics of discussion that may occur during executive session are listed in Ind. Code §5-14-1.5-6.1(b).

Failure to Properly Notice the Purpose of the Executive Session

The Open Door Law requires public agencies to post notice of both public meetings and executive sessions. Specifically, I.C. §5-14-1.5-5(a) provides:

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 (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting.

In addition to date, time, and place, the content of a notice for an executive session must state the subject matter of the session by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). I.C. §5-14-1.5-6.1(d).

The Commissioners’ notice stated that the executive session was being held for the purpose of discussing “IC 5-14-1.5-6.1 (b)2(B), IC 5-14-1.5-6.1 (b)2(C) and discussion of personnel issues.” This notice is deficient in two ways.

While the notice did provide a specific pinpoint citation to two of the instances for which the executive session was being held by listing Ind. Code §5-14-1.5-6.1(b)2(B) and Ind. Code

§5-14-1.5-6.1(b)2(C), the notice did not provide any further explanation to the public as to what these topics of discussion would entail. Specifically, the Commissioners should have also included the text of the cited statutes. The Office of the Public Access Counselor has stressed in numerous opinions that the specific pinpoint citation to the exceptions allowing for an executive session must be included in the notice. Citation alone, however, does not fully comply either. In keeping with the intent and purpose of the ODL, that official action of public agencies be conducted and taken openly in order that the people may be fully informed, the text of exception must also be included. A member of the public, standing before a notice on the door of the meeting room without a statute book in hand, could not reasonably be expected to know what the topic of the executive session would be just from reading the citation. For this reason it is imperative that both the pinpoint citation and text of the enumerated exceptions be included in the notice for an executive session to comply with the requirement to specify exceptions which allow for that session to occur.

The commissioners' notice also included the opposite, and more common concern, in that it failed to provide a specific pinpoint citation for the matter listed as "personnel issues." Public agencies are required to state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. Ind. Code §5-14-1.5-6.1(d). There are at least three categories of discussion that may occur in executive session under Ind. Code §5-14-1.5-6.1(b) that could fall under the description of "personnel issues". Without specific reference to the appropriate citation, neither the public, nor this office could ascertain which exception applied or whether the personnel issues were of such a nature as to qualify for an executive session.

Insufficient Memoranda of the Executive Session

Under the Open Door Law, public agencies that conduct meetings are required to keep memoranda. As the meeting progresses, the following memoranda shall be kept:

- (1) The date, time, and place of the meeting.
- (2) The members of the governing body recorded as either present or absent.
- (3) The general substance of all matters proposed, discussed, or decided.
- (4) A record of all votes taken, by individual members if there is a roll call.

Indiana Code section 5-14-1.5-4(b). In the case of executive sessions, the memoranda requirements are modified in that the memoranda "must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given." Ind. Code §5-14-1.5-6.1(d). The public agency must also certify in a statement in those memoranda that no subject was discussed other than the subject specified in the public notice. Id.

The attorney for the Commissioners responded to this complaint by letter and asserted that no decisions were made at the executive session. The response was accompanied by a copy of the memoranda of the executive session, which stated, "[t]he executive session was pursuant to IC 5-14-1.5-6.1(b)2(B), and IC 5-14-1.5-6.1(b)2(C)-discussion of personnel issues."¹ The

¹ Additionally, it should be noted that the notice and the memoranda differ in that the notice stated "and personnel issues, whereas the memoranda places the and between the first two exceptions, then adds "-discussion of personnel issues." Since the citation preceding "-discussion of personnel issues" does not pertain to personnel issues, this Office understands the executive session to have covered three distinct subject matter.

memoranda failed to comply with the requirements of the ODL because the required certification under Ind. Code §5-14-1.5-6.1(d) was not included.

Additionally, memoranda for executive sessions are required to identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. Ind. Code §5-14-1.5-6.1(d). The memoranda of the April 5, 2005 meeting perpetuated the same errors in reference to the subject matter of the executive session as were found in the original notice of that session. For that reason also, the memoranda is deficient.

CONCLUSION

For the foregoing reasons, I find that the Dearborn County Commissioners violated the Open Door Law for failing to properly notice the April 5, 2005 executive session and for providing insufficient memoranda of the same session.

Sincerely,

Karen Davis
Public Access Counselor

cc: Robert J. Ewbank