

February 7, 2005

Sent Via Facsimile

Mr. Eric M. Cox
The Banner
24 North Washington Street
Knighstown, IN 46148

Re: Formal Complaint 05-FC-9; Alleged Violation of the Open Door Law by the Charles A. Beard Memorial School Corporation Board of School Trustees

Dear Mr. Cox:

This is in response to your formal complaint alleging that the Charles A. Beard Memorial School Corporation Board of School Trustees ("School Board") violated the Open Door Law ("Open Door Law") by posting a notice of its executive session that did not reflect the correct instance for which the executive session was actually held. I find that the Board violated the Open Door Law.

BACKGROUND

You filed your formal complaint on January 6, 2005, after hearing from several parents of the nature of an executive session of the School Board that took place on December 6, 2004. The School Board posted a notice of its executive session, stating the purposes as: "1. To discuss a job performance evaluation of an individual employee. 2. To discuss strategy with respect to collective bargaining." The latter purpose is not at issue in your complaint.

You provided me with affidavits of two parents, Tim Hensley and Debra Magee. In Mr. Hensley's affidavit, he states that at a September 21, 2004 public meeting of the School Board, he advised members of the School Board that his son had been intentionally injured by another student at school and raised concerns about the adequacy of the punishment given to the child who injured his son. He also raised his concerns at an October 19, 2004 public meeting regarding the same issue, and was told that the matter was related to "personnel" and that an executive session would be required. According to Mr. Hensley, at the December 6 executive

session, Mr. Hensley discussed with the School Board the injury to his son and whether certain employees of Charles A. Beard School Corporation had properly followed school policies with respect to the incident.

In Debra Magee's affidavit, she relates that at a public meeting of the School Board on November 16, 2004, she raised concerns about the Knightstown Community High School's varsity volleyball program and the program's coaches. Before she had the opportunity to elaborate on her concerns, Ms. Magee was told that the matter was personnel-related and would have to be dealt with in an executive session. At the same December 6 executive session that Mr. Hensley attended, Ms. Magee discussed with the Board her concerns about the high school's varsity volleyball program and her allegation of misconduct on the part of the head coach of the varsity volleyball team.

A third member of the public also attended the December 6 executive session for the same purpose as Ms. Magee.

You received a copy of the memoranda for the December 6 executive session. That memoranda recited that the Board met for the purposes recited in the notice, except that the memoranda stated that the purpose of the executive session was to "discuss the job performance evaluation of individual employees" (in the plural rather than singular).

Your complaint regarding the notice of the executive session and the purpose of the executive session can be restated in two parts: 1) with respect to the discussion of Mr. Hensley's concerns about the injury to his son, you do not believe that this discussion may be properly characterized as a job performance evaluation of an employee or employees; and 2) with respect to the two parents who presented information to the School Board regarding the volleyball program, the notice of the executive session should have referred to IC 5-14-1.5-6.1(b)(6) regarding allegations of misconduct, to the extent that the discussion involved such allegations of misconduct on the part of the head coach. To the extent the discussion was regarding the volleyball program without discussion of employee misconduct, no executive session instance would apply, and the discussion should have occurred in a public meeting.

I sent a copy of your complaint to the School Board. The School Board sent a written response, which I have previously provided you a copy of. In its response, Mr. E. Edward Dunsmore, the School Board's attorney, argued that:

1) the Board has a written policy for discussion of parent complaints which Mr. Hensley and Ms. Magee did not follow;

2) the Open Door Law does not include the right of the public to speak at public meetings;

3) the "alleged misconduct" instance is in the conjunctive and therefore must be read to limit the School Board to receiving information about alleged misconduct **and** to discuss the individual's status as an employee, making it inappropriate for the December 6 executive session; and

4) in the present case and with respect to the facts known by the School Board at the time it posted notice of the executive session, a "reasonable conclusion regarding the purpose of the

meeting would be that of evaluating the conduct of its employees regarding their job performance in dealing with the issues raised by Mr. Hensley and Ms. Magee.”

Other facts will be developed as necessary in this opinion.

ANALYSIS

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 School Board is a public agency and 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). One of these exceptions provides that a governing body may meet in executive session to

discuss a job performance evaluation of an individual employee. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.

Indiana Code §5-14-1.5-6.1(b)(9).

It is the public policy of the ODL that it is to be construed liberally in favor of disclosure. For this reason, Indiana courts have generally held that exceptions to the general rule of openness are to be narrowly construed. Ind. Code §5-14-1.5-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . .

"[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995) [Citations omitted.], quoting, *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E.2d 726, 729 (Ind. Ct. App.1982) [Citations omitted].

Hence, the burden is on the School Board to show that its December 6 executive session was held for the stated purpose under IC 5-14-1.5-6.1(b)(9). I find that the School Board has not met its burden of showing that it could receive information regarding the Hensley and Magee matters in the executive session that was noticed for purposes of discussion of a job performance evaluation of an individual employee.

The School Board points to *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), *transfer denied*, as support for its contention that it could undertake “any official action except final action” in the December 6 executive session.

Indeed, while narrow construction of the executive session exceptions under the ODL is the general rule, an Indiana Court of Appeals decision interpreting the executive session exception for job performance evaluations appears to allow a more liberal reading of this provision. In *Middlebury*, an employee of the Town alleged that during an executive session to discuss his job performance, the Town Council had violated the ODL. Specifically, Mr. Baker alleged that the Town Council had taken final action during the executive session, which is not permitted under Indiana Code section 5-14-1.5-6.1(c), by compiling a list of persons to be rehired during that private session and keeping his name off the list. The list was later used in the open, public meeting to make decisions on who would be rehired. The Court held that the compilation of the list was not "final action" and that doing so did not go beyond the scope of the General Assembly's expressed intention to permit governing bodies the ability to meet privately to discuss certain personnel matters.

While *Middlebury* and subsequent opinions of this office have acknowledged that certain other official action may be taken in the “job performance evaluation” instance, the circumstances under which this has been allowed have been limited to other matters discussed *in relation to a job performance evaluation*. See *Opinion of the Public Access Counselor 02-FC-24* (salaries and benefits may be discussed in relation to a job performance evaluation). As I read the School Board’s response, the Board did not gather with the express intention of evaluating an identified employee. Rather, the Board by its own admission set up the executive session to address discrete concerns of parents that may have related to, or were at least likely to raise issues of, employee performance or misconduct. In particular, I point to the following excerpt from the School Boards response:

a “reasonable conclusion regarding the purpose of the meeting would be that of evaluating the conduct of its employees regarding their job performance in dealing with the issues raised by Mr. Hensley and Ms. Magee.”

This statement implies that the School Board was not aware of the precise nature of the parent’s concerns, or whether their concerns could raise misconduct allegations or might reflect on an employee’s job performance. In fact, the School Board asks that I not deem the December 6 executive session in violation of the Open Door Law merely because the School Board could

not anticipate in advance the specificity of the issues to be addressed by the parents to the School Board.

The argument advanced by the School Board fails to take into account that it is the governing body that determines, in advance, the purpose of the executive session. In this regard, the School Board argues that the executive session was necessary because the parents did not follow the School Board's policy for dealing with complaints, which prescribes escalation of the matters through appropriate staff to the school principal to the superintendent and finally to the School Board, which may allow complainants to air concerns in either a public meeting of the School Board or an executive session depending upon the nature of the complaint.

It is of no moment that the School Board believes that the exigency of the parent's concerns and the fact that the parents did not follow School Board procedures required that the School Board allow the parents a forum with the School Board. The question is whether the matters presented by the parents were in relation to discussion of a job performance evaluation of an employee. By the School Board's own response, it appears that no such discussion was intended or actually took place.

You have advanced an argument that another executive session instance was more appropriate to any discussion regarding allegations of misconduct of the head coach of the volleyball team of the high school. A governing body may also meet in executive session:

- (6) With respect to any individual over whom the governing body has jurisdiction:
 - (A) to receive information concerning the individual's alleged misconduct; and
 - (B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is:
 - (i) a physician; or
 - (ii) a school bus driver.

In answer to your assertion that this provision was more appropriate for the December 6 executive session, the School Board argues that it could not have met under (b)(6) because the School Board did not intend to meet for purposes of both (6)(A) and (6)(B), and because those clauses are joined by a conjunctive "and", both must occur in order to hold an executive session for this purpose.

I would not have interpreted (b)(6) to require that a governing body must intend both receive information and to discuss, before a determination, the individual's status. Rather, I would have interpreted the "and" to provide a grammatical way to read (b)(6) so that "any individual over whom the governing body has jurisdiction" applies to both (A) and (B), which could then operate as independent bases for which the governing body could meet in executive session. *Cf. Florida Power and Light Company v. Lorion*, 470 U.S. 729, 105 S.Ct. 1598 (1985).

However, the holding in *Town of Middlebury* appears to forestall that interpretation:

“We note that subsection (b)(5) is written in the conjunctive. Therefore, in order for this subsection to apply, the Council must have met to receive information about Baker’s misconduct and to discuss his employment status.”

Town of Middlebury, Id., at 74.

However, the construction of (b)(6) is not necessary for my opinion in this matter. The ultimate issue is whether the executive session notice was held for the instance stated in the notice.

I have found that the School Board did not meet its burden of showing that it met to discuss an employee’s job performance evaluation. Therefore, I find that the School Board did not meet in executive session for the purpose for which its notice stated when it received information regarding the adequacy of punishment of a student for wrongdoing to Mr. Hensley’s son, and Ms. Magee’s concerns about the conduct of the volleyball program by the head coach, where the receipt of that information was not in relation to a job performance evaluation.

You also raise an issue with respect to the adequacy of the executive session notice where it omits reference to the statutory citation for which the executive session may be held. Governing bodies are to provide a specific reference to the exception or exceptions at IC 5-14-1.5-6.1(b) that would permit a meeting that excludes the public. IC 5-14-1.5-6.1(d). This office has approved of executive session notices that state exactly the text of the executive session instance provided in statute. However, we advise the governing body to include the statutory citation as well as the text of the instance in order to prevent any misunderstanding as to the purpose for the executive session. The notice posted by the School Board for its December 6 executive session did comply with the ODL because the School Board restated the text of Indiana Code section 5-14-1.5-6.1(b)(9).

CONCLUSION

For the foregoing reasons, I find that the Charles A. Beard Memorial School Corporation Board of School Trustees did not meet in executive session for the purpose for which its notice stated, in violation of the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. E. Edward Dunsmore