

April 13, 2006

Sent Via Facsimile

Michael Marturello
Herald-Republican
45 S. Public Square
P.O. Box 180
Angola, IN 46703

*Re: Formal Complaint 06-FC-52; Alleged Violation of the Open Door Law by the
Steuben County Board of Commissioners*

Dear Mr. Marturello:

This is in response to your formal complaint alleging that the Steuben County Board of Commissioners (“Commissioners”) violated the Open Door Law by failing to post notice of two February meetings.

BACKGROUND

Your complaint centers on two gatherings of the Commissioners. The first, on February 14, 2006, involved two of the three Commissioners, Crowl and Smith, who attended the regularly scheduled meeting of the Steuben County Council. The Council provided notice of the meeting, but the Commissioners failed to post a notice that a majority of their members would be in attendance. During the meeting, a Fort Wayne company working on a possible guaranteed energy saving capital project for county buildings gave a presentation. A representative of a bonding firm was also present. You stated that during the meeting, the presenters stated that they would not have to present at a future meeting of the Commissioners because all had been informed. When someone solicited opinions of the Commissioners during the February 14 gathering, Commissioner Smith declined, stating that the Commissioners were only there to gather information.

During a February 28 breakfast meeting and public presentation sponsored by the Angola Area Chamber of Commerce, "State of the City and County," all three Commissioners were present. Commissioner Sanders gave a presentation "on behalf of the Commissioners." Commissioners Crowl and Smith aided in the presentation. No notice of this public meeting was provided by the Commissioners, or to the media that had filed a request to receive such notices.

I sent a copy of your complaint to the Commissioners. Responding on the Commissioners' behalf was Attorney Donald Stuckey. I have enclosed a copy of his response for your reference. Mr. Stuckey acknowledged that no notice was given for either gathering. For the February 28 gathering at the Chamber of Commerce, the Commissioners contend that the gathering was not a "meeting" as defined in the Open Door Law. This is because the Commissioners, in addressing the Chamber regarding the general state of the county, did not take "official action" on public business.

With respect to the February 14 gathering, only one of the Commissioners, Commissioner Smith, had planned to attend the meeting. Commissioner Sanders did not attend the meeting, and Commissioner Crowl did not intend to attend the meeting. However, Commissioner Crowl was in the Courthouse Annex meeting with the County Surveyor when he "noticed a meeting was being held" in the County Council Room. He "slipped in" and sat next to you. Mr. Stuckey stated that Commissioner Crowl listened to the presentation for a period of time and then left the meeting. During the time he was there, he was asked to comment on the presentation, but he declined to comment because this was not a published meeting. The Commissioners contend that the information presented had already been provided to the Commissioners at a previous meeting. Hence, the Commissioners contend that the gathering of two of the three Commissioners was excepted from the definition of a meeting because it was a "chance gathering not intended to avoid" the Open Door Law.

ANALYSIS

It is the intent of the Open Door Law 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. All meetings of 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). "Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. A meeting does not include, in relevant part, "any social or chance gathering not intended to avoid [the Open Door Law]." IC 5-14-1.5-2(c).

"Official action" means to: (1) receive information; (2) deliberative; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action. IC 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. IC 5-14-1.5-2(e). "Deliberate" means a discussion which may reasonably be expected to result in official action; i.e., result in: a recommendation, establishment of policy, a decision or a final action. IC 5-14-1.5-2(i).

A public agency is required to post notice of its meetings at least 48 hours in advance of the meeting, excluding Saturdays, Sundays, and legal holidays. IC 5-14-1.5-5(a). In addition, a public agency is required to send its notices to any media who request such notices by January 1 for the following year. IC 5-14-1.5-5(b)(2).

There are no factual disputes with respect to whether notice was adequate; the Commissioners concede that no notice was posted or sent to the media. There is also no question that at each function, a majority of the Commissioners were gathered. Therefore, if either gathering of the majority of the Commissioners was for the purpose of taking official action upon public business, a meeting without proper notice would have occurred, in contravention of the Open Door Law.

There are two discrete issues concerning your allegations. The first is whether the gathering at the Chamber of Commerce in which one Commissioner gave a presentation concerning the State of the County was “official action.” The second issue is whether the Steuben County Council meeting where two Commissioners were in attendance was a chance gathering under the facts as presented.

In my opinion, the gathering of the three Commissioners at the Chamber of Commerce was “official action” upon public business. I did not come to this conclusion easily, because the actions of the Commissioners do not fit neatly into the “official action” definition.

It is consistent with previous opinions of this office to not regard the Open Door Law as applying solely to meetings *called by* the governing body. Hence, the mere fact that the Commissioners were gathered at a Chamber of Commerce function does not support a finding that no official action on public business of the Commissioners occurred. Rather, a meeting is any gathering for the purpose of taking official action on public business, and this could occur at a meeting called by another governing body or at a function of another entity.

I also note that the activities that constitute “official action” do not encompass only formalistic motions that are commonly undertaken by a governing body, but instead are expressed as more general activities such as “receiving information,” “making recommendations,” and “establishing policy,” which could take many forms. The gathering at the Chamber of Commerce included a speech by one of the Commissioners (the executive of a county), in the presence of a quorum of the Commissioners, regarding the State of the County. Those are the only facts before me. Considering the relatively broad definition of “official action,” in my opinion, a presentation by one of the Commissioners on the State of the County constitutes official action on public business. I came to this conclusion more readily when I considered whether a meeting *called by the Commissioners* for this same activity would constitute a meeting. The answer appeared to be in the affirmative. The Commissioners should have posted a notice that it intended to gather at the Chamber of Commerce on February 28, 2006.

The question regarding the Steuben County Council meeting turns on whether Commissioner Crowl’s attendance made the gathering of a majority a “chance” gathering not intended to avoid the Open Door Law. On February 14, you allege that two Commissioners were

present for an informational presentation to the Steuben County Council. Your facts do not contradict those set forth by the Commissioners, except that you do not mention the timeframe in which Commissioner Crowl was present. The Commissioners' response implies that Commissioner Crowl had not known previously about the Council meeting but only came upon it by happenstance as he took care of other business in the same building.

In any case, once in the Council meeting, it is apparent that Commissioner Crowl became aware of Commissioner Smith's attendance, because you allege that at one point, both Commissioners were asked to comment. Moreover, the complaint response of the Commissioners indicates that Commissioner Crowl declined to comment because "this was not a published meeting." Because "receiving information" is official action, and the Commissioners clearly received information, official action occurred even in the absence of the Commissioners' input. Commissioner Crowl's statement tends to acknowledge that the gathering was either not a "chance" gathering or was, at some point, transformed into a meeting, where Commissioner Crowl did not excuse himself once the nature of the gathering and the attendance of one of the other Commissioners was apparent. This situation does not differ significantly from one in which a majority of a governing body encounters one another by chance and then takes the opportunity to discuss or receive information about the governing body's business.

CONCLUSION

For the foregoing reasons, it is my opinion that the Steuben County Board of Commissioners should have posted notice of the February 28 gathering at the Chamber of Commerce because it involved "official action." In addition, the quorum of the Commissioners present in the Steuben County Council meeting constituted a meeting of the Commissioners under the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Donald Stuckey