

October 20, 2000

Mr. Calvin Hawkins
P.O. Box M859
Gary, Indiana 46401

Re: Advisory Opinion 00-FC-34 *Notices of Executive Session of the Gary Housing Authority.*

Dear Mr. Hawkins:

This is in response to your formal complaint, which was received on September 26, 2000. You have alleged that the Gary Housing Authority ("Authority") has violated the Indiana Open Door Law ("ODL"), Indiana Code chapter 5-14-1.5. Specifically, you have referenced the fact that two (2) different notices were prepared for the Authority's September 14, 2000 executive session, the first indicating only one subject matter would be discussed, and the other listing multiple subject matters. In addition, as a member of the Authority who attended this meeting, you allege that the actual discussion at the executive session did not fit within any of the specific purposes identified in the notices. Mr. Willie Harris, attorney for the Gary Housing Authority, responded by facsimile with a letter dated October 12, 2000. A copy of his response is enclosed for your reference.

For the following reasons, it is my opinion that notice was properly given of the executive session held on September 14, 2000 under Indiana Code section 5-14-1.5-5 and the Authority could amend their notice so long as the amended notice was posted under the ODL. In addition, discussion of a job performance of an employee would not violate the ODL; however, any discussion regarding the conduct of individual commissioners at an executive session extends beyond the exceptions listed at Indiana Code section 5-14-1.5-6.1(b) and would violate the ODL.

BACKGROUND

According to your complaint, the Authority posted two notices for its September 14, 2000 executive session. This notice was based upon a sample notice¹ prepared by this Office at the request of the Authority's staff, which follows:

NOTICE OF EXECUTIVE SESSION

Name of Governing Body
Date, Time and Place

The Governing Body will hold an Executive Session as authorized under Indiana Code section 5-14-1.5-

6.1(b):

___An executive session is authorized under:

Indiana Code section(s): _____

___An executive session is authorized under:

United States Code section(s): _____

___For discussion* of strategy with respect to any of the following:

___Collective bargaining.

___The initiation of litigation or litigation that is either pending or has been threatened specifically in writing. ___The implementation of security systems.

___The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

**The strategy discussions are necessary for competitive or bargaining reasons and will not include competitive or bargaining adversaries.*

___To receive information about and interview prospective employees.

___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, student, or an independent contractor who is a physician.

___For discussion of records classified as confidential by state or federal statute.

___To discuss a job performance evaluation** of individual employees.

***This does not include discussion of the salary, compensation, or benefits of employees during a budget process.*

___For the consideration of the appointment of a public official, to do the following:

___Develop a list of prospective appointees.

___Consider applications.

___Make one (1) initial exclusion*** of prospective appointees from further consideration.

****The initial exclusion of prospective appointees from further consideration will not reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3)*

prospective appointees. Interviews of prospective will be conducted at a meeting that is open to the public.

As you noted in your complaint, your opposition to this format is that the governing body does not provide specific notice to the public of the purpose of the executive session. Further, you noted that two separate notices were provided for the September 14th. The first notice you received indicated that the Authority would discuss the job performance evaluation of an employee. The second notice indicated that listed this exception, plus the exceptions for interviewing and receiving information about prospective employees, and to develop a list of prospective appointees in the consideration of the appointment of a public official.

You also claim that the actual discussion at the executive session violated the ODL because it did not conform to any of the stated purposes for the meeting. It is your contention that the substance of the executive session concerned the treatment of the executive director in relationship to the commissioners. You further stated that the executive director indicated that there was unethical conduct on the part of one specific commissioner in relation to an unauthorized meeting with the executive director in an attempt to have certain people hired by the Authority.

In response to your complaint, Mr. Harris stated that the format is appropriate. The Authority staff used this checklist format after consultation with the Office of Public Access Counselor. Accordingly, Mr. Harris responded that the executive director for the Authority checked those items that were to be discussed and which were discussed during the September 14th executive session. The second notice was no more than an amendment to the first notice and it was posted within the time frame required under the ODL.

ANAYLSIS

The intent and purpose of the Indiana Open Door Law 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 Open Door Law are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Authority is clearly both a public agency and a governing body subject to the requirements of the Open Door Law. Ind. Code § 5-14-1.5-2.

The general rule of the Open Door Law is that all meetings of the governing body of a public agency are to be conducted openly for the purpose of permitting the public to attend and observe them. Ind. Code §5-14-1.5-3(a). The exception to this rule is an executive session, defined as a meeting from which the public is excluded, which may be held under Indiana Code section 5-14-1.5-6.1(b). Ind. Code §5-14-1.5-2(f).

Notice of Executive Session

The Open Door Law requires public agencies to provide notice of public meetings and *executive sessions*. Specifically, Indiana Code section 5-14-1.5-5(a) provides that:

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.

(Emphasis added). Public notice of the date, time and place of an executive session, therefore, must be provided at least forty-eight (48) hours in advance of the executive session. In addition, such notices must state the "subject matter by specific reference to the enumerated instance or instances" for which executive sessions may be held under Indiana Code section 5-14-1.5-6.1(b). Ind. Code § 5-14-1.5-6.1(d). The question presented is whether the September 14th notice of the Authority's executive session conforms to Indiana Code section 5-14-1.5-6.1(d).

The Open Door Law uses the terms "*specific reference*" and "*enumerated instance or instances*" when describing the notice of an executive session. It is clear that the General Assembly intended that public agencies provide the public with detailed information as to the purpose of their executive session so that the public would be "fully informed," despite the fact that the public is lawfully excluded from executive sessions. See, Ind. Code §5-14-1.5-1.

Certainly, public agencies may produce unique notices for each executive session that conform to the requirements of the ODL. The notices in question, however, are in a checklist format, listing the exceptions that would permit the Authority to conduct an executive session, but requiring an affirmative indication of the specific purpose or purposes for the executive session. I did recommend this format for the Authority for a variety of reasons. The previous format² used by the Authority did not conform to the requirements of the ODL and it was imperative that I provide an easy-to-use solution for the Authority staff, which demonstrated to me that they were interested in correcting any problems with these notices. The checklist format is easy to use and has been utilized by other governing bodies. This format ensures that the public is notified of the specific purpose or purposes for which the governing body plans to conduct an executive session and that the notice conforms to the other requirements of Indiana Code sections 5-14-1.5-5(a) and (b) and 5-14-1.5-6.1(d).

It is my opinion that a "checklist" notice that provides a list of all statutory exceptions allowing an executive session, but requires an affirmative indication of the specific statutory exception or exceptions claimed by that governing body for the particular meeting, does not violate the notice requirements of the ODL. With respect to the two notices issued for the September 14th executive session, there is nothing in the ODL that prohibits amending a notice of executive session, so long as the amended notice has been provided in accordance with Indiana Code section 5-14-1.5-5(b). According to Mr. Harris' response, the second notice did meet these requirements; your complaint contained no evidence to the contrary. For this reason, it is my opinion that the issuance of an amended second notice of executive session was not a violation of the Open Door Law.

Content of the Executive Session

Finally, you questioned whether the content of the executive session violated the ODL. In his response, Mr. Harris only indicated that the discussions at that meeting conformed to the notices, but did

not offer any specific comment on the content of the executive session. Your complaint states that the substance of the executive session dealt with the treatment of the executive director in relationship to the commissioners. If the discussion of the treatment of the executive director related to a discussion of his job performance evaluation, the notices prepared for the meeting would have conformed to the ODL. I agree with you, however, that if the discussion was not regarding a job performance evaluation, but rather about the conduct of a commissioner of the Authority in meeting with the executive director, this would exceed the statutory exception permitting an executive session³. There is no exception under the ODL that would allow a majority of the members of a governing body to meet in executive session to discuss the conduct of one of its members. To the extent that the discussion of September 14th concerned the conduct of a commissioner, therefore, it is my opinion that this exceeded the authority of the exceptions stated in the Authority's notices for the executive session and violated the ODL.

CONCLUSION

It is my opinion that the checklist notice forms for executive sessions used by the Authority do not violate the ODL. The Authority was not prohibited from amending an executive session notice so long as the amended notice conforms to the notice requirements under Indiana Code sections 5-14-1.5-5(a), 5-14-1.5-5(b) and 5-14-1.5-6.1(d). It is my opinion that the amended notice for the September 14th executive session did conform to those statutory requirements. It is also my opinion that any discussion in executive session concerning the conduct of a member of the Authority did violate the ODL. There is no valid exception under the Law permitting a majority of the members of a governing body to discuss the conduct of another member in executive session under Indiana Code section 5-14-1.5-6.1(b).

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Willie Harris, Attorney
Gary Housing Authority

¹ This notice does not include all of the exceptions listed under the ODL, only those that might be relevant to the operations of the Authority.

² The Authority used a form that listed all possible exceptions for conducting an executive session

noting only that they may be discussing any or all of these matters.

³ The two other exceptions that were marked in the notice would not apply to this discussion. The discussion was not receiving information about and interviewing a prospective employee, and the discussion was not in regard to developing a list of prospective appointees for the appointment of a public official.
