



STATE OF INDIANA

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April 9, 2013

Ms. Stephanie Graf
8060 Colonial Heights
Brookville, Indiana 47012

Re: Formal Complaint 13-FC-87/13-INF-21; Alleged Violation of the Open Door Law by the Franklin County Board of Commissioners

Dear Ms. Graf:

This advisory opinion is in response to your formal complaint alleging the Franklin County Board of Commissioners ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* John O. Worth, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on January 17, 2013 the Board conducted an executive session without providing 48 hours notice as required by I.C. § 5-14-1.5-5. At the executive session, the Board took final action by terminating your employment with the County. You allege that the Board failed to provide you with notice of the executive session, informed you that you would be terminated if you did not resign, refused you the opportunity to consult with your husband or an attorney prior to making a decision, and did not allow you to leave the room by threatening you with immediate termination. You understand that governmental entities can make decisions on whether to terminate an employee at an executive session, but that the entity cannot act on those decisions until a public meeting is held. In effect you believe that the Board took final action to terminate your employment at an executive session in violation of I.C. § 5-14-1.5-6.1(c). You provide that you did not become aware of the violation until you consulted with legal counsel on March 5, 2013 and thus have filed your formal complaint within thirty days of becoming aware of the violation.

In response to your formal complaint, Mr. Worth advised that your formal complaint is untimely filed to the extent that it seeks to avoid any thirty-day statute of limitations. The thirty day period in which to file a complaint triggers from the date of the alleged violation or the date the complaining party knew or should have known of the alleged violation. As applicable here, you became aware of the events that led to the

formal complaint on January 17, 2013. As the formal complaint was not filed until March 12, 2013, it is considered to be untimely.

As to the substance of your formal complaint, the executive session in question was held on January 17, 2013 to deal with the job performance of an employee. A notice of the executive session was provided forty-eight hours before the meeting was held. A copy of the notice is enclosed for your reference. Further, a copy of the email notifying all those who had requested such notices is also attached. Contrary to your formal complaint, direct notice to a specific individual forty-eight hours prior to the executive session is not required under the ODL. Only the public and those requesting as such must be provided with notice.

At the executive session, you were given the opportunity to resign or retire after being informed of the general nature of the issues with your job performance. As you retired at that time, the Board did not make a final determination. If you had not resigned or retired, the Board would have had to subsequently make some final decision. However here, no such decision was required. The Board is not aware of any law that would prevent an individual employee from resigning or retiring by their own act at an executive session.

ANALYSIS

I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the counselor must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. The Board's executive session was held on January 17, 2013; you were in attendance at the executive session. Your formal complaint was received by our office on March 12, 2013. Therefore, you would not have standing to file a formal complaint as more than thirty days have passed since the date the session were held and the date your formal complaint was filed. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your formal complaint will be addressed as an informal inquiry. *See* I.C. § 5-14-4-10(5).

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).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). With regard to individuals over whom the governing body has jurisdiction, an executive session may be held to receive information regarding an individual's alleged misconduct or to discuss, before a determination, the individual's status as an employee. *See* I.C. § 5-

14-1.5-6.1(b)(6)(A)-(B). Notice of an executive session must be given 48 hours in advance of every session, excluding holidays and weekends, and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, “To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.*

Here, the notice provide by the Board for the executive session held on January 17, 2013 failed to cite to the specific statutory citation that would allow the Board to meet in executive session; nor did the notice provide the language of the statutory citation. Accordingly, it is my opinion that the Board acted contrary to section 5 and 6.1(d) of the ODL in regards to the notice that was posted for the January 17, 2013 executive session. You have alleged that the notice provide by the Board was not posted more than forty-eight hours prior to the executive session. The Board denies the allegation. The Public Access Counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* Thus, if the Board posted notice forty-eight hours in advance of the executive session, minus weekends and holidays, it did not violate the ODL (emphasis added). As correctly noted by Mr. Worth, the Board did not violate the ODL by not personally providing you with notice of the executive session more than forty-eight hours in advance.

The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001). “Final action” means a vote by a governing body on a proposal, motion, resolution, rule, regulation, ordinance or order. *See* I.C. § 5-14-1.5-2(g). You allege that while the Board can make decisions on whether to terminate an employee at an executive session, the entity cannot act on those decisions until a public session is held. You maintain that the Board took final action to terminate you at the executive session in violation of the ODL. In response, the Board has provided that at the executive session, you were given the opportunity to resign or retire. You elected at that time to retire; thus no action was taken by the Board. The ODL does not instruct governing bodies as to what actions specifically require a meeting and/or vote. *See Opinions of the Public Access Counselor 08-FC-136 and 12-FC-144.* Further, the parties disagree as to whether you were terminated at the executive session or you elected to retire. As noted *supra* that the Public Access Counselor is not a finder of fact. Therefore, if the Board voted to terminate you employment with the County at the executive session, it acted contrary to the requirements of the ODL. However, if you retired at the executive session and no vote or final action was taken by the Board, it is my opinion that the Board did not violate the ODL.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "H".

Joseph B. Hoage
Public Access Counselor

cc: John O. Worth