



STATE OF INDIANA

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Senator Jim Arnold
200 W. Washington Street
Indianapolis, Indiana 46204

Re: Informal Inquiry 13-INF-42; Meetings conducted by County Commissioners

Dear Senator Arnold:

You have submitted an inquiry requesting an overview of the requirements of the Open Door Law ("ODL"), Ind. Code. § 5-14-1.5 *et seq.* that may be applicable to a closed-door meeting conducted by two members of a county's Board of Commissioners ("Board") with a private vendor. Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on the applicable provisions of the Open Door Law ("ODL") I.C. § 5-14-1.5 *et seq.*

BACKGROUND

Your inquiry deals with the requirements of the ODL that would apply to a meeting attended by two members of the Board and a private vendor. You have only made a general inquiry and I would note that whether a violation of the ODL has occurred will be dependent on the specific facts involved. I will attempt to address all possible scenarios and requirements of the ODL that a Board should be aware of in attempting to meet under such circumstances as described in your inquiry.

ANALYSIS

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).

A "meeting" is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* I.C. § 5-14-1.5-2(c). "Official action" means to receive information, deliberate, make recommendations,

establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). “Public business” means any function upon which the public agency is empowered or authorized to take official action.

As applicable to your inquiry, a Board is comprised of three members. Thus, if two members of the Board are present in meeting with the private vendor, the majority requirement of the meeting definition has been met. Next, it must be determined what topics were discussed by the parties during the gathering in order to determine if a meeting, as defined under the ODL, has occurred.

For the purposes of your inquiry, let us assume that the meeting between two members of the Board and the private vendor related to “public business.” “Public business” means any function upon which the public agency is empowered or authorized to take official action. It should be noted that just because a governing body does not take final action (i.e. vote) on a matter is not a determining factor in deciding whether a “meeting” has occurred. If the members of the Board simply receive information on public business from the private vendor, said gathering would be considered a “meeting” as defined under the ODL.

As a meeting has occurred, the ODL would require that public notice of the date, time, and place of any meeting, executive session, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if no such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper unless specifically directed pursuant to a separate statute. *See* I.C. § 5-14-1.5-5(b)(2).

It should be noted that the ODL contains exceptions to the definition of a “meeting.” *See* I.C. § 5-14-3-2(c)(1)-(7). As could be applicable here, if two members of the Board met socially or had a chance gathering with a private vendor, then the requirements of the ODL would not apply. *See* I.C. § 5-14-3-2(c)(1); *see also* *Opinion of the Public Access Counselor 13-INF-23* (<http://www.in.gov/pac/informal/files/13-INF-23.pdf>) for a detailed analysis of social and change gatherings under the ODL. The members of the Board should be careful to ensure that any social or change gathering was not conducted in order to avoid the requirements of the ODL and that the members of the Board do not take any official action on public business. In addition, any on-site inspection of a project or program, attended by two members of the Board with a private vendor, would not be considered a meeting under the ODL. *See* I.C. § 5-14-3-2(c)(2). Lastly, a gathering by the Board to discuss an industrial or commercial prospect that did not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or offer of public financial resources would not be considered a “meeting” under the ODL. *See* I.C. § 5-14-3-2(c)(5).

The ODL further provides an exception for the requirements for posting notice when the executive of a county conducts a meeting solely for the purpose of receiving information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. *See* I.C. § 5-14-1.5-5(f)(2). In our example, the Board would qualify as the executive of the county. Administrative functions do not include the awarding of contracts, the entering into contracts or any other action creating an obligation or otherwise binding a county or town. *Id.* Even though notice is not required, the administrative function meetings must be held in the public, since the notice provision of the ODL is the only provision that does not apply to an “administrative function” meeting. *See* I.C. § 5-14-1.5-5(f)(2). The Board would still be required to keep memoranda from its administrative function meetings pursuant to section 4(a) of the ODL. The memoranda would be discloseable in response to a request made under the Access to Public Records Act (“APRA”). Further, any individual that was aware of the administrative function meeting would be allowed to attend, observe, and record the meeting.

Previous counselors addressing administrative meetings have noted that said meetings are limited in scope and cannot be used to bind or obligate the county in any way. *See Opinions of the Public Access Counselor 00-FC-09 and 01-FC-82.* Counselor Neal opined:

I would urge the Commissioners to be mindful of the subject matter of the administrative function meetings. It appears the meetings at the highway garage have become routine, and I would urge the Commissioners to consider carefully, before every meeting, whether the meeting is being held *solely* to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit, as allowed by I.C. § 5-14-1.5-5(f)(2). If at any point the subject matter reaches beyond administrative function, the meeting should be a properly noticed public meeting. *See Opinion of the Public Access Counselor 09-FC-30.*

In previous opinions, the following have been considered to be an appropriate topic for discussion at an administrative meeting:

- Preliminary matters regarding the status of an individual’s employment with the County, provided that all final actions or any decisions regarding the employment status or obligating the governing body are made at an open public meeting. *See Opinions of the Public Access Counselor 07-FC-250, 10-INF-56, 11-FC-14, 11-INF-69.*
- Making copies of documents with no substance discussion regarding public business. *See Opinion of the Public Access Counselor 09-FC-69.*
- Determining when a meeting will occur and setting an agenda. *See Opinion of the Public Access Counselor 07-FC-62.*

- Signing documents. *See Opinion of the Public Access Counselor 09-FC-62.*
- Creation of an equipment list and to direct the return of equipment from a Town employee. *See Opinion of the Public Access Counselor 00-FC-04.*
- Receiving status update on ongoing debris removal work. *See Opinion of the Public Access Counselor 12-FC-77.*
- Discussion on the placement of photographs, decorating, and physical configuration of Town Hall. *See Opinion of the Public Access Counselor 12-FC-74.*
- Organize and administer plans to hold the Town Festival. *See Informal Opinion of the Public Access Counselor 11-INF-13.*
- How to deal with the absence of the clerk-treasurer at meetings (e.g. who would be responsible for drafting the meeting memoranda). *See Opinion of the Public Access Counselor 03-FC-05.*
- Alteration of county employee work schedule and amending the county employee handbook. *See Opinion of the Public Access Counselor 08-FC-137.*

Alternatively, the following have been deemed to be an inappropriate issue to be addressed at an administrative meeting:

- Terminating an employee. *See Opinion of the Public Access Counselor 07-FC-250.*
- Considering or evaluating the sale or lease of real property. *See Opinion of the Public Access Counselor 04-FC-138 & 139.*
- Making formal motions with respect to whether the body would allow a document to be inspected or copied and setting an appropriate fee. *See Opinion of the Public Access Counselor 06-FC-200.*
- Approving financial claims. *See Opinions of the Public Access Counselor 07-FC-7, 8, & 9.*
- Discussing whether the governing body was prepared to vote. *See Opinion of the Public Access Counselor 08-FC-186.*
- Hiring a town attorney. *See Opinion of the Public Access Counselor 01-FC-79.*
- Holding deliberations on a town's budget. *See Opinion of the Public Access Counselor 04-FC-154.*
- Discussions regarding ambulance service between the Commissioners and a separate governing body. *See Opinion of the Public Access Counselor 98-FC-5.*

See also 12-INF-36 (<http://www.in.gov/pac/informal/files/12-INF-36.pdf>) for a detailed analysis of administrative function meetings.

The remaining issue to be addressed as it relates to the ODL would be executive sessions. 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). As with all meetings of a governing body, the Board would be required to post notice for its executive sessions. *See I.C. § 5-14-1.5-5; I.C. § 5-14-1.5-6.1(d); see also Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.* A governing body may only meet in executive session pursuant to topics cited under

I.C. § 5-14-1.5-6.1(b). Discussions conducted in an executive session that go beyond those cited in section 6.1(b) of the ODL would be in violation of the laws requirements. The provisions of 6.1(b) of the ODL do not provide that an executive session may be held in order to allow for general discussions to occur between a private vendor and a governing body. Again, memoranda must be kept by the governing body for its executive sessions, which again would be discloseable as a public record under the APRA.

If I can be of any further assistance, please do not hesitate to contact me. As noted *supra*, a determination whether an agency has violated the ODL is generally a fact sensitive endeavor; however all governing bodies should keep in mind that transparency and openness are the hallmarks of the ODL and the actions of the bodies should be governed accordingly.

Best regards,

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

Joseph B. Hoage
Public Access Counselor