

December 14, 2006

Sent Via Facsimile

Marian Percy
8515 Otterbein Road SE
Laconia, IN 47135

*Re: Formal Complaint 06-FC-200; Alleged Violation of the Open Door Law by the
Harrison County Commissioners*

Dear Ms. Percy:

This is in response to your formal complaint alleging that the Harrison County Commissioners (“Commissioners”) violated the Open Door Law by holding an illegal executive session and voting during the executive session. I find that the Commissioners held an open meeting, but posted a notice that did not comply with the Open Door Law because the notice stated the meeting was an emergency executive session. In addition, I find that the Commissioners could not hold an emergency meeting under the circumstances, and therefore notice was not posted 48 hours in advance of the meeting, in violation of the Open Door Law.

BACKGROUND

You allege in your formal complaint that the Commissioners met on November 3, 2006 to discuss a request for viewing a security camera tape. The notice for the November 3 meeting stated that it was an emergency executive session. You contend that the discussion concerning the public record request was not a purpose for which an executive session may be held under the Open Door Law. You submitted a copy of the minutes that show that all three Commissioners were in attendance, as was the county Auditor Patricia Wolfe and several others. The minutes show that the meeting was convened on November 3 at 9:35 a.m. The relevant portions of the minutes read as follows:

The reason for the meeting was to respond to the letter from Larry Shickles, Harrison County Republican Chairman, that was hand-delivered

to the Auditor on November 2, 2006 at 11:58 a.m. regarding the request to inspect and obtain a copy of the surveillance tapes taken Wednesday, November 1, 2006 from 3:30 p.m. to midnight in the Harrison County Courthouse. According to IC 5-14-3, the Commissioners have 24 hours to respond to this request...Commissioner Goldman made a motion to notify Mr. Shickles that he had their permission to review the recordings of the security tapes...he was to contact Mr. Simon for the viewing...Ms. Wolfe said they were unable to make any motions due to this having been called an executive session meeting. Commissioner Eckart said he had called for an emergency meeting only and not an executive session. Commissioners Goldman and Heitkemper agreed. Ms. Wolfe apologized and acknowledged the fact the meeting was posted in error...Commissioner Goldman said he would like to amend his motion to include \$260 charge to Mr. Shickles for the cost from Simplex Grinnell. Commissioner Heitkemper and Commissioner Eckart seconded the motion. Motion carried.

You do not raise any issue with respect to whether the meeting could have been called as an emergency. You contend that as a result of the illegal meeting, any action taken was void *ab initio*.

I sent a copy of your complaint to the Commissioners. Harrison County Attorney Christopher L. Byrd responded, a copy of which is attached for your reference. Mr. Byrd admitted that the minutes accurately reflect what occurred at the emergency Commissioners meeting held on November 3. The meeting was inadvertently posted as an executive session by the county auditor. Mr. Byrd attached e-mails showing that instructions from Commissioner Eckart were for an emergency meeting, not an executive meeting. Due to the requirement that a response be given within 24 hours of the written request for information filed by a citizen, it was not reasonably possible for the meeting to be rescheduled and reposted. There was no attempt to prevent the public from observing the meeting and those present were welcome to participate. The Commissioners acted within the spirit and letter of 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. Except as provided in section 6.1 of the Open Door Law, 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. IC 5-14-1.5-3(a). 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 hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. Ind. Code 5-14-1.5-5(a). The public may be excluded from an executive session, which may be held for only the purposes set out in IC 5-14-1.5-6.1(b). A final action must be taken at a meeting open to the public. IC 5-14-1.5-6.1(c). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. IC 5-14-1.5-2(g).

If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice under IC 5-14-1.5-5 shall not apply, but news media which have requested notice of meetings must be given the same notice as is given to members of the governing body, and the public must be notified by posting a copy of the notice according to this section. IC 5-14-1.5-5(d).

The Commissioners do not argue that the purpose for the meeting was one for which an executive session could be held, but instead say that the meeting was open to the public. "Executive session" means a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f). The Commissioners assert that the public was not barred from attending the meeting. I find that if the Commissioners did not prevent any person from attending the meeting on November 3, the meeting was not an executive session. If the meeting was not an executive session, the Commissioners could take final action during the meeting.

This does nothing to assuage the Commissioners' failure to post proper notice. Notice announcing an executive session where an open meeting was intended was defective notice, since it signaled that the meeting was closed to the public. Members of the public who happened by were admitted, but others may have stayed away. Accordingly, notice of an executive session for November 3, 2006 was not proper under IC 5-14-1.5-5.

Although you do not raise the issue, I am compelled to address a question concerning whether the Commissioners could have held an emergency meeting, a term that the Commissioners gave to the November 3 meeting. From the correspondence provided by the Commissioners, it is apparent that the notice was posted less than 48 hours prior to the meeting. The request for the tape was received November 2 at 11:58 a.m. Commissioner Eckart wrote a message to Auditor Wolfe at 7:01 p.m. November 2 calling for the emergency meeting. Although the message does not state the date or time for the meeting, the meeting was convened at 9:35 a.m. the following day, November 3. The minutes document that the purpose for the emergency meeting was to respond to the letter from Larry Shickles within the 24 hour timeframe provided in the Access to Public Records Act.

A governing body may hold an emergency meeting only if the meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event. It is my opinion that the purpose for the November 3 meeting does not constitute an emergency, because it does not involve actual or threatened injury to person or property, or actual or threatened disruption of the county government.

Although it is true that the response of the Commissioners was required to be sent within 24 hours of the hand-delivered request,¹ the response to a request under the Access to Public Records Act ("APRA") is adequate if it acknowledges receipt of the request. The APRA does not require that the response of the public agency state affirmatively whether the public agency

¹ Pursuant to Indiana Code 5-14-3-9(a).

intends to disclose the record. In fact, the message from Commissioner Eckart to Auditor Wolfe stated “Tell Larry we will consider his request...” If Ms. Wolfe had so notified Mr. Shickles in accordance with those instructions within 24 hours, that is all that was required by the APRA.

In addition, the Open Door Law allows the executive of a county to hold without notice meetings 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. IC 5-14-1.5-5(f)(1). For an administrative function meeting, the governing body must allow the public to observe and record the meeting, but no notice is required.

The minutes show that the Commissioners made formal motions with respect to whether the Commissioners would allow inspection and copying of the tape, and set a copying fee for the tape. This went beyond carrying out administrative functions, in my view. I set forth this provision of the Open Door Law only to recommend that in the future, should two or more Commissioners need to direct staff to send a letter or call a person to respond to a records request, this administrative function could be handled expeditiously without the need to post any notice or call an emergency meeting. Subsequent to the pro forma initial response to a records request, the Commissioners could meet if necessary to discuss the merits of a particular request for records after posting notice of a public meeting.

Because the November 3 meeting was neither an administrative function meeting nor an emergency meeting, notice should have been posted at least 48 hours in advance of the meeting. You contend that the final action taken at the meeting was void *ab initio* because final action was taken in an executive session, and I have found that the final action was not prohibited by the Open Door Law because the meeting was not an executive session. However, the Commissioners violated the Open Door Law because notice was not posted 48 hours in advance of the meeting. This violation of the Open Door Law does not render the final action void *ab initio*, but it subjects the Commissioners to the provisions of IC 5-14-1.5-7(d), setting forth a substantial compliance standard for a court to determine whether to declare any policy, decision, or final action void.

CONCLUSION

For the foregoing reasons, I find that the Harrison County Commissioners violated the Open Door Law when they failed to post notice of the November 3 meeting 48 hours in advance of the meeting.

Sincerely,

Karen Davis
Public Access Counselor

cc: Christopher L. Byrd