



# STATE OF INDIANA

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November 22, 2010

Mr. Miller Murray  
23698 Western Ave.  
South Bend, IN 46619

*Re: Formal Complaint 10-FC-254; Alleged Violation of the Open Door Law by the City of South Bend*

Dear Mr. Murray:

This advisory opinion is in response to your formal complaint alleging the City of South Bend ("City") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* My office forwarded a copy of your complaint to the City, but as of today we have not received a response.

## BACKGROUND

In your complaint, you allege that the City denied you access to the "Studebaker Pre-construction [sic] meeting base[d] on the fact that it is a meeting of employees." However, you note that neither the contractor nor the architect is an employee of the City. The City did not respond directly to your complaint, but enclosed with your complaint is a letter from Assistant City Attorney Thomas Bodnar. In that letter, Mr. Bodnar claims that the ODL does not apply to the meetings you desire to attend because it is a meeting of employees rather than a meeting of any "governing body" as defined by the ODL.

## ANALYSIS

The General Assembly enacted the ODL intending that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, so that the people may be fully informed. I.C. § 5-14-1.5-1. Accordingly, the ODL requires that, except for those situations where an executive session is authorized, "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." I.C. § 5-14-1.5-3(a). The plaintiff in a lawsuit under the ODL has the burden of proving that the defendant entity is a "public agency" within the meaning of the statute. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999).

By its terms, the ODL applies only to meetings of “governing bodies” of public agencies:

- (b) "Governing body" means two (2) or more individuals who are:
  - (1) a public agency that:
    - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
    - (B) takes official action on public business;
  - (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
  - (3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

I.C. § 5-14-1.5-2(b). The ODL defines a “meeting” as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). The Indiana Court of Appeals has analyzed these provisions of the ODL and determined that they do not apply to meetings of staff members of public agencies if the staff members themselves do not constitute a governing body:

As originally enacted, the Open Door Law applied only to meetings at which "a majority of the governing body" of a public agency was in attendance. The legislature never intended Sec. 3 to apply to gatherings of agency employees conducting the “internal staff operations of public agencies.” *See The Open Door Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 Val.U.L.Rev. 295, 309 (1979-80). Gatherings of employees of public agencies were not then and are not now specifically mentioned as being covered by the Act.

*Indiana State Bd. of Health v. State Journal-Gazette Co.*, 608 N.E.2d 989, 991 (Ind. Ct. App. 1993). The Court of Appeals reasoned that if the result were otherwise, large state agencies would have to convene a majority of their staff members -- which would often number in the hundreds or even thousands -- in order to conduct a “meeting” under the ODL:

If the definitions [of “governing body” and “meeting”] were to be literally applied in the case before us, it would require the presence of 544 of the ISBH's 1,087 full time state employees to convene a “meeting” subject to the Open Door Law. Such an interpretation in this or any similar case is clearly absurd. The legislature did not intend such a result. . . . Clearly, the amendment is inartfully worded. Because the amendment is ambiguous and of doubtful meaning, we must construe it to give effect to the true intent of the legislature in this regard.

*Id.* at 993 (internal citations omitted). In *Indiana Department of Health* (“IDH”) case, two employees of the IDH gathered and engaged with other individuals while taking action upon public business. However, neither employee was a member of the 11

member Indiana State Board of Health (“ISBH”), the governing body of the IDH, nor were they members of any advisory committee directly appointed by that board. As a result, the Court of Appeals determined that the meeting was not one conducted by any “governing body” of the IDH, nor was it a meeting of any advisory committee directly appointed by the ISBH. As a result, it was not subject to the ODL. *Id.*

Similarly here, if the staff members of the City who gathered are not members of a governing body of INDOT or some other public agency, and no majority of any other governing body was present at the meeting, the ODL did not apply to the meetings. That is also true if non-employees attend the meeting, because the fact that one or more non-employees attended the meeting along with City employees does not automatically subject the meeting to the ODL. Consequently, if Mr. Bodnar’s assertion is true that no majority of any “governing body” attends the meetings in question, it is my opinion that the City did not violate the ODL.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the City did not violate the ODL.

Best regards,



Andrew J. Kossack  
Public Access Counselor

cc: Thomas L. Bodnar