



STATE OF INDIANA

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July 16, 2012

Mark Buckley
8225 North State Road 157
Worthington, Indiana 47471

*Re: Formal Complaint 12-FC-154; Alleged Violation of the Open Door Law by
the White River Valley School Corporation*

Dear Mr. Buckley:

This advisory opinion is in response to your formal complaint alleging the White River Valley School Corporation ("School") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Susan Traynor Chastain, Attorney, responded on behalf of the School. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that that School failed to provide proper notice for an executive session held by the School Board on May 24, 2012. Further, you provide that during the executive session, the School Board discussed issues beyond what was provided in the notice or allowed under ODL. In support of your allegations, you provide a copy of the agenda utilized by the School for the May 24, 2012 executive session and open public meeting.

In response to your formal complaint, Ms. Chastain advised that the agenda for the May 24, 2012 School Board meeting notes that an executive session was to be held at 6:00 p.m. to discuss personnel and cites I.C. § 5-14-1.5-6.1(b). The agenda for the executive session was inadvertently posted with information for the items that were to be discussed in the open meeting that same evening. The specific items listed in the notes for the executive session pertained to potential hires; specific student discipline situations; staffing issues including recalling laid off teachers; and teacher evaluations. While the notes also refer to football and facility matters as major discussion items, no specific information is provided about either of these topics in the Board Information Agenda.

The School Board acknowledges that the Public Access Counselor has stated that merely citing "personnel matters" as a justification for an executive session is not proper under the ODL. However, the School Board notice properly cited Indiana Code § 5-14-

1.5-6.1(b) as the statutory authority for executive sessions. Further, the topics discussed in the executive session fell within the permissible statutory exemptions for executive session. For example, I.C. § 5-14-1.5-6.1(b)(5) allows the School to receive information about prospective employees. The notes from the executive session reveal that the School Board was provided with information about prospective employees for staffing purposes for the 2012-13 school year. This information included the possibility of recalling teachers who had been previously laid off to fill certain positions. Further, I.C. § 5-14-1.5-6.1(b)(9) allows the Board to discuss the evaluation of individual employees during an executive session. The agenda specific states that employee evaluation information would be available to Board members at the executive session for them to review and discuss. The Superintendent cautioned Board members that the employee evaluation information was confidential. Further I.C. § 5-14-3-4(b)(8) exempts certain personnel information from disclosure, thereby rendering the records confidential under state law.

I.C. § 5-14-1.5-6.1(b)(7) allows the Board to discuss records classified as confidential pursuant to state or federal law. The notes from the executive session reveal that specific instances of student misconduct were discussed during the executive session. The Family Education Rights and Privacy Act (“FERPA”), 34 C.F.R. 99, exempts personally identifiable student information from disclosure. Accordingly, the appropriate forum for discussion of alleged student misconduct is an executive session as permitted under (b)(7).

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).

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). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). Notice of an executive session must be given 48 hours in advance of every session, excluding nights and weekend, 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.*

It is not entirely evident whether the School utilized and posted the agenda that was submitted by both parties to the formal complaint as its notice for the May 24, 2012 executive session, or whether it posted a separate notice entirely. The School provided that it properly noticed the May 24, 2012 executive session and cited I.C. § 5-14-1.5-6.1(b) as the statutory authority for the executive session. Assuming that the agenda was also utilized as the notice for the executive session, which is not prohibited under the ODL as long as the necessary information is provided and the record is timely posted, the agenda/notice fails to provide the specific statutory citation and the language of the statute. The agenda/notice specifically provides:

The White River Valley Board of School Trustees will meet in regular session on Thursday, May 24, 2012 at 7:30 p.m. at the Administrative Center in Switz City. An executive session will precede the open meeting at 6:00 p.m. to discuss personnel. I.C. § 5-14-1.5-6.1(b).

Accordingly, it is my opinion that the School Board violated the ODL by failing to provide proper notice for its May 24, 2012 executive session. If, for example, the School Board had met on May 24, 2012 in executive session solely pursuant to I.C. § 5-14-1.5-6.1(b)(5), a proper notice would have provided:

The White River Valley Board of School Trustees will meet in regular session on Thursday, May 24, 2012 at 7:30 p.m. at the Administrative Center in Switz City. An executive session will precede the open meeting at 6:00 p.m. to receive information about and interview prospective employees pursuant to I.C. § 5-14-1.5-6.1(b)(5).

As to the allegation that the School Board discussed issues during its executive session that went beyond what was allowed or properly noticed under the ODL, I would note that I was not in attendance at the executive session nor is the public access counselor 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*. If the School Board held discussions at its May 24, 2012 executive session on topics that went beyond what was allowable under I.C. § 5-14-1.5-6.1, then it would have acted contrary to the ODL.

For future reference, I would offer the following guidance. A governing body may meet in executive session to receive information about and interview prospective employees or discuss a job performance evaluation of an individual employee. *See* I.C. §§ 5-14.1.5-6.1(b)(5),(9). However, the ODL does not provide that a wide-ranging discussion of all personnel matters related to the agency may be discussed. While the School Board could have conducted interviews for a new football coach at an executive session; it could not have a discussion on all things related to the football program. Further, I.C. § 5-14-1.5-6.1(d) provides that the governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice. Lastly I would note that I.C. § 5-14-3-4(b)(8) provides that that certain

records, maintained in an employee's personnel file, may be excepted from disclosure at the discretion of the agency. There may be other applicable state and federal laws that make certain records, or parts of certain records, maintained in the employee file confidential; but by itself, subsection (b)(8) does not impart confidentiality on any record.

CONCLUSION

Based on the foregoing, it is my opinion that the School Board failed to provide proper notice for its May 24, 2012 executive session. Further, if the School Board held discussions at its May 24, 2012 executive session on topics that went beyond what was allowable under I.C. § 5-14-1.5-6.1(b), then it acted contrary to the requirements of the ODL.

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 long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Susan Traynor Chastain