STATE OF INDIANA

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November 21, 2013

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Re: Formal Complaint 13-FC-324; Alleged Violation of the Open Door Law by the Indiana State Board of Education[1]

Dear Complainants,

This advisory opinion is in response to your formal complaint alleging the Indiana State Board of Education ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.* The Board responded to your complaint via Ms. Michelle McKeown, Board General Counsel. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on November 8, 2013. Please be advised your request for priority status has been denied as there is no pending proceeding which would meet the standards enumerated in 62 IAC 1-1-3, however, it has been expedited at my discretion.

BACKGROUND

Your complaint alleges the Indiana State Board of Education violated the Open Door Law by conducting a meeting without notice.

You speculate in your formal complaint the Board met behind closed doors to draft a letter to Indiana Senate President Pro Tem David Long and Speaker of the Indiana House of Representatives Brian Bosma. The letter, dated October 16, 2013, addressed concerns with the Indiana Department of Education's alleged delay in providing the Board with timely data (A-F Grades) in order for the Board to meet accountability standards predetermined by State

[1] This cause number been consolidated at the request of the Complainants. The Formal Complaints are substantively identical.

and Federal regulations. Therein, the Board requested that President Pro Tem Long and Speaker Bosma forward the letter to the Legislative Services Agency for assistance in gathering the required data. They did so jointly on October 18, 2013. Ten Board members in total signed the letter. Chairwoman Glenda Ritz, Indiana Superintendent of Public Instruction, did not participate in the drafting or the signing of the letter.

The Board, through Ms. McKeown, filed a timely response to your complaint on November 15, 2013. In their response, the Board contends that no "secret" meeting of a majority of the Board took place to take official action on public business. It argues all communication regarding the letter was via email and a quorum of members was not present to constitute a majority. Furthermore, the Board asserts the letter itself, although signed by the members, was drafted by Board staffers who do not sit on the Board itself. The letter was then distributed individually to the Board members who indicated whether they wanted their name affixed to the letter. All ten members approved the letter and provided authorization for signature. Emails reflecting as such are attached to the Board's response.

Additionally, the Board posits that Ind. Code § 5-14-1.5-3.1 *et. seq*. excludes email communications from serial meetings. Furthermore, the Board argues the term "gathering" as intended by the serial meeting prohibition is not defined anywhere else the ODL as relating to email communication, therefore, online contact does not rise to the level of a "gathering".

ANALYSIS

It is the intent of the Open Door Law (ODL) 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 Ind. Code § 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 Ind. Code § 5-14-1.5-3(a).

"Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. Ind. Code 5-14-1.5-2(c). "Public business" means "any function upon which the public agency is empowered or authorized to take official action." Ind. Code 5-14-1.5-2(e). "Official action" is very broadly defined by our state legislature to include everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. Ind. Code § 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. Ind. Code § 5-14-1.5-5(a).

The Board concedes it is a public agency subject to the ODL and its response provides a limited history of the genesis of the letter in question. It contends the letter arose from an open meeting on October 2, 2013 regarding the grade calculations. On October 15, 2013 it became clear the grade calculations would not be released by the Indiana Department of Education until late 2013 and the Board took exception to the delay. To help expedite the

release of data, the October 16, 2013 letter was generated to bring the matter to the attention of the General Assembly.

Among other duties, the responsibilities of the Board include making recommendations to the governor and general assembly concerning the educational needs of the state. Ind. Code § 20-19-2-14(5). Clearly the Board had authorization to issue the letter. You assert the origination of the notion of issuing the letter may have been born out of a closed discussion.

I cannot state conclusively whether a discussion directing the Board's staff to draft the letter took place behind closed doors. You have not provided any evidence that any secret meeting took place. It may very well be the Board's staff would not unilaterally draft the letter without some kind of direction from the Board. Even so, there is no indication a *majority* of the Board directed them to do so. Therefore, it cannot be conclusively stated or inferred whether a quorum of the Board met to discuss the letter in advance. To be clear, if a majority of the Board (six or more members) directed the staff members to draft the letter, then a violation would have occurred.

In an October 16, 2013 email from Claire Fiddian-Green of the Center for Education and Career Innovation, Ms. Fiddian-Green clearly states the letter was drafted by the State Board of Education staff and not by the members themselves. She went on in the letter to solicit email input from the members of the Board as to their consent to affix their signatures to the letter.

The question remains if the online exchange constituted a serial meeting which is prohibited by the Open Door Law. While a serial meeting would typically be a violation of the Open Door Law, electronic mail is not considered to establish physical presence for a meeting. The Board did not violate the Open Door Law simply by communicating over email. In 2007, as the Board points out in its response, the Indiana General Assembly excluded email exchanges from serial meetings in Ind. Code § 5-14-1.5-3.1(a):

> [T]he governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:
>
> (1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.
>
> (2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.
>
> (3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.
>
> (4) The gatherings are held to take official action on public business.
>
> For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, **excluding electronic mail**.

Emphasis added.

As the *Court in Dillman v. Trs. of Ind. Univ*., 848 N.E.2d 348 (2006) has stated the legislature has specifically defined "meeting" under the Open Door Law as a gathering of a

majority of the governing body. "Without a majority present, there can be no meeting." I find it important to note the individual members weighed in one-by-one on the letter. They all ratified the action – some by way of "reply-all" messages. *All* members were recipients of the original email from Ms. Fiddian-Green and were privy to some of the replies. For all intents and purposes, this is *a meeting of the minds*, which just so happened to take place in cyberspace as opposed to a brick-and-mortar building.

While Indiana has not addressed whether email gatherings constitute a quorum for the purposes of a meeting where a constructive vote is taken, other jurisdictions have done so. As previously addressed in 05-FC-115, former Public Access Counselor Davis offered some guidance. Referencing the non-binding Virginia Freedom of Information Act, similar to the ODL, she cites in relevant part:

> "'Meeting' or 'meetings' means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body."

Va. Code Ann. § 2.2-3701.

Consider also the following from Counselor Davis:

> The Supreme Court of Virginia analyzed the definition of "meeting" using principles of statutory construction. The court stated:
>
> > "[T]he key to resolving the question before us is whether there was an 'assemblage.' The term 'assemble' means 'to bring together' and comes from the Latin simul, meaning 'together, at the same time.' The term inherently entails the quality of simultaneity. While such simultaneity may be present when e-mail technology is used in a 'chat room' or as 'instant messaging,' it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission."

Id. at 198.

The Virginia Supreme Court, under the circumstances presented, declined to find a meeting had occurred via e-mail. Applying the same logic in the case at hand, all of the replies occurred within approximately a 24-hour period. This is not "simultaneous" therefore, must be treated akin to a serial meeting. Indiana law has not yet addressed whether a meeting of the minds over an email chain would constitute constructive presence for public meetings or in an aggregate sum. To conclude as such would currently go beyond the scope of the legislature's intent. As Public Access Counselor, one of my statutory duties is to make recommendations to the general assembly concerning ways to improve public access. As such, I highly recommend that the legislature look into this issue.

Even through email, a perceived proactive ratification of an action concerning public interest is leaning against the public policy intentions of openness and transparency, but it cannot definitively be considered a violation of the Open Door Law as the legislature intended. I firmly believe the call-and-response nature of the email exchange amounted to an endorsement of the action, but I cannot say it is a vote in the traditional sense. The solicitation in the original email was for signatures only and not necessarily for approval of the issuance of the letter or input as to its content. It appears as if the letter would be sent regardless whether a majority ratified the letter. It should be noted, however, an open meeting is a condition precedent to a vote or final action under the ODL.

RECOMMENDATIONS

Departing from my typical Advisory Opinion format, I find it prudent to comment on this situation from an educational standpoint. By the letter of the law, the State Board of Education has not violated the Open Door Law. And although I am to liberally construe the public access laws in favor of its underlying policies, I cannot say definitively if there has been a violation.

In this instance, the email exchange could be interpreted as a ratification of a final decision by vote. I do not think it rises to that level, but the perception of the public is of significant importance. While email discussion and deliberation are excluded from serial meetings as not being violative, final decisions are meant to be open and transparent. In the future, the Board should be aware of these considerations. This is not meant to chill the exchange of ideas amongst public agencies, but to be dutiful to the ongoing pursuit of governmental accountability and accessibility.

I encourage all public agencies to be especially attentive to the purpose of public access laws to avoid ambiguous situations and arousing suspicions of prohibited activities. Regardless of intent, the *appearance* of action taken which is hidden from public view is particularly damaging to the integrity of a public agency and contrary to the purposes of transparency and open access.

Regards,

Luke H. Britt
Public Access Counselor

Cc: Ms. Michelle McKeown