



STATE OF INDIANA

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June 3, 2014

Mr. Keith Benman
601 W. 45th. Ave.
Munster, IN 46321

Re: Formal Complaint 14-FC-100; Alleged Violation of the Open Door Law by the Gary/Chicago International Airport Authority

Dear Mr. Benman,

This advisory opinion is in response to your formal complaint alleging the Gary/Chicago International Airport Authority ("GCIAA") violated the Open Door Law (ODL), Ind. Code § 5-14-3-1 *et. seq.* The GCIAA has responded to your complaint Mr. Lee I. Lane. His 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 May 2, 2014.

BACKGROUND

Your complaint dated May 1, 2014, alleges the Gary/Chicago International Airport Authority violated the Open Door Law by not providing appropriate notice of an executive session.

According to your formal complaint on April 23, 2014, the GCIAA held an executive session at the airport administration building. Notice was posted of the meeting; however, it did not include the subject matter of the discussion which would be a violation of the Open Door Law.

The GCIAA responds by arguing a quorum of majority of the board was not present as only three of five sitting members were physically present at the meeting. One member communicated by phone. The GCIAA Board has seven available seats of which only five are filled. The GCIAA does state it met to discuss matters authorized by the Open Door Law during executive sessions.

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).

Ind. Code § 5-14-1.5-6.1(d) states public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. The subject matters allegedly discussed do fall under the permissible discussion topics for a closed door executive session under the ODL.

The GCIAA states an executive session or any meeting could not have taken place as a majority of the Board was not present. "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. See Ind. Code § 5-14-1.5-2(c).

Several issues are raised by the GCIAA in their response. The first is the matter of what constitutes a meeting. Of the seven seats on the GCIAA Board, only five are currently filled. Therefore, the GCIAA essentially argues four members would still constitute a quorum even though two seats are vacant.

I disagree with this argument. A quorum is established by a majority of a board as it currently exists. In its present state, there are five members of the GCIAA Board. Thusly, three members constitute a quorum. While voting procedures may say different in the Board's by-laws or policy, for the purposes of the Open Door Law, three of five members is a majority. This analysis is rooted in the general principles discussed in *Board of South Vermillion School Trustees v. Benetti*, 492 N.E.2d 1098 (1986). The Court stated as follows:

Statutes pertaining to other state regulated forums, defining a quorum and the vote necessary to perform acts empowered to the governing bodies of those other forums, shed some light on the legislature's intent. [e.g.] The statute pertaining to a city legislative governing body defines a quorum as "[a] majority of all the elected members of the legislative body.

A majority or quorum is not defined by more than half of the available seats on the board, but rather the number of elected or appointed members. In the current instance there are five current members. Three establishes a majority for the purposes of the ODL.

In any case, a fourth member was present telephonically at some point during the executive session. Ind. Code § 5-14-1.5-3.5(b) states:

A member of the governing body of a public agency who is not physically present at a meeting of the governing body but who communicates with members of the governing body during the meeting by telephone, computer, video conferencing, or any other electronic means of communication:

(1) may not participate in final action taken at the meeting unless the member's participation is expressly authorized by statute; and

(2) may not be considered to be present at the meeting unless considering the member to be present at the meeting is expressly authorized by statute.

GCIAA interprets this statute to imply telephonic presence is not sufficient to constitute a majority for the purposes of taking official action on public business. I disagree. This statute is for the purposes of establishing presence for a quorum in order to take final action or votes. To accept GCIAA's interpretation would be authorizing governing bodies to hold telephonic or videoconference discussion sessions behind closed doors. This would effectively erode the objective of the Open Door Law itself. Any kind of *simultaneous communication* by a majority of elected or appointed board members is enough to trigger the Open Door Law. See also *Opinion of the Public Access Counselor 13-FC-275*.

In regard to the notice issue, notice of an executive session must be given 48 hours in advance of every session, excluding holidays and weekends, 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 Ind. Code § 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 Ind. Code § 5-14-1.5-6.1(b)(9)" would satisfy the requirements of an executive session notice.

Had the executive session taken place as GCIAA planned, with the presence of a majority of the GCIAA Board, the notice was deficient. The attendance argument of the Board notwithstanding, the executive session took place in the eyes of the Open Door Law. Regardless, GCIAA intended to hold an executive session. The notice provided was deficient as it did not include subject matter.

I do not believe the GCIAA has acted in bad faith conducting the meeting, and it has indicated its intention of complying with the Open Door Law in the future. I trust future GCIAA executive session will be held accordingly.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the Gary/Chicago International Airport Authority acted contrary to the Open Door Law by

conducting an executive session of a majority of its elected/appointed members without giving proper notice.

Regards,

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Lee I. Lane