



STATE OF INDIANA

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August 4, 2014

Mr. Wayne E. Uhl, Esq.
3077 East 98th. St., Ste. 240
Indianapolis, IN 46280

Re: Formal Complaint 14-FC-140; Alleged Violation of the Access to Public Records Act by the Indiana Civil Rights Commission

Dear Mr. Uhl,

This advisory opinion is in response to your formal complaint alleging the Indiana Civil Rights Commission ("ICRC") violated the Open Door Law (ODL), Ind. Code § 5-14-3-1 *et. seq.* The ICRC has provided a response to your complaint via Counsel, Akia A. Haynes, Esq. Her response is attached 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 July 2, 2014.

BACKGROUND

Your complaint dated July 2, 2014, alleges the Indiana Civil Rights Commission violated the Open Door Law by not providing appropriate notice of an executive session.

The ICRC Commissioners review findings of fact and conclusions of law as the ultimate authority reviewing orders of ICRC hearing officers in administrative law cases. See generally Ind. Code § 4-22 *et. al.* On June 6, 2014 you received a Commission Order (dated May 30, 2014) remanding the matter to the administrative law judge for consideration. This Order was subsequent to oral arguments held on April 25, 2014.

The Commissioners hold regularly scheduled meetings to discuss ICRC business. The ICRC does not keep minutes of their meetings, but rather posts transcripts of the proceedings on the ICRC's web site. Upon receiving the public notice posted of the May 30, 2014 meeting and comparing it to the meeting transcript, you identify portions of the transcript which indicate the Commissioners take recesses to discuss cases off-the-record before voting on them. The transcript suggests this is a common practice of the Commissioners.

ANALYSIS

It is the intent of the Open Door Law (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 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).

In this case, the ICRC Commissioners are the governing body designated as the ultimate authority for the ICRC regarding agency actions. See Ind. Code § 22-9-1-6. The monthly meetings held by the ICRC Commissioners are public meetings subject to the Open Door Law and it appears the ICRC posts the requisite notice and satisfies the majority of the requirements of the ODL. You take exception, however, to the practice of convening behind closed doors to discuss cases. You characterize such actions as being an illegal executive session.

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 48-hour notice requirements of Ind. Code § 5-14-1.5-5 also apply to executive sessions.

Because "official action" is defined so broadly by the Indiana General Assembly, virtually any discussion on matters of public business by a majority of a governing body's members would fall under the purview of the Open Door Law. The adjudication of administrative cases before the Commission is certainly public business. As such, any closed door meetings would need to be held pursuant to Ind. Code § 5-14-1.5-6.1 as an executive session.

The ICRC Commissioners do not have an inherent justification for holding closed door discussions about pending cases. A properly noticed executive session would be required. Although they have not asserted it as an argument, Ind. Code § 5-14-1.5-6.1(b)(2)(B) authorizes executive sessions to discuss pending administrative litigation. As you have indicated in your complaint, the ultimate authorities of many public agencies hold

administrative review deliberations in the open and do not take matters under advisement. I do not encourage closed-door discussions (even if authorized) unless it is absolutely necessary for the protection of privacy. In any case, a governing body as a collective may never take any final action during executive sessions. Individual members may come to a conclusive determination, but no votes or decisions are ever to be made behind closed doors as a quorum.

If appears as if the ICRC has also recognized the public's interest in observing these deliberations and has commendably amended their practices to deliberate cases in open meetings. While it is noteworthy the ICRC is remediating the issue, a violation has indeed occurred as you describe in your complaint.

You suggest that if a matter was discussed behind closed doors, any decision arising from such a discussion is void. This is not automatically the case. A final action will only be overturned if voiding a decision is a necessary prerequisite to a substantial reconsideration of the subject matter. See Ind. Code § 5-14-1.5-7. The Public Access Counselor does not make these factual determinations and the decision to remand would only be overturned pursuant to an order from a trial court.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the Indiana Civil Rights Commission has violated the Open Door Law.

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Ms. Akia A. Haynes, Esq.