



STATE OF INDIANA

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March 4, 2016

Ms. Jimella Harris
4609 Woodlyn Court
Fort Wayne, Indiana 46816

Re: Formal Complaint 16-FC-21; Alleged Violation of the Open Door Law by the East Allen County Schools Board

Dear Ms Harris:

This advisory opinion is in response to your formal complaint alleging the East Allen County Schools Board ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 et. seq. The Board has responded to your complaint via counsel, Mr. Mark Scudder. 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 February 2, 2016.

BACKGROUND

Your complaint dated February 2, 2016 alleges the East Allen County Schools Board violated the Open Door Law by improperly conducting an executive session.

On January 12, 2016, the Board conducted an executive session to train school members under Ind. Code § 5-14-1.5-6.1(b)(11). On January 16, 2016, Mr. Baker informed you the meeting involved discussion of a potential referendum. Mr. Baker also noted that a referendum could not occur until a 1028 Hearing has occurred. After the executive session, the Board decided to remove the hearing from the agenda for the next public meeting.

On February 23, 2016 the Board responded via counsel. The Board contends that discussing the referendum was not improper because, the training provided included training on issues such as the referendum process.

Counsel also notes three (3) Board members met with the superintendent after the meeting to discuss the referendum. However, counsel asserts this was not a violation of the ODL, because the meeting did not constitute a gathering of the majority of the seven (7) member board. Counsel does acknowledge the Board members and superintendent decided to remove the hearing from the agenda for the January public meeting.

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).

Under Indiana Code, executive sessions may only be held under certain circumstances, one of them being training of school board members. *See Ind. Code 5-14-1.5-6.1(b)(11)*. Indiana Code § 5-14-1.5-6.1(d) requires a public agency conducting an executive session to “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. Further, under Ind. Code 5-14-1.5-6.1(c) states that “final action must be taken at a meeting open to the public.”

The Board admits a conversation occurred after the executive session between three (3) board members and the superintendent. However, the Board also admits that as a result of this discussion, the three (3) board members and the superintendent decided to remove the 1028 Hearing from the agenda of the January meeting. It is difficult to qualify removal of an item from a meeting agenda as an official action within the definition of Ind. Code § 5-14-1.5-2, because the removal is not substantive public business. Removal of an item from an agenda does not involve policy decisions or deliberations on initiatives. Setting an agenda is merely a condition precedent to taking official action. To be clear, placing something on a ballot or setting a referendum on a resolution would be official action on public business, but not merely setting an agenda to discuss those matters.

In any event, three (3) members of the Board meeting with the superintendent is not a majority gathering by definition. A meeting is defined under the ODL as 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)*. Superintendents are not school board members and do not count toward a majority.

Your complaint was precipitated by a comment made by the School Board president in an email indicating there was discussion of the referendum in executive session. The Board is correct that discussion of the referendum process is permissible within a training session. The Board President’s email on January 16, 2016 stated that “a possible referendum was discussed.” While discussion of the referendum process is permissible in the hypothetical, discussion of a pending matter or an imminent initiative is not. For that reason, I caution the Board members to be cautious when using the training exception for executive session that it not include discussion of a matter which may be a potential issue in the future. Such discussions should be hypothetical in nature and truly procedural. While the communication may have been merely demonstrative, it creates the appearance of impropriety which specifics of a referendum was discussed.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor the East Allen County Schools Board has not violated the Open Door Law if the referendum was discussed in executive session in

procedural terms. If the discussion included specific policy considerations or ramifications, it is inappropriate for executive session.

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Mr. Mark D. Scudder, Esq.