

February 1, 2002

Re: *Advisory Opinion 02-FC-01*;

Alleged Violation of the Open Door Law by the Elkhart County Commissioners

Dear Mr. McCloskey:

This is in response to your formal complaint, which was received on January 4, 2002. You have alleged that the Elkhart County Commissioners ("Commissioners") violated the Indiana Open Door Law ("ODL"), Indiana Code chapter 5-14-1.5. According to your complaint, a majority of the members of the Commissioners reached a decision as to the election of officers and appointments or assignments for the year some time prior to the meeting held on December 31, 2001 without posting notice to the public. Mr. Phil Neff, President of the Board of Commissioners and Mr. Phil Stiver, Vice President of the Board of Commissioners responded jointly to your complaint. A copy of the response is enclosed for your reference. It is my opinion that there is insufficient evidence to indicate that the Commissioners conducted a meeting in violation of the ODL.

#### BACKGROUND

In your complaint, you allege that discussions and the decisions concerning Commissioner officer and assignments or appointments took place outside of a properly noticed meeting. As evidence of these possible violations, you point to the fact that on December 31, 2001 you discovered a document entitled "2002 Commissioner Assignments," which was created prior to any vote on the matter.

In response to your complaint, Mr. Neff and Mr. Stiver stated that on December 10, 2001 the Commissioners held an administrative function meeting pursuant to Indiana Code section 5-14-1.5-6.1 (f). According to Mr. Stiver and Mr. Neff, as a result of the December 10th administrative function meeting then President Stiver instructed Ms. Erschen to prepare a list of 2002 Commissioner assignments.

#### ANALYSIS

The intent and purpose of the ODL is 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." Ind. Code § 5-14-1.5-1. The provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-2. The Board of Commissioners is a governing body of a public agency subject to the ODL. Ind. Code § 5-14-1.5-2(b)(2).

A meeting for the purpose of the ODL is defined as 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). The general rule is that meetings of public agencies are to be held openly, so that the public may "observe and record them." Ind. Code § 5-14-1.5-3(a). There are three elements to this definition: a majority, official action and public business. If all three elements are met, the requirements of the ODL apply, including providing notice of the meeting and preparing memoranda. See, Ind. Code §§ 5-14-1.5-4 and 5.

For the purposes of my opinion, I will address the second two elements first: official action and public business. The action taken prior to the December 31st public meeting must have been "official action" by the Commissioners in order to be subject to the requirements of the ODL. Official action is defined under the ODL to include making a decision. Ind. Code § 5-14-1.5-2(d). According to your complaint, you believe that Mr. Neff and Mr. Stiver held a meeting prior to the December 31st meeting and made a decision regarding commission elections and assignments, which would qualify as "official action."

The second element for the purposes of a meeting under the ODL is whether the discussions and decisions at issue concerned public business. Public business is defined in the ODL to mean "any function upon which the public agency is empowered or authorized to take official action." Ind. Code § 5-14-1.5-2(e). According to the information in your complaint and the response by Mr. Stiver and Mr. Neff, it is clear that the elections and assignments or appointments by the Commissioners are public business.

The final point of analysis is whether a majority of the members of the Commissioners were present. Since the Board of Commissioners is comprised of three (3) members, two members constitute a majority. You contend that at some point prior the December 31st meeting Mr. Neff and Mr. Stiver met without posting notice and decided the commissioner elections and assignments or appointments for the year 2002. You claim that the creation of the "2002 Commissioner Assignments" list is evidence of that meeting. However, you have provided no other evidence that any such meeting occurred. Mr. Neff and Mr. Stiver stated in their joint response that it was Mr. Stiver alone who instructed Ms. Erschen to prepare the list of "2002 Commissioner Assignments." This was done, according to Mr. Neff and Mr. Stiver's response, as a result of the December 10th administrative function meeting, which you attended. Since a majority of the Commissioners is required for the ODL to apply, action by Mr. Stiver alone would not be subject to the provisions of the ODL.

## CONCLUSION

It is my opinion that action by less than a majority of the Commissioners is not governed by the Open Door Law. Therefore, action by Mr. Stiver alone would not be subject to the Open Door Law. Since you have provided no evidence other than the 2002 Commissioner assignment list that a meeting occurred between Mr. Stiver and Mr. Neff it is my position that there is insufficient evidence to indicate the Elkhart Board of County Commissioners conducted a meeting in violation of the ODL.

Sincerely,

Sandra K. Barger  
Staff Attorney

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