

July 16, 2002

Ms. Donna Thacker
323 Diehl Drive
Lawrenceburg, IN 47025

Re: *Advisory Opinion 02-FC-24*;

Alleged Violation of the Open Door Law by the Lawrenceburg Community School Corporation Board of Trustees.

Dear Ms. Thacker:

This is in response to your formal complaint, which was received on June 19, 2002. You have alleged that the Lawrenceburg Community School Corporation Board of Trustees ("School Board") has violated the Indiana Open Door Law ("ODL") Indiana Code chapter 5-14-1.5. Specifically, you claim that the School Board discussed administrative salaries and contract recommendations in executive session and that this discussion was not authorized under the ODL. Mr. Ron Rychener, attorney for the School Board responded in writing to your complaint. A copy of his response is enclosed for your reference.

It is my opinion that the School Board did not violate the ODL by discussing individual employees' salary and benefit issues during executive sessions held under Indiana Code section 5-14-1.5-6.1(b)(9). Further, it appears that the final action on these matters was taken on these matters at a public meeting as is required under the ODL.

BACKGROUND

In your complaint, you allege that at a public meeting of the School Board on June 10, 2002, two (2) board members referenced discussions previously held concerning administrative salary and contract recommendations. The only meetings held in the weeks before the June 10th meeting were a special public meeting to award a mechanical contract award and two executive sessions. The issue was not discussed at the special public meeting, so you believe that the discussion occurred at one or both of the executive sessions. The notices of executive session referenced Indiana Code sections 5-14-1.5-6.1(b)(2), for strategy discussions and 5-14-1.5-6.1(b)(9), and it is your position that neither of these exceptions would allow the School Board to discuss administrator's salaries and contract recommendations outside of a public meeting. You then filed your formal complaint with this Office.

In his response to your complaint, Mr. Rychener stated that there were two (2) executive sessions held prior to the June 10th public meeting. These executive sessions were held on June 3rd and June 6th and the notices provided that the School Board would be meeting as permitted under Indiana Code section 5-14-1.5-6.1(b)(9), which permits governing bodies to meet in executive session to discuss the job performance evaluations of individual employees. A committee formed by the superintendent had

reviewed the salary and benefits issues and made recommendations to the School Board. The School Board then discussed, in executive session, the job performance evaluation of individual employees, as permitted under Indiana Code section 5-14-1.5-6.1(b)(9), including salary and compensation in connection with the job performance evaluations. The School Board contends there was no violation of the ODL because they were not discussing salary and benefits generally for a group of employees, but only with respect to the job performance evaluations individual employees.

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 § 5-14-1.5-1. The School Board is a public agency and a governing body subject to the ODL. Ind. Code §§ 5-14-1.5-2(a) and (b).

A meeting for the purposes 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). As noted above, 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). The exception to the general rule that a meeting of the governing body must be open to the public is an executive session.

Executive session is defined as a meeting "from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." Ind. Code §5-14-1.5-2(f). One of these exceptions provides that a governing body may meet in executive session to

discuss a job performance evaluation of an individual employee. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.

Indiana Code §5-14-1.5-6.1(b)(9). The question raised by your complaint concerns the notice of the June 3rd and June 6th executive sessions¹ and whether the discussions of specific administrator's salaries and contract recommendations was permissible during those gatherings under Indiana Code section 5-14-1.5-6.1(b)(9).

It is the public policy of the ODL that it is to be construed liberally in favor of disclosure. For this reason, Indiana courts have generally held that exceptions to the general rule of openness are to be narrowly construed. Ind. Code §5-14-1.5-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . .

"[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective

'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted.], quoting, *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted].

While narrow construction of the executive session exceptions under the ODL is the general rule, a recent Indiana Court of Appeals decision interpreting the executive session exception for job performance evaluations appears to allow a more liberal reading of this provision. In *Baker v. Town of Middlebury*, 753 N.E.2d 67, (Ind. App. 2001), *transfer denied* (2002), an employee of the Town alleged that during an executive session to discuss his job performance, the Town Council had violated the ODL. Specifically, Mr. Baker alleged that the Town Council had taken final action during the executive session, which is not permitted under Indiana Code section 5-14-1.5-6.1(c), by compiling a list of persons to be rehired during that private session and keeping his name off the list. The list was later used in the open, public meeting to make decisions on who would be rehired. The Court held that the compilation of the list was not "final action²" and that doing so did not go beyond the scope of the General Assembly's expressed intention to permit governing bodies the ability to meet privately to discuss certain personnel matters.

Based upon the facts provided to me and applying the case law mentioned above, it is my opinion that the language of Indiana Code section 5-14-1.5-6.1(b)(9) does permit a governing body to discuss salary and benefit matters related to the job performance of individual employees. In this case, the language of Indiana Code section 5-14-1.5-6.1(b)(9) appears to recognize that salaries and benefits may be discussed in relation to a job performance evaluation. A governing body may not, however, use this same exception to discuss of salaries and benefits for groups of employees during a budget process. According to Mr. Rychener, the only discussions that took place did concern the individual employees who were being evaluated and did not constitute general discussions of these matters, which are prohibited under Indiana Code section 5-14-1.5-6.1(b)(9). It also appears that final action on the issues discussed during those executive sessions took place at the June 10th meeting, and according to the Baker Court, this is what was required.

CONCLUSION

It is my opinion that the Lawrenceburg Community School Corporation Board of Trustees did not violate the Open Door Law with respect to their June 3rd and June 6th executive sessions to discuss the job performance evaluations of individual employees by discussing individual salary and benefits issues. Final action on the salary and benefits matters was taken at a public meeting on June 10th as required under the Law.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Ron Rychener, Attorney for LCSC

¹ Although it was not raised in your complaint, nor in Mr. Rychener's response, the notice of the June 6th executive session provided to me did not include a reference to the specific statute authorizing an executive session. Indiana Code section 5-14-1.5-6.1(d) requires such a specific reference. This may not have been a copy of the actual posted notice, but I would caution the School Board to ensure that this information is included in all future notices.

² Final action is defined under the ODL as "a vote by the governing body on any motion, proposal, resolution, rule, regulation or order." Ind. Code §5-14-1.5-2(g).