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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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JERRY THOMAS MELE, JR.  
*Complainant,*

v.

INDIANA PROFESSIONAL LICENSING AGENCY  
*Respondent.*

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Formal Complaint No.  
21-FC-44

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Professional Licensing Agency violated the Access to Public Records Act<sup>1</sup> and the Open Door Law.<sup>2</sup> Attorney Alyssa Servies filed an answer on behalf of PLA.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

<sup>2</sup> Ind. Code § 5-14-1.5-1-8.

In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on April 15, 2021.

### **BACKGROUND**

This case involves a dispute over access to contact information and whether the Indiana State Board of Nursing illegally held both an executive session and a public meeting.

On March 19, 2021, Jerry T. Mele (Complainant) filed a public records request with the Indiana Professional Licensing Agency (PLA) seeking the following:

Contact information, telephone number, cell phone number, mailing address, and email address of Michael Antonio Barrera, a licensee of the Behavior Health Board

Mele asserts this was the second time he submitted the request with the PLA and at the time the complaint was filed he had not received a response from the agency.

Mele also alleges that on March 18, 2021, the Indiana State Board of Nursing held an executive session, the public notice for which stated the purpose of the meeting was to discuss pending litigation. Mele claims that there was no pending litigation before the board at the that time.

The final part of Mele's complaint concerns another meeting held by the State Board of Nursing on March 18, 2021, which was open to the public. Mele contends the board members "took a break" before deliberation of three of his motions before the Board. Apparently, after this break the Board voted 8-0 against all three motions without holding

public discussions. Mele argues that these actions clearly indicate that the Board of Nursing conducted its deliberations in violation of the Open Door Law.

Accordingly, Mele filed his complaint on April 8, 2021.

On May 5, 2021, the PLA responded to Mele's allegations through the Board Director for the Indiana State Board of Nursing and on behalf of PLA generally. Regarding the allegation that the agency violated the APRA, PLA states that the Board lacks sufficient evidence to respond to Count 1 of Mele's complaint because the Behavioral Health and Human Services Board is separate from the Indiana State Board of Nursing. That stated, PLA does indicate that the requested information was available on the agency's website and this office has confirmed that the information is available through a search portal.

As for Mele's second claim, PLA disputes the Complainant's assertions, first by providing a copy of the notice of the March 18, 2021, executive session as evidence that the meeting was held lawfully then by denying there is no pending litigation which would require an executive session (inferring there is pending litigation).

Finally, regarding the public meeting held on March 18, 2021, PLA argues that the meeting in question was one of many regularly scheduled monthly public meetings held by the Board of Nursing, which can often last eight or more hours. Given the long duration of these meetings board members can take breaks to address personal needs, which was the case during the meeting in question. Of the multiple breaks that were taken during the March 18, 2021, meeting Mele's motions were never discussed. Furthermore, PLA

states that the board and its advisory counsel discussed the motions during the meetings with each member provided a copy of each of the motions.

In sum, the PLA rejects Mele's allegations and argues that the neither the PLA nor the State Board of Nursing violated the Access to Public Records Act or the Open Door Law.

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code § 5-14-3-1. The Indiana Professional Licensing Agency (PLA), the State Board of Nursing, and the Behavioral Health and Human Services Board are public agencies for purposes of APRA; and therefore, subject to the law's requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the agencies' public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a); -(b).

#### 1.2. Mele's request

Insofar as Mele's APRA request is concerned, the information is indeed conspicuously available online through a PLA search portal.

While it is unclear why Mele's request went unaddressed, one possibility is the recency of Mele's appearance before the licensing board. In any case, the information has now been made available and the issue remedied.

## **2. The Open Door Law**

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.

Except as provided in section 6.1, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. Ind. Code § 5-14-1.5-3(a).

### **2.1 Executive Sessions**

Under the ODL, the term "executive session" means "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).

There exists a heightened requirement for executive session notice and for good reason. While the law allows some latitude to a governing body to meet behind closed doors, the public in turn is entitled to specific notice as to why.

The ODL requires public notice of executive sessions to state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). Ind. Code § 5-14-1.5-6.1(d).

Subsection (b), of course, lists the specific subject matters that are authorized for an executive session.

It appears as if the Board noticed the meeting properly in that discussions of strategy with respect to pending litigation is an appropriate purpose for an executive session. *See* Ind. Code § 5-14-1.5-6.1(b)(2)(B).

Accordingly, “strategy” is indeed a fairly broad term and can reasonably include potential resolutions to a case including settlements, concessions, pleadings, and motions. Any course of action germane to pending litigation is fair game for “strategizing.” Notably, litigation can include administrative litigation, which tracks with the day’s public agenda on March 18. While a governing body does not have to identify the specific litigation in its notice, an executive session is appropriate so long as the discussions are related to litigation strategy.

## **2. 2 Meeting recesses**

The complaint implies that a meeting recess immediately preceding a vote on his motions is proof positive that deliberations took place outside of the meeting itself.

It is impossible for this office to say conclusively whether those talks took place during a recess, it can affirmatively be stated that all public business should cease during a break and only resume when the meeting begins again.

While circumstantially it may look suspicious, the test is whether the motions before the Board were substantively discussed prior to the vote. The complaint does not identify whether there was any discussion preceding the vote or

whether the vote was taken cursorily without any discussions whatsoever. The Board claims discussions took place during the public meeting. Without more, there can be no conclusive determination on this point.

**CONCLUSION**

Based on the foregoing, it is the opinion of this office that the PLA and its governing bodies did not violate the Access to Public Records Act or the Open Door Law.



Luke H. Britt  
Public Access Counselor