

May 27, 2008

Richard Dunkin  
2416 South 5<sup>th</sup> Street  
Terre Haute, Indiana 47802

*Re: Formal Complaint 08-FC-109; Alleged Violation of the Open Door Law by the  
Terre Haute Housing Authority Board of Commissioners*

Dear Mr. Dunkin:

This advisory opinion is in response to your formal complaint, and the formal complaints of fifteen other individuals, alleging the Terre Haute Housing Authority Board of Commissioners (“Board”) violated the Open Door Law (“ODL”) (Ind. Code 5-14-1.5) by failing to provide proper notice for “several” executive sessions. I have enclosed a copy of the Board’s response to your complaint for your reference. In my opinion the Board did not provide proper notice for the April 18 and April 28 executive sessions. Further, the subject matter of the April 18 meeting may have been inappropriate for an executive session.

#### BACKGROUND

You and fifteen other individuals allege the Board conducted several executive sessions for which no notice was posted. Because the complaints are quite similar in nature and in subject matter, I have consolidated all sixteen complaints and now issue this opinion in response. While no complaint provided a detailed narrative, it is my understanding the complainants allege the Board has a practice, in place since November 2007, of holding executive sessions without proper notice as required by the ODL. Specifically, you allege the Board held executive sessions on March 24, April 18, April 25, and April 28 (the March 24 and April 25 dates were alleged by only one complainant) and did not provide proper notice of those executive sessions. You requested priority status for the complaint but did not allege any of the reasons for priority status listed in 62 IAC 1-1-3, so priority status was not granted.

The Board responded to the complaint by letter dated May 23 from attorney David Sullivan. The Board contends no meetings were held on March 24 or April 25. Regarding the April 18 meeting, the Board contends notice was issued for the regular meeting of the Board. At the conclusion of the regular meeting, the Board “went into brief executive session;” the executive session was not noticed or advertised. The Board contends no

action was taken during the brief meeting. The Board further contends that during the regular, properly noticed, April 28 meeting, the Board briefly went into executive session and received information about a prospective employee. The Board contends no action was taken during the session. The session was not noticed. When the Board returned to its regular meeting, the Board voted, following a motion and second, to hire an executive director.

The Board contends it held another meeting on May 20, following appropriate notice, at which many of the complainants were present. At that meeting, the Board voted, pursuant to another motion, to hire an executive director. The Board contends it has long been the duty of the executive director to issue notices for the meetings. Finally, the Board contends the members are revising their procedures to make certain all notices and conduct of meetings comply with the ODL.

## ANALYSIS

It is the intent of the Open Door Law 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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, 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. I.C. § 5-14-1.5-3(a). Executive sessions may only be conducted for the enumerated instances listed in the ODL. I.C. § 5-14-1.5-6.1.

A “meeting” means a gathering of the majority of the governing body of a public agency for the purpose of taking official action upon public business. I.C. § 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. I.C. § 5-14-1.5-2(d). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. I.C. § 5-14-1.5-2(g).

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. I.C. § 5-14-1.5-5(a). Notice shall be given by posting a copy of the notice at the principal office of the public agency or at the building where the meeting is to be held if no principal office exists and by delivering to the news media who submit an annual request for notices by January 1. I.C. § 5-14-1.5-5(b). Public notice of executive sessions must state the subject matter by reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). I.C. § 5-14-1.5-6.1(d).

You have alleged the Board violated the ODL by holding executive sessions without providing proper notice of the meetings. One complainant of the sixteen alleges executive sessions were held on March 24 and April 25, but no other complainant addresses those dates, and I find no evidence the Board conducted executive sessions on those dates.

Regarding the April 18 meeting, the Board concedes it held a brief executive session at the conclusion of the regular meeting. The executive session was not properly noticed. The Board contends it did not take action during the brief executive session, but I remind the Board that “official action” is comprised of much more than voting. It is a common mistake of public officials to believe an executive session is appropriate so long as a vote is not taken. But the definition of official action includes receiving information, deliberating, making recommendations, establishing policy, making decisions, or taking final action (i.e. voting). I.C. § 5-14-1.5-2(d). So if the Board discussed any public business, that discussion would constitute official action. It is my opinion the Board violated the ODL by conducting an executive session without proper notice on April 18.

Further, the Board may have violated the ODL by conducting an executive session for an instance not specifically allowed by I.C. § 5-14-1.5-6.1(b). An executive session may only be conducted for an instance provided in I.C. § 5-14-1.5-6.1(b). Because I am not privy to the subject matter of the April 18 executive session, I cannot definitely say whether the executive session was held for an instance allowed by the ODL.

Regarding the April 28 meeting, the Board concedes it held an executive session during the regular meeting. Again, the executive session was not noticed. Again, it is my opinion the Board violated the ODL by not providing proper notice for the executive session. Regarding the subject matter of the executive session, the ODL allows an executive session to receive information about and interview prospective employees. I.C. § 5-14-1.5-6.1(b)(5). Because the Board indicated it used the executive session to receive information about a prospective employee, it is my opinion the instance for which the Board held the executive session was proper.

Here again, the Board contends it did not take action during the executive session. But if the Board received information about a prospective employee, it indeed took action, since receiving information is taking official action. *See* I.C. § 5-14-1.5-2(d). Finally, the Board indicates the April 28 executive session was conducted during the regular meeting. A governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. I.C. § 5-14-1.5-6.1(e). As such, unless the Board can provide an applicable statute allowing it to conduct the executive session during its regular meeting, it is my opinion the Board violated the ODL by conducting the executive session during the regular meeting.

I understand the Board contends the executive director is responsible for providing notices of Board meetings. I further understand the Board has indicated it is revising its procedure to make certain all notices and conduct of meetings comply with the ODL. I would urge the Board to keep in mind that ultimately it is the governing body’s (i.e. the Board’s) responsibility to make certain all notices are provided as required by I.C. § 5-14-1.5-5, so in the event a notice is not provided for a meeting and the Board discovers the omission inside 48 hours before the meeting, the Board should postpone the meeting to a later time when a 48 hour notice may be provided.

## CONCLUSION

For the foregoing reasons, it is my opinion the Board did not provide proper notice for the April 18 and April 28 executive sessions. Further, the subject matter of the April 18 meeting may have been inappropriate for an executive session.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: David Sullivan, Cox Zwerner Gambill & Sullivan  
Tom Hunt, Terre Haute Housing Authority Board of Commissioners  
Additional complaints