



STATE OF INDIANA

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January 19, 2009

David Crisler
6948 Governors Point Drive
Indianapolis, Indiana 46217

*Re: Formal Complaint 09-FC-12; Alleged Violation of the Open Door Law
and the Access to Public Records Act by RISE Special Services*

Dear Mr. Crisler:

This advisory opinion is in response to your formal complaint alleging RISE Special Services ("RISE") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) and the Access to Public Records Act ("APRA") (Ind. Code 5-14-3). A copy of RISE's response to the complaint is enclosed for your reference. In my opinion RISE has not violated the ODL. Further, it is my opinion RISE violated the APRA if it denied access to the draft minutes of the December 1, 2008 meeting on the basis the minutes had not yet been approved.

BACKGROUND

You filed the present complaint on December 22, 2008. You allege that RISE held a meeting on December 1 to vote for a new principal for the RISE school. You allege the meeting was not publicized. You allege a small posted was posted on the back door of the RISE building. You contend the posting should have been at an entry location used by most parents and staff. You allege that "several witnesses to the meeting" contend the decision regarding hiring was made prior to the meeting, in an executive session. You also contend that public testimony was not allowed at the meeting.

Further, you allege you have requested a copy of the minutes of the December 1 meeting. You allege you were told the meeting minutes will not be available until February 2009. You include a copy of an electronic mail exchange between William Dreibelbis of RISE and you, wherein Mr. Dreibelbis indicates the minutes will not be available until approved at the next RISE Board meeting, February 5, 2009.

RISE responded to the complaint by letter dated January 7, 2009 from attorney Seamus Boyce. Mr. Boyce explains that his response is on behalf of RISE Special Services, which is the administrative agency; RISE Learning Center is a school which is

part of RISE Special Services. Mr. Boyce indicates the two share a building but have separate entrances. Further, Mr. Boyce explains that the governing body of RISE is made up of superintendents of the member school corporations. This office did not seek responses from each of those school corporations since RISE is the administrative agency responsible for meeting the requirements of the ODL and APRA.

RISE explains that the RISE Board held a meeting on December 1 to decide on a candidate to recommend for the position of principal at RISE Learning Center (final personnel decisions are made by the Metropolitan School District of Perry Township). Prior to the meeting, the RISE Board held an executive session to interview a candidate for the position. RISE contends it complied with the notice requirements of the ODL by sending notice to the news media on November 25 and by posting notice at the entrance of RISE at least 48 hours (excluding weekends and holidays) in advance of the meeting. The notice was posted at the entrance of RISE Special Services. RISE contends that just as a school corporation is not required to post notice of meetings at all of its schools, RISE was not required to post notice of the meeting at the RISE Learning Center.

Regarding the executive session, RISE contends the Board used the executive session to interview a candidate for the principal position. RISE Board members asked questions, and the candidate answered those questions. RISE contends no votes were taken and no decisions were made. RISE further contends it was only in the public meeting that the Board decided to recommend the candidate. Regarding public comment at the public meeting, RISE contends it follows a practice of only allowing public testimony when a group or individual has submitted a request prior to the meeting. Further, RISE Board members and administration stayed in the meeting room to address comments and questions from those in attendance.

Finally, RISE contends that when you requested a copy of the minutes, only a handwritten copy was available. RISE contends that when a typed version was available, the draft minutes were provided to you.

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).

Regarding notice, the ODL provides the following:

(a) 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 (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. This requirement does not apply to

reconvened meetings (not including executive sessions) where announcement of the date, time, and place of the reconvened meeting is made at the original meeting and recorded in the memoranda and minutes thereof, and there is no change in the agenda.

(b) Public notice shall be given by the governing body of a public agency by:

(1) posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and

(2) delivering notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency. . .

I.C. § 5-14-1.5-5.

Here, RISE contends notice was posted in accordance with the ODL. The notice was delivered to the news media on November 25, which was prior to 48 hours before the meeting, so long as that notice was sent by 2:00pm on November 25. Further, RISE contends the notice was posted at the principal office of the public agency. Here, the public agency is RISE Special Services. RISE contends the notice was posted at the entrance to RISE Special Services and was not required to be posted at RISE Learning Center. The ODL requires that notice be posted at the principal office of the public agency holding the meeting. I.C. § 5-14-1.5-5(b)(1). Since RISE Special Services was the agency holding the meeting, it is my opinion RISE was not required to post notice at RISE Learning Center. As RISE suggests, school corporations are required to post notice only at the administrative office location and not at each school location, even if business related to that school appears on the agenda for the meeting.

Regarding the executive session, the ODL provides that a governing body may conduct an executive session to receive information about and interview prospective employees. *See* I.C. § 5-14-1.5-6.1(b)(5). Here, RISE contends the executive session was held to interview the candidate for principal. As such, it is my opinion RISE was authorized to conduct an executive session on December 1 to interview the candidate for principal.

You allege that RISE made a decision during executive session and that decision should have been made during an open meeting. A final action must be taken at a meeting open to the public. I.C. § 5-14-1.5-6.1(c). “Final action” means a vote by a governing body on a motion, proposal, resolution, rule, regulation, ordinance or order. I.C. § 5-14-1.5-2(g). If RISE made the decision during executive session to recommend a candidate for the position of principal, that action would have been permissible pursuant to *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), so long as a vote was not taken at the executive session.

In *Baker*, Town Marshal Baker alleged that during an executive session to discuss his job performance, the Town Council had violated the ODL by compiling a list of persons to be rehired and keeping his name off the list. The list was later used in a public meeting to make decisions on who would be rehired. The court held that the compilation of the list was not "final action" and that creating the list did not go beyond the scope of the General Assembly's expressed intent to permit governing bodies the ability to meet privately to discuss certain personnel matters. Instead, the court said the "final action" consisted of the Council's vote at the public meeting. *Id.* at 71. Similarly, any decisions made by RISE during executive session in the present matter would not constitute final action. Final action was the vote to recommend the candidate, and that vote was taken during a meeting open to the public.

Further, you allege RISE violated the ODL when it declined to allow public testimony at the December 1 public meeting. Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. *Brademas v. South Bend Cmty. Sch. Corp.*, 783 N.E.2d 745 (Ind. Ct. App. 2003), *trans. denied*, 2003. As such, it is my opinion RISE did not violate the ODL by declining to allow public testimony.

Finally, you allege you requested a copy of the minutes of the December 1 meeting. You include an electronic mail message exchange between Mr. Dreibelbis and you, wherein Mr. Dreibelbis indicates the minutes will not be available until approved at the next RISE Board meeting, scheduled for February 5, 2009. This office had long held that drafts of records are disclosable public records and that access to such records cannot be denied on the basis the record has not yet been approved:

Applying these principles of statutory construction, it is clear that draft or proposed minutes of public meetings are merely summaries of information received, not deliberative material. While there is naturally a concern about accuracy in draft or proposed minutes, there is no provision in the APRA that would make such information nondisclosable. It is always important, however, that the recipient of the information is notified that the draft is subject to change and approval of the appropriate person or governing body. In this way, disclosure is possible, but the concern about someone relying upon the draft or proposed minutes is minimized. *Opinion of the Public Access Counselor 98-FC-08*, available at <http://www.in.gov/pac/advisory/files/op98-8.pdf>.

Here, RISE contends that the minutes were in handwritten format when you requested a copy. Pursuant to the APRA, and based on the analysis provided in *Opinion 98-FC-9*, it is my opinion RISE violated the APRA if it denied you access to the minutes on the basis they were unapproved. It is my understanding, though, that RISE has now provided you with a copy of the minutes.

CONCLUSION

For the foregoing reasons, it is my opinion RISE has not violated the ODL. Further, it is my opinion RISE violated the APRA if it denied access to the draft minutes of the December 1, 2008 meeting on the basis the minutes had not yet been approved.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Seamus Boyce, Church, Church, Hittle & Antrim