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Similar case, different PAC opinions

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SOUTH BEND - South Bend's school board might not have broken the law when it discussed closing schools in a closed meeting.

A similar meeting in 2007 by another Indiana school board, though, was ruled to have been illegal.

Like South Bend schools, **Indianapolis Public Schools** was under a court **order** requiring **desegregation** and its board met in executive session to discuss closing schools.

Also like South Bend, according to an Indianapolis Star article from Oct. 24, 2007, the district cited a state law that allows closed-door meetings to discuss pending litigation.

But in that case, then-Public Access Counselor Heather Neal ruled in an advisory opinion that **Indianapolis Public Schools'** court order signified the case was no longer pending.

Fred Cate, a professor of information and communications law with Indiana University in Bloomington, served on the legislative study committee in 1998 that created the public access counselor's office under then-Gov. Frank O'Bannon.

This week, a Tribune reporter asked Cate to reread the article about the IPS case, as well as information on the recent South Bend one.

In his opinion, the reason South Bend schools cited for the meeting is outside the scope that the exception was intended to deal with.

"In fact," he said, "I would argue the (South Bend) school district and the PAC were exactly wrong."

It all comes down to the wording of the law, he said.

Executive sessions can be held for the discussion of strategy relating to the initiation of litigation or litigation that is either pending or has been threatened in writing.

"Strategy, to a lawyer," Cate said, "means thinking through do we settle? What's it going to cost us? ... (It does) not mean implementation. We've got this court order. Now what do we do?

"That's precisely the business that should be conducted in public."

Taking that logic one step further, Cate said, the law says the strategy must be necessary for "competitive" reasons, such as deciding whether to settle, for example.

"How can it be necessary for competitive reasons," he asked, "when (in South Bend's case) there's already a judgment in place?"

Joseph Hoage, Indiana's current public access counselor, stood by his recent decision in the South Bend case.

Hoage said he didn't know about the 2007 case involving IPS and Neal's informal opinion.

But after reviewing the Star article, Hoage said, it appears he and Neal used similar analysis when reaching their opinions.

Neal, he pointed out, said she believed in the IPS case, the **desegregation order** was no longer pending.

In South Bend's case, he said, the district met its burden to demonstrate the case against it is still pending.

"If the facts surrounding the 2007 informal opinion regarding IPS are identical," Hoage wrote in an e-mail, "then my opinion differs from Counselor Neal's on this issue."

Though they're non-binding and advisory, Hoage said, PAC rulings are considered precedents.

Hoage's ruling did not ultimately decide the issue of whether the meeting violated the law in ways alleged by school board member Bill Sniadecki, who claimed the board discussed more than just the **desegregation order.**

Hoage pointed out that deciding what was or wasn't discussed falls outside his jurisdiction. But if the board limited its discussion to only the **desegregation order,** Hoage said, the meeting would be legal.

As for Cate, he said the job of the public access counselor is undoubtedly a difficult one.

And, he said, "It somehow doesn't surprise me for government to be inconsistent, especially when the occupant of the job changes."

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