

April 29, 2003

Ms. Melissa J. Widner
The Kankakee Valley Post News
827 N. Halleck
DeMotte, IN 46310

Re: *Advisory Opinion 03-FC-23*; Alleged Violation of the Notice Requirements of the Open Door Law by the Town of Wheatfield.

Dear Ms. Widner:

This is written in response to your formal complaint, which was received April 9, 2003. You have alleged that the Town Council of Wheatfield ("Town Council") has violated the Indiana Open Door Law. Ind. Code chapter 5-14-1.5 ("ODL.") Specifically, you claim that on April 6, 2003 an executive session was held without proper notice to the public and to your newspaper under Indiana Code section 5-14-1.5-5 and that this meeting may have included discussions that are not authorized under the ODL. Mr. Darwin Whited, Town Clerk-Treasurer, responded in writing to your complaint and a copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that the Town Council failed to post and deliver to you the notices required under Indiana Code section 5-14-1.5-5(b) in violation of the ODL. Further, it is my opinion that the Town Council could not discuss persons who work for township fire departments under contract with the Town to provide fire service because these persons are not "employees" of the Town.

BACKGROUND

According to your complaint, your newspaper learned through an anonymous caller on April 4, 2003 about a planned executive session of the Town Council. You contacted Mr. Whited by telephone that day, but he did not return your call until April 7th. Mr. Whited left a message at the newspaper office indicating that there was an executive session held on Sunday, April 6th with the township trustees to discuss contracts and personnel. You met with Mr. Whited the afternoon of April 7th and asked him whether notice had been posted under the ODL for the April 6th executive session. Your newspaper makes annual requests under Indiana Code section 5-14-1.5-5(b)(2), but you had not received notice of this meeting. Mr. Whited responded that he had mentioned the executive session at the last regular Town

Council meeting on March 20th that he had planned an executive session soon to discuss the fire chief and he believed that this constituted sufficient notice. Mr. Whited also told you at this time that no notice was posted under the ODL at the building where the meeting was to be held.

During your meeting with Mr. Whited, you also inquired about the stated purposes of the executive session and that discussion of contracts is not one of the items listed under Indiana Code section 5-14-1.5-6.1(b). Mr. Whited apparently stated that he was not aware of this and apologized for not complying with the ODL. It is your position that the Town Council used this executive session to discuss the provision of fire services to the Town and the fire chief of the Wheatfield Volunteer Fire Department, who is not an employee of the Town. You then filed your complaint with this Office. ¹

In his response to your complaint, Mr. Whited indicated that during the Town Council's March 20, 2003 meeting, someone asked the Town Council to review how personnel were operating the fire department. Town Council President Becky Czarnecki stated that an executive session would be held regarding this matter. According to Mr. Whited, a reporter from your newspaper, Kim Cobb, was present at this meeting and was aware of it. Mr. Whited also stated that on April 3rd, your newspaper ran an article about the March 20th meeting and mentioned that the Town Council would have an executive session. On Sunday, April 6, 2003, the executive session did take place and members of the public did show up to attend, apparently based upon the news article and the announcement at the March 20th meeting. The Town Council explained that the executive session was not open to the public. Mr. Whited received your telephone message after 5:00 P.M. on April 4th and your office was then closed for the weekend. Mr. Whited stated that he called first thing on April 7th and met with you three (3) hours later.

Mr. Whited's position is that the Town Council made no effort to conceal the executive session from the public. He indicated that the public even knew that the reasons for the executive session were to discuss personnel and contracts. The Town has three (3) contracts with three (3) different townships for fire protection and had invited the various township trustees to attend the executive session. The township trustees who were present, however, did not want to discuss the contracts, so they limited the discussion to personnel matters. Mr. Whited stated that he would make every effort to follow the proper procedures for notice in the future.

ANALYSIS

The intent and purpose of the Indiana Open Door Law 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 Town Council is a public agency and a governing body for the purposes of the Law. Ind. Code §§ 5-14-1.5-2(a) and 2(b).

Indiana Code section 5-14-1.5-3(a) provides, in pertinent part, that:

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.

A meeting 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). An executive session is a meeting for which the governing body may lawfully exclude the public, but executive sessions may only be held for limited purposes that are listed at Indiana Code section 5-14-1.5-6.1(b). Ind.Code §5-14-1.5-2(f).

In your complaint, you have raised two (2) issues related to the conduct of the April 6th executive session of the Town Council: whether proper notice was given of the meeting under the ODL and whether the stated purposes for the executive session were valid under the ODL. Each of these issues will be addressed in the following paragraphs.

Meeting Notice

Indiana Code section 5-14-1.5-5(a) provides that:

(p)ublic 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.

The governing body is required to:

- (1) (post) 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) (deposit) in the United States mail with postage prepaid or by 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.

Indiana Code §5-14-1.5-5(b). [Emphasis added.] Your newspaper did make an annual request to the Town for copies of meeting notices for calendar year 2003. According to Mr. Whited, the Town Council did not make efforts to conceal the executive session and that a reporter from your newspaper was present at the public meeting when it was announced. He also stated that the newspaper ran an article mentioning that a proposed executive session would take place in the near future. Mr. Whited apparently did not post any notice of the meeting nor did he send a copy of the written notice to your newspaper.

The Indiana General Assembly and the Indiana Court of Appeals have recognized that a notice that does not meet all of the technical requirements may still be valid under a substantial compliance approach. In *Town of Merrillville v. Blanco*, 687 N.E.2d 191 (1997), the Indiana Court of Appeals reviewed an issue concerning that Town's police commission. In that case, the Court determined that the Town clearly violated the technical requirements of the ODL by failing to post notice of a hearing at

least forty-eight (48) hours in advance. *Id.* at 196. The Court analyzed this technical violation in light of the decision in *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. App., 1986) and subsequent changes to the Open Door Law by the Indiana General Assembly. Under the ODL, a court will review a governing body's notice under standards identified at Indiana Code section 5-14-1.5-7(d), including the extent to which the violation "denied or impaired access to any meetings that the public has a right to observe and record." Ind. Code §5-14-1.5-7(d)(1).

In this case, however, no notice was posted or provided to the news media that had made valid requests under Indiana Code section 5-14-1.5-5(b). The fact that the meeting was announced at a public meeting and a news article mentioned that an executive session would be held by the Town Council, apparently without a date certain, are not enough in my opinion to show substantial compliance with the ODL notice requirements. For these reasons, it is my opinion that the Town Council violated the ODL notice requirements, both by failing to post notice to the public and by failing to send a copy of that notice to your newspaper, as required under Indiana Code section 5-14-1.5-5(b).

Validity of Purposes stated for the Executive Session

Another issue raised by your complaint concerns the purposes for which the April 6th executive session was held. As noted above, executive sessions are meetings from which the public is lawfully excluded, but the governing body must state the specific statutory basis for such meetings. See, Ind. Code §§ 5-14-1.5-2(f) and 5-14-1.5-6.1(d).

According to Mr. Whited, the purposes of the April 6th executive session were to discuss personnel and contracts. Under Indiana Code section 5-14-1.5-6.1(d), a governing body is required to list in the notice of its meeting the specific statutory exception or exceptions that authorize an executive session. Since no written notice was provided for this meeting, I am unclear as to which of the statutory exceptions the Town Council intended to rely upon. There are no exceptions for "personnel" or "contracts" per se, although there are some exceptions that would permit a governing body to discuss personnel-related issues. See, Ind. Code §§5-14-1.5-6.1(b)(5), (b)(6) and (b)(9). Mr. Whited admitted in his response that the contract issues were never discussed, so it is not necessary to discuss this issue any further. Mr. Whited did admit that the Town Council did discuss personnel issues related to the contracts for fire protection with three (3) different township trustees who were present.

Exceptions under the ODL are to be construed narrowly, in favor of openness. *Evansville Courier v. Willner*, 553 N.E.2d 1386, 1388 (Ind. App. 1990), vacated in part and adopted in part, 563 N.E.2d 1269 (Ind. 1990). What is clear under the ODL is that any "personnel" discussions must relate to a town employee or a prospective town employee. Since the term "employee" is not defined under the ODL, we must rely upon the rules of statutory construction to determine its meaning. "Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99,103 (Ind. 1998), citations omitted. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), citations omitted.

"Employee" means "one employed by another usually for wages or salary." MERRIAM-WEBSTER ON-LINE DICTIONARY (2003). From the information provided, it appears that the Town contracts with three (3) different townships for fire protection. In fact, the other part of the planned executive session on April 6th was supposed to be about those contracts. It does not appear that persons who work for these township fire departments are employees of the Town of Wheatfield, but they may be employees of the townships or volunteer firefighters in those townships. For this reason, it is my opinion that the Town Council did violate the ODL by conducting an executive session to discuss "personnel" of township fire departments that contract with the Town of Wheatfield for fire protection since these persons are not employees of the Town.

CONCLUSION

It is my opinion that the Town Council of Wheatfield failed to post and deliver to you the notices required under Indiana Code section 5-14-1.5-5(b) in violation of the ODL. Further, it is my opinion that the Town Council was not authorized under the ODL to discuss in executive session persons who work for township fire departments that are under contract with the Town to provide fire service because these persons are not "employees" or "personnel" of the Town.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: The Honorable Darwin Whited, Clerk-Treasurer

¹ In your complaint, you state that you are seeking "a declaratory judgment enjoining continuing, threatened or future violations of the Open Door Law" by the Town Council. The PAC cannot issue such judgments, only a court can under Indiana Code section 5-14-3-9.