



STATE OF INDIANA

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October 15, 2013

Mr. Brent Snow
6159 W. 100 S.
Tipton, IN 46072

Re: Formal Complaint 13-FC-292; Alleged Violation of the Open Door Law by the Tipton County Planning Commission

Dear Mr. Snow,

This advisory opinion is in response to your formal complaint alleging the Tipton County Planning Commission ("Commission") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.* The Commission, by Jason R. Henderson, responded to your complaint. His response is enclosed for your review. Your complaint requested this issue be treated with priority status under 62 IAC 1-1-3 *et. seq.* It is granted Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 13, 2013.¹

BACKGROUND

Your complaint alleges the Tipton County Planning Commission violated the Open Door Law by failing to give sufficient notice of a meeting and also by soliciting the presence of another public agency.

You allege that on or about October 4, 2013, you received notice of an executive session that is to be held on October 16, 2013. The notice cited the appropriate statute under which an executive session may be held; however, they failed to specify the exact subject matter of the purpose of the meeting other than "personnel and litigation". You also take exception to the request that all members of the Tipton County Board of Zoning Appeals be present.

¹ Please be advised this Opinion is being issued despite the fact the meeting you reference has not yet been held. No violation can exist other than insufficient notice. Ind. Code § 5-14-5-7 *et. al.* states a formal complaint must be filed *after* the meeting is held if the complainant believes a violation has occurred. Therefore, the complaint will be treated in the hypothetical and is for educational purposes only.

The Commission filed their response to this Office on October 10, 2013. They state the request for the attendance of the Board of Zoning Appeals has been rescinded by a subsequent posted notice released on October 7, 2013. They also reiterate the Executive Session will be held to “discuss litigation and personnel as it pertains to itself”.

ANALYSIS

It is the intent of the Open Door Law (ODL) 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. Accordingly, except as provided in section 6.1 of the ODL, 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. *See* Ind. Code § 5-14-1.5-3(a).

As to the issue of discussion with the Board of Zoning appeals members of pending litigation, the ODL provides that an executive session may be held to discuss Initiation of litigation or litigation that is either pending or has been threatened specifically in writing. *See* Ind. Code § 5-14-1.5-6.1(b)(2)(B). Although the litigation does not specifically name the Planning Commission as a defendant, it is not beyond the realm of possibility the litigation filed against the Board of Zoning Appeals would substantially affect the operations and responsibilities of the Planning Commission.

Nothing in the ODL would prevent two boards from discussing litigation in an executive session as long as there is notice. And while the notice substantially complies with the ODL, the Board of Zoning Appeals should be mindful they are also holding an executive session if a quorum is present. This would necessitate a separate notice from them or; alternatively, both agencies should list the meeting on the same notice. In any case, the notice has been amended to rescind the request for the presence of the Zoning Boar; therefore, I trust this is satisfactory to you.

Section 6.1 enumerates the subject matter regarding personnel of which may be discussed in an executive session. This list is exclusive. Furthermore, the executive session statute holds the following in section 4:

Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). The requirements stated in section 4 of this chapter for memoranda and minutes being made available to the public is modified as to executive sessions in that the memoranda and minutes must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given.

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in Ind. Code § 5-14-1.5-6.1(b). Exceptions include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* Ind. Code § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). Notice of an executive session must be given 48

hours in advance, excluding nights and weekends, and contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. See I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and list the specific statutory citation. See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39. Thus in order to satisfy the requirements of 6.1(d), a proper notice for an executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(9) would include, in addition to the time, date, and location of the executive session, the following statement: “To discuss a job performance evaluation of an individual employee pursuant to I.C. § 5-14-1.5-6.1(b)(9).”

Because the discussion of personnel issues allowed in an executive session is narrow, a broad notice stating merely that “personnel issues” generally are being discussed would not be sufficient under the ODL. Unless the Commission was to amend their notice, it would technically be a violation.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Office of the Public Access Counselor the Tipton County Planning Commission is in potential violation of the Open Door Law with regard to the general statement they will be discussing “personnel issues”.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt
Public Access Counselor

Cc: Jason R. Henderson