



STATE OF INDIANA

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April 8, 2013

Ms. Kathy Juillerat
450 Leedy Lane
Andrews, Indiana 46702

*Re: Formal Complaint 13-FC-92; Alleged Violation of the Open Door Law by the
Andrews Town Council*

Dear Ms. Juillerat:

This advisory opinion is in response to your formal complaint alleging that the Andrews Town Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Michael Hartburg, Attorney, responded on behalf of the Council. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on March 11, 2013 the Council held an open, public meeting. At the meeting, you provide that John Harshbarger stated that it was time for a change, the Town Marshall was not doing his job, and he should be demoted in favor of Curt VanOver. Mr. Harshbarger thereafter made a motion, which was seconded by Raymond Tacket. The motion passed without any discussion of the Council. You allege that the members of the Council are discussing issues and making decisions outside of a public meeting.

On March 15, 2013 the Council was scheduled to hold an executive session. On March 14, 2013, the Clerk-Treasurer informed the Town Marshall that an executive session was not going to be held on March 15, 2013; instead an administrative meeting was to be held on March 19, 2013 at 9 a.m. Thereafter, you provide that notice in the newspaper stated that a special meeting was to be held on March 19, 2013, not an administrative meeting. You allege that the Council uses the administrative meetings very loosely and holding meetings during the day so that the public can not attend.

In response to your formal complaint, Mr. Hartburg maintains that the Council has not violated the ODL. As to your allegation that the members of the Council met unlawfully prior to the March 11, 2013 public meeting, both Mr. Harshbarger and Mr. Tacket have provided written statements that deny the allegation. Both Mr. Harshbarger and Mr. Tacket stated that they were aware of the requirements of the ODL, that they

have not violated the ODL, and that all decisions of the Council are made in meetings open to the public. As to your allegation regarding members of the Council conducting conversations with the Town's Clerk-Treasurer, Mr. Hartburg noted that a sole member of the Council meeting with the Town's Clerk-Treasurer does not meet the definition of a "meeting" pursuant to I.C. § 5-14-1.5-2(c).

Further, Mr. Hartburg noted that conducting a special meeting at 9:00 a.m. on a weekday in the Council's normal meeting location is not a violation of the ODL. The Council has previously conducted special meeting at different times on different topics. The ODL only requires that meetings be open at all times permitting members of the public to observe and record; it does not provide requirements of the specific time when meetings of a governing body may be conducted.

As to your allegation regarding administrative functions, the Council has held two administrative meetings since the beginning of 2012. No formal action was taken at either meeting and both concerned healthcare benefits. Both administrative meetings were conducted pursuant to the requirements of I.C. § 5-14-1.5-5(f)(2).

ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 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* I.C. § 5-14-1.5-3(a).

A "meeting" is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* 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. *See* I.C. § 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14.1.5-2(e). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). The ODL does not require that a governing body deliberate prior to final action being taken.

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 I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). A governing holding an executive session may admit those persons necessary to carry out its purpose. *See* I.C. § 5-14-1.5-2(f). The only official action that cannot take place in executive

session is a final action, which must take place at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c).

I would note that the Public Access Counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. You have alleged that members of the Council privately discussed public business and made decisions outside of a public meeting; specifically regarding the demotion of the Town Marshall prior to the March 11, 2013 public meeting. The Council has denied your allegation and provided written statements of Mr. Harshbarger and Mr. Tacket in support. As such, it is my opinion that *if* the Council did not meet in secret prior to the March 11, 2013 public meeting to hold discussions and make decisions on public business, then it did not violate the ODL (emphasis added). You have also provided that both Mr. Harshbarger and Mr. Tacket, separately, sit in the Town's Clerk-Treasurer's Office during the day in violation of the ODL. In my opinion such action would not be a violation of the ODL as a majority of the Council has not alleged to have been present at the Clerk-Treasurer's Office; thus a "meeting" as defined under the ODL would not have occurred.

The ODL requires that 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. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing, requires the governing body to publish the notice in a newspaper. The ODL does not specify certain times in which a governing body may hold a public meeting. It is my opinion that the Council did not violate the ODL by holding a properly noticed meeting at 9 a.m. on a weekday morning.

The requirements for posting notice do not apply when the executive of a county or legislative body of a town meets, if the meeting is held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. *See* I.C. § 5-14-1.5-5(f)(2). Administrative functions do not include the awarding of contracts, the entering into contracts or any other action creating an obligation or otherwise binding a county or town. *Id.* Even though notice is not required, the administrative meetings must be held in the public, since the notice provision of the ODL is the only provision that does not apply to an "administrative function" meeting. *See* I.C. § 5-14-1.5-5(f)(2). You further allege that the Council uses the administrative meetings very loosely. In response, the Council has advised that it has conducted only two administrative meetings since the beginning of 2012, both related to health insurance benefits. Further, all requirements of the ODL have been followed in regard to the administrative function meetings that have been held. As the Public Access Counselor is not a finder of fact, *if* the Council abided by the requirements of the ODL

for the two administrative function meetings that have been held since 2012, it is my opinion that the Council did not violate the ODL (emphasis added).

CONCLUSION

Based on the foregoing, it is my opinion that *if* the Council did not meet in secret prior to the March 11, 2013 public meeting, then it did not violate the ODL (emphasis added). It is my opinion that the Council did not violate the ODL by individually appearing in the Town's Clerk-Treasurer's Office. It is my opinion that the Council did not violate the ODL by holding a properly noticed meeting at 9 a.m. on a weekday morning. Finally, *if* the Council abided by the requirements of the ODL for the two administrative function meetings that were held, it is my opinion that the Council did not violate the ODL (emphasis added).

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Mike Hartburg