



# STATE OF INDIANA

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February 4, 2013

Mr. Jeff D. Hoover  
8562 West 200 North  
Tipton, Indiana 46072

*Re: Informal Opinion 13-INF-06; Alleged Violation of the Open Door Law by the  
Tipton County Council*

Dear Mr. Hoover:

This informal opinion is in response to your formal complaint alleging the Tipton County Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Richard J. Hall, Attorney, responded on behalf of the Council. His response is enclosed for your reference. As noted *infra*, it is my opinion that you do not have standing to file a complaint alleging violation of the ODL as you were not denied the right to attend a public hearing or meeting of the Council. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your ODL complaint will be addressed as an informal inquiry. See I.C. § 5-14-4-10(5). Your allegations concerning the Assessor's violation of the Access to Public Records Act will be addressed in Advisory Opinion 13-FC-09, which is enclosed for your reference.

## BACKGROUND

In your formal complaint you that provide that on December 7, 2012, the Council provided legal notice in the *Tipton Tribune* that a public hearing would occur concerning an Economic Realization Area on December 18, 2012 at 7 p.m. at the Tipton County Foundation Building ("Foundation"). In the December 15, 2012 edition of the *Tipton Tribune*, the Council ran a subsequent legal notice titled "Notice of Change in County Council Meeting Place on December 18, 2012" that still provided that the December 18, 2012 public hearing would take place at the Foundation. Separate from the legal notice section of the December 15, 2012 edition of the *Tipton Tribune*, a notice was posted that the Council meeting on December 18, 2012 would be held at the Tri-Central High School Auditorium ("Auditorium"). Ultimately, the Council meeting and public hearing on December 18, 2012 was held at the Auditorium. You note that the Council placed a change of meeting notice on the doors of the Foundation at approximately 12:30 p.m. on December 18, 2012. You allege that the Council failed to provide, in a legal notice, the new location of the December 18, 2012 meeting, the notice was not provided within 48

hours on the meeting, and that the Council did not have the required public meeting to change the meeting location.

In response to your formal complaint, Mr. Hall advised that Resolution No. 2012-21 (“Resolution”) was adopted by the Council on December 3, 2012, preliminarily approving the creation of an economic revitalization area and granting of property tax abatement, pursuant to I.C. § 6-1.1-12-1, with respect to a proposed wind farm in the County. The Resolution also directed the publication of notice that on December 18, 2012, the Council would hear and receive remonstrances and objections and consider final action of the creation of the economic revitalization area and the tax abatement.

I.C. § 6-1.1-12.1-2.5(c) requires the publication of “notice of the adoption and substance of the resolution in accordance with IC 5-3-1.” On December 7, 2012, the Council published in the *Tipton Tribune* notice (“Initial Notice”), which described the substance of the Resolution and conveyed that the public hearing would be held on December 18, 2012 at 7 p.m. at the Foundation. In days approaching the public hearing to be held on December 18, 2012, the County became aware of the significant public interest in the matters preliminary approved by the Resolution. Given the amount of public interest, the County knew that the Foundation could not accommodate the large attendance expected that evening. Aware of this fact and after reviewing prior advisory opinions from the Public Access Counselor’s Office, the Council concluded that the location of the public hearing needed to be moved in order to give full and proper consideration of all public comment. Thus, the decision was made to hold the public hearing at the Auditorium, which would comfortably accommodate all parties.

On Thursday, December 13, 2012, the President of the Council hand delivered to the *Tipton Tribune* a public notice (“Revised Notice”) that described the change of location to the Auditorium. The President requested that the Revised Notice be run in the Friday, December 14, 2012 edition of the *Tipton Tribune*. The Revised Notice was published on Saturday, December 15, 2012. In addition to the publication of the Revised Notice, the County posted the Revised Notice at the Foundation on December 18, 2012, and had a representative at the Foundation on the evening of the 18<sup>th</sup> to direct any members of the public to the Auditorium. Further, the Council dealt with all other business at the start of its meeting before commencing the public hearing, so as to allow anyone who mistakenly went to the Foundation sufficient time to travel to the Auditorium. Mr. Hall noted that you and several hundred members of the public attended the meeting on December 18, 2012. You spoke at the meeting and expressed your objection to the confirmation of the Resolution and the approval of the proposed abatement. After public comment was received, the Council adopted the Resolution.

As to your formal complaint, Mr. Hall argues that you lack standing to file your complaint as only a person who has been denied the right to attend a public meeting of a public agency in violation of the ODL may file a complaint with the Public Access Counselor. *See* I.C. § 5-14-5-6; *see also Opinion of the Public Access Counselor 11-FC-223*. Regardless, as to the substance of your formal complaint alleging violation of the ODL, the requirements of the ODL with respect to notice of a public meeting do not

apply “where notice by publication is required by statute, ordinance, rule, or regulation.” See I.C. § 5-14-1.5-5(e). The Council published the Initial Notice in compliance with all the requirements of I.C. § 6-1.1-12.1-2.5(c), which is the applicable tax abatement statute. Unlike other statutes, I.C. § 6-1.1-12.1-2.5(c) does not expressly require that the location of the public hearing be specified. The Council provided in the initial notice the location of the meeting and when it realized a larger facility was needed to accommodate the public, the Council issued the Revised Notice and took other action as described *supra*.

As to the extent the ODL applied to the meeting held by the Council on December 18, 2012, the ODL would not require that notice be published in the newspaper. The Council complied with the media notification requirements of the ODL when it delivered notice to the *Tipton Tribune* on December 13, 2012. As the ODL does not require notice by publication, the Revised Notice’s location in a more prominent location of the newspaper, rather than the legal notice section, is of no legal consequence and only helped to better inform the public. Further, notice of the meeting would not be required to be posted at the meeting’s location. The Public Access Counselor has previously opined that the public has been adequately notified of a meeting location when the public agency announces at the published time and location of the meeting that the location is being moved. See *Opinion of the Public Access Counselor 09-FC-06*. By stationing a representative at the Foundation and directing all that arrived of the new location at the Auditorium, the Council provided the legally adequate notice.

As to your assertion that a public meeting is necessary to change the location of the meeting, such complaint is legally unfounded and impractical. The Resolution did not specify the location of the December 18, 2012 meeting, but rather just the date upon which the meeting would be held. Pursuant to I.C. § 36-2-3-7, the President of the Council, a majority of the Council, and the Auditor have the ability to call a meeting of the Council and necessarily implicit in that power is the ability to determine the location of the meeting. The public hearing was held at a location determined by the President and implicitly accepted by the Council through its unanimous attendance.

#### ANALYSIS

A person denied the right to attend any public meeting of a public agency in violation of I.C. § 5-14-1.5 or denied any other right conferred by I.C. § 5-14-1.5 may file a formal complaint with the public access counselor. See I.C. § 5-14-5-6. You were in attendance at the Council’s meeting and public hearing held on December 18, 2012. Because you were not denied access to the meeting, you lack standing to file a complaint with this office. See *Opinions of the Public Access Counselor 00-FC-11, 03-FC-32; 8-FC-168; 11-FC-223*. However, you are entitled to make an informal inquiry about the state’s public access laws. The substance of your complaint alleging violation of the ODL will therefore be addressed as an informal inquiry. See I.C. § 5-14-4-10(5). I would note that the analysis provided in an informal inquiry is identical to that which is provided in an advisory opinion issued in response to a formal complaint. In the event that you intend to file suit pursuant to I.C. § 5-1.5-7, the fact that you are receiving an

informal opinion would not prevent you from seeking attorneys fees, court costs, and other reasonable fees should the court find that you prevailed in your claim. *See* I.C. § 5-14-1.5-7(f)(2).

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).

I.C. § 5-14-1.5-5(e) provides that section 5 (e.g. Public Notice of Meetings) of the ODL does not apply when notice by publication is required by statute, ordinance, rule, or regulation. From what I have gathered from your formal complaint and the Council's response, the Council held a public hearing, which required notice by publication by statute, and a meeting, which required notice pursuant to section 5.5 of the ODL, on December 18, 2102. *See Opinions of the Public Access Counselor 02-FC-39; 07-FC-9, 07-FC-79; and 07-FC-197.* As the legal requirements for notice for the public hearing and the meeting are distinct, each event must be analyzed separately.

#### December 18, 2012 Public Meeting

A "meeting" is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon 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 to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. 5-14-3-2(e).

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 notice, nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

As applicable to the Council's meeting held on December 18, 2012, the Council would not have been required to publish notice in the local newspaper. Alternatively, it would have been required to provide notice to any news media who had requested notice prior to the first of the year; to which the Council has provided that notice was given to the *Tipton Tribune* on December 13, 2012. The Council would have been required under section 5 of the ODL to post notice of the time, date, and place of the meeting held on December 18, 2012 at 7 p.m. by Friday, December 14, 2012 at 7 p.m. The notice would have been required to have been posted at the Council's principal office or if no such

office exists, at the place where the meeting was held. The Council provided that notice was posted at the Foundation on December 18, 2012. It is not evident from the Council's response whether it has a "principal office" as described under I.C. § 5-14-1.5-5(b)(1).

The Council cites in support a prior advisory opinion of the Public Access Counselor where Counselor Neal opined that the governing body was not required to provide additional notice regarding the change of location of a meeting other than to provide an announcement at the original location of the change and the change was recorded in the memoranda. *See Opinion of the Public Access Counselor 09-FC-06*. However, the meeting discussed in the opinion was a reconvened meeting. The meeting commenced at the location provided in the notice, it was then immediately decided to move the meeting to another location. The governing body made the announcement at the original meeting location and recorded the change of location in the meeting's memoranda. Alternatively, here the meeting was never originally convened at the Foundation, nor can the meeting be described as reconvened.

It is my opinion that as to the meeting held by the Council on December 18, 2012, if it failed to post notice at either the Council's offices or the meetings location by December 14, 2012, it failed to comply with section 5 of the ODL. However, I would note that the Indiana Court of Appeals has addressed substantial compliance with the ODL in *Turner v. Town of Speedway*, 528 N.E.2d 858 (Ind. Ct. App. 1988); *See also Opinions of the Public Access Counselor 00-FC-23; 00-FC-41; 08-FC-186*. *Turner* held:

. . . substantial compliance with the Open Door Law may in some circumstances be sufficient. Other jurisdictions have reached the same result. [Citation omitted] In a 1987 amendment to IC 5-14-1.5-7, our legislature confirmed Judge Neal's use of "substantial compliance" as the proper standard to review violations under the Open Door Law. Several factors are considered, including the extent to which the violation denied or impaired access to a meeting, and prevented or impaired public knowledge or understanding of the business conducted in the meeting. IC 5-14-1.5-7(d) (Supp. 1987). *Id.* at 862.

In light of all of the factors identified by the Council to ensure the public received notice of the meeting held on December 18, 2012, including, but not limited to, posting the Initial Notice in the *Tipton Tribune*, posting the Revised Notice in the *Tipton Tribune*, posting notice at the original location where the meeting was to be held, having a representative at the original location on the night of the meeting to alert those who had not been informed of the location change, conducting the public meeting prior to the public hearing to ensure that those individuals who went to the original location would not miss the public hearing, the public hearing lasted for more than three hours and allowed for the public to speak on the issue, the issue was covered by the local media, the Council identified in advance that the original location was not going to comfortably accommodate all those who were to attend and changed the location so as to allow for

maximum public input, and that several hundred members of the community were in attendance at the meeting, it is my opinion that the Council substantially complied with the ODL regarding the notice that was posted for the December 18, 2012 meeting.

#### December 18, 2012 Public Hearing

The Council held a public hearing pursuant to I.C. § 6-1.1-12.1-2.5(c). I.C. 6-1.1-12.1-2.5(c)(1) provides that the Council was required to publish notice of the adoption and substance of the resolution in accordance with IC 5-3-1. Further, the statute provides that the notice must state that a description of the affected area is available and can be inspected in the county assessor's office. *See* I.C. § 6-1.1-12.1-2.5(c)(2)(B). The notice must also name a date when the governing body will receive and hear all remonstrances and objections from interested parties. *Id.* The body shall take final action determining whether the qualifications for an economic revitalization area have been met and confirming, modifying and confirming, or rescinding the resolution. *Id.* As oddly noted by the Council, I.C. § 6-1.1-12.1-2.5 does not require the location of the public hearing be specified. I.C. § 5-3-1-2(b) provides that if the event is a public hearing or meeting concerning any matter specifically mentioned in subsection (c)-(h), notice shall be published one (1) time, at least then (10) days before the day of the hearing or meeting. Thus, according to the letter of the law, the Council would not have violated I.C. § 6-1.1-12.2-2.5 by not providing the location of the public hearing.

Aside from the letter of the law, there is the spirit and intent in which the law was passed. As noted by the Council, other areas of the law require that the public hearing notice provide the location of the hearing (e.g. budget hearings held pursuant to I.C. § 6-1.1-17-3(a)). For all those involved in public hearings held pursuant to I.C. § 6-1.1-12.1-2.5, the assumption can undoubtedly be made that the General Assembly intended for the notice to contain the location of the public hearing. I.C. § 5-3-1-2.3 provides that a notice published in accordance with this chapter or any other Indiana statute is valid even though the notice contains errors or omissions, as long as a reasonable person would not be misled by the error or omission and the notice is in substantial compliance with the time and publication requirements. This is not the case where the Council did not publish notice of the location of the public hearing in either the Initial or Revised Notice. Rather, the Council decided to move the location of the public hearing in order to accommodate all those who were expected to attend. In light of all of the actions identified *surpa* by the Council in its effort to inform the public of the new location of the public hearing and its decision to move the public hearing specifically to accommodate all those who were expected to attend, it is my opinion that the Council provided proper notice for the public hearing.

As to your allegation that the Council violated the ODL by not having a meeting to change the location of the public hearing, I would agree with Mr. Hall that the allegation is legally unfounded. Pursuant to I.C. § 36-2-3-7, the President of the Council, a majority of the Council, and the Auditor have the ability to call a meeting of the Council. Implicit in that power is the ability to determine the location of the meeting.

The public hearing was held at a location determined by the President and implicitly accepted by the Council through its unanimous attendance at the hearing.

Please let me know if I can be of any further assistance.

Best regards,

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

Joseph B. Hoage  
Public Access Counselor

cc: Richard J. Hall