

February 14, 2005

*Sent Via Facsimile*

Mr. Eric M. Cox  
and other interested persons  
*c/o The Banner*  
24 North Washington Street  
Knightstown, IN 46148

*Re: Formal Complaint 05-FC-15; Alleged Violation of the Open Door Law by the  
Knightstown Town Council*

Dear Mr. Cox:

This is in response to your formal complaint alleging that the Knightstown Town Council (“Council”) violated the Open Door Law (“ODL”) by posting a notice of an executive session that stated the incorrect reason for the executive session, and by taking impermissible action in the executive session.

#### BACKGROUND

This complaint, filed by *The Banner* newspaper and six individuals whom I presume to be members of the public, challenges an action taken by the Council pursuant to its executive session of December 13, 2004. Specifically, *The Banner* maintains that the Council’s real purpose for meeting in executive session was to receive information about alleged misconduct of the Police Chief James Meyers, and therefore the notice should have stated that reason. Also, *The Banner* alleges that with respect to Meyers’ resignation, the Council took impermissible action either at the executive session or during the time between the executive session and the next public hearing. The facts with respect to the executive session are somewhat in dispute. I set out below the salient facts as proffered by both *The Banner* and by the Council by its attorney, David L. Copenhaver.

### *The Banner Version*

*The Banner* states that a timely executive session notice was posted for December 13, 2004 at 4:00 p.m., the purpose being “to further discuss job performance of an employee in accordance with IC 5-14-1.5-6.1(9).” Thereafter, on December 16 the Knightstown Chief of Police, Mr. James L. Meyers, received a call from the Council’s attorney, David Copenhaver. Mr. Copenhaver asked that Mr. Meyers meet with Copenhaver. At the meeting, Copenhaver advised Meyers that the Council would like to have Meyers’s resignation and that the Council was prepared to place him on administrative leave through the end of the year.

On December 17, Meyers called Copenhaver and told him that he would be willing to resign, but would like to receive full pay and benefits through the middle of February 2005. Copenhaver told Meyers he would speak with the Council and get back with him. Later that day, Copenhaver called Meyers and told him that the Council was agreeable to this arrangement.

On December 20, Meyers delivered a copy of his letter of resignation to the Council. That afternoon, according to *The Banner*, Council member Cort Swincher told *The Banner* news editor Jeff Eakins that two Knightstown police officers had requested that the Council schedule an executive session so that they be permitted to share concerns about the police department, including allegations of intimidation and threatening behavior on the part of Meyers. Swincher reported that after the officers gave their information, the Council sent the officers out and then discussed the matter further, deciding to give Meyers the option of either resigning or being removed from his job.

On December 30, during a public meeting of the Council, Council President Jim Roderick read Meyers’ letter of resignation aloud. In response to questions from the public regarding the decision made in the executive session, Copenhaver stated that before any formal statutory procedures had taken place, Meyers resigned. At the December 30 meeting, the Council voted to accept Meyers’ letter of resignation, including the terms as offered with respect to administrative leave pay and benefits. The typewritten memoranda from the December 13 executive session stated that job performance of an employee in accordance with IC 5-14-1.5-6.1(9)<sup>1</sup> was discussed, and no other subject matter was discussed. Four members of the Council were present, including President James Roderick and Cort Swincher, as well as attorney David Copenhaver and police officers David Johnson and Troy Sampley. *The Banner* states that its allegation that the discussion at the executive session was about Meyers’ misconduct as related by Council member Swincher is reliable, because Swincher has never disavowed the quote attributed to him that the Council met to discuss allegations of intimidation and threatening behavior, as published by *The Banner* in its December 22, 2004 report of Meyer’s resignation.

### *The Council’s Version*

---

<sup>1</sup> *The Banner* does not specifically raise the citation form in its complaint, but I note that in both the notice and the memoranda, the Council fails to correctly cite the instance for which it met: IC 5-14-1.5-6.1(b)(9). Because it set out the text of the instance and the correct subparagraph, I find that the Council was in substantial compliance with the Open Door Law. IC 5-14-1.5-6.1(d); IC 5-14-1.5-7.

In October and November of 2004, various employees of the Knightstown Police Department and other city employees approached various members of the Town Council to express concerns about the operation and management of the Police Department. The Council states that at no time were complaints of misconduct alleged against the Chief (sometimes called the Town Marshal). As a result of the concerns, the Council decided to hold an executive session to "evaluate the Town Marshal's management techniques and review his performance in office." The sole subject of "conversation" at the executive session was an evaluation of the performance of the Town Marshal. No final action or vote was taken regarding any matter at the executive session. On December 16, the Council President Roderick advised the Council attorney Copenhaver to prepare proposed charges against the Town Marshal for failure to properly administer the Police Department, pursuant to the formal requirements to dismiss a member of the police department under IC 36-8-3-4. He also told Copenhaver that the Town Marshal should be advised that if he wished to resign, any formal proceedings would not take place. After the meeting with Chief Meyers, the attorney called Council President Roderick to advise him that Meyers was considering tendering his resignation but asked if the Town would consider allowing him to remain on administrative leave with full pay and benefits through February 15, 2005. Roderick agreed to recommend those terms to the Council if Meyers agreed to resign. Once receiving the resignation letter of Meyers, the Council President understood it to be contingent on the acceptance of the terms requested by the Chief.

In response to your complaint, attorney Copenhaver argues that the resignation of the Town Marshal was not due to any charges of misconduct against him. Further, the Council states it did not make a final decision regarding the removal of Meyers. Any final decision would have violated IC 36-8-3-4 where a police officer is afforded a due process hearing prior to the fact-finder (the Council) making a final determination with respect to the matter of the officer's dismissal.

## ANALYSIS

The intent and purpose of the ODL 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 provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Council is a public agency and a governing body subject to the ODL. Ind. Code §§ 5-14-1.5-2(a) and (b).

A meeting for the purposes of the ODL 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). As noted above, the general rule is that meetings of public agencies are to be held openly, so that the public may "observe and record them." Ind. Code §5-14-1.5-3(a). The exception to the general rule that a meeting of the governing body must be open to the public is an executive session.

"Executive session" is defined as a meeting "from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." Ind. Code §5-

14-1.5-2(f). One of these exceptions provides that a governing body may meet in executive session to:

discuss a job performance evaluation of an individual employee. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.

Indiana Code §5-14-1.5-6.1(b)(9).

It is the public policy of the ODL that it is to be construed liberally in favor of disclosure. For this reason, Indiana courts have generally held that exceptions to the general rule of openness are to be narrowly construed. Ind. Code §5-14-1.5-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . .

"[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

*Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995) [Citations omitted.], quoting, *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E.2d 726, 729 (Ind. Ct. App.1982) [Citations omitted].

Hence, the burden is on the Council to show that its December 13 executive session was held for the stated purpose under IC 5-14-1.5-6.1(b)(9), the "job performance exception."

The Council fails to "fill in" any facts that show on what basis Council President Roderick had authority to call Council attorney Copenhaver and ask him to draw up formal charges and seek a resignation from Meyers. Assuming for purposes of this opinion that Roderick was given authority to do so during the December 13 executive session, the question is whether the Council could have taken this action on December 13.

Although the Council did not cite any cases in its response to your complaint, I must consider the case of *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), *transfer denied*, as support for the Council's contention that it could take the actions it took following the December 13 executive session.

While narrow construction of the executive session exceptions under the ODL is the general rule, an Indiana Court of Appeals decision interpreting the executive session exception for job performance evaluations appears to allow a more liberal reading of this provision. In *Middlebury*, Town Marshal Baker alleged that during an executive session to discuss his job performance, the Town Council had violated the ODL. Specifically, Mr. Baker alleged that the Town Council had taken final action during the executive session, which is not permitted under

Indiana Code section 5-14-1.5-6.1(c), by compiling a list of persons to be rehired during that private session and keeping his name off the list. The list was later used in the open, public meeting to make decisions on who would be rehired. The Court held that the compilation of the list was not "final action" and that doing so did not go beyond the scope of the General Assembly's expressed intention to permit governing bodies the ability to meet privately to discuss certain personnel matters.

One other advisory opinion issued by this office discussing the "job performance evaluation" exception after *Middlebury* acknowledged that under the *Middlebury* holding, a School Board could discuss individual employees' salary and benefits in relation to job performance evaluations taking place in an executive session. Although the Council does not concede any additional discussion during the executive session regarding Chief Meyers' future employment with the Town, assuming such a discussion took place and a decision made to offer resignation as a means to avoid formal charges, this official action is consistent with the holding in *Middlebury*:

"In the case at bar, the Council's discussion was held in a noticed executive session, the Council made decisions in that session as it is authorized to do by statute, and it instituted its decisions by an actual vote at the subsequent public session."

*Id. at 72.* Here, final action on the Chief's resignation took place in a public meeting, where the letter of resignation, including the condition of remaining on administrative leave with full pay and benefits, was read aloud and voted upon. I would add a cautionary note that if a majority of the Council met to take any official action relating to Meyers in the period of time from the conclusion of the December 13 executive session to the December 16 call to counsel, that would have violated the Open Door Law.

*The Banner* has also raised an issue concerning whether the actual purpose for the executive session was IC 5-14-1.5-6.1(b)(6), which allows an executive session:

- (6) With respect to any individual over whom the governing body has jurisdiction:
  - (A) to receive information concerning the individual's alleged misconduct; and
  - (B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is:
    - (i) a physician; or
    - (ii) a school bus driver.

No Indiana cases have elucidated the distinction between IC 5-14-1.5-6.1(b)(6) and (b)(9), except in *Middlebury*, where the court held that in order to meet under (b)(6), a governing body must both receive information and discuss the individual's status. *Id. at 74.* There, Baker had asserted that the Town actually discussed his status as an employee, but the court declined to find the notice at fault, because Baker did not assert that the Town had received information at all, much less about alleged misconduct. Here, the Council disavows that the problems alleged with Meyer amounted to misconduct, preferring to characterize the discussions as "management theory, departmental policies, supervision style and effectiveness, and scope of duties." Indeed, I

doubt that there is a clear line that can be drawn in every case between issues of performance and those of misconduct. Given the facts presented by the Council, I cannot find that the Council met to receive information about misconduct and to discuss Meyers' status as an employee.

By making this finding, I do not intend to diminish the importance of the Council's duty to inform the public of the purpose of its executive session, in spite of the Council's right to exclude the public from its meetings regarding sensitive employee matters. In fact, I point out that in neither executive session instance is it necessary to place an employee's name in the notice. Hence, privacy is protected in either instance.

#### CONCLUSION

For the foregoing reasons, I find that the Knightstown Town Council did not violate the Open Door Law under the facts as presented by the Knightstown Town Council.

Sincerely,

Karen Davis  
Public Access Counselor

cc: David L. Copenhaver