

November 23, 2005

*Sent Via Facsimile*

Mr. L. Charles Lukmann  
Town of Chesterton  
726 Broadway  
Chesterton, IN 46304

*Re: Formal Complaint 05-FC-237; Alleged Violation of the Open Door Law by the  
Town of Porter*

Dear Mr. Lukmann:

This is in response to your formal complaint on behalf of the Town of Chesterton, alleging that the Town of Porter (“Porter”) violated the Open Door Law by voting in an executive session to bring a lawsuit against the Town of Chesterton. I find that if the Town of Porter took final action in an executive session, it violated the Open Door Law.

#### BACKGROUND

You filed a formal complaint with the Office of the Public Access Counselor on November 16, 2005. You represent the Town of Chesterton. In your complaint, you requested priority status, alleging that the Town of Chesterton intended to file a suit concerning the alleged violation of the Open Door Law. Because you allege circumstances for which priority status may be granted under Ind. Admin. Code tit. 62, r. 1-1-3, I am issuing an advisory opinion within seven days of receipt of your complaint.

You allege that the decision to file a lawsuit against the Town of Chesterton (“Chesterton”) was made in an executive session held by the Porter Town Council on October 11, 2005. A lawsuit styled “Complaint Requesting Court Order for Access to Property” was filed by Porter on November 3, 2005 in Porter Superior Court. You allege that the Porter Town Council has never taken action in a public meeting to authorize the litigation against Chesterton. Accordingly, you contend that Porter must have taken final action in the October 11 executive

session, which is prohibited under the Open Door Law. As part of the documentation of your claim, you enclosed an October 17, 2005 letter to you from Patrick Lyp, attorney for Porter. Attorney Lyp advised you that Porter had conducted an executive session to “consider this matter,” without specifying the date of the executive session. Mr. Lyp had enclosed a copy of the Porter Superior Court Complaint which he said he “was requested to file concerning access to the waste water plant.” Mr. Lyp told you that he was instructed to take no further action other than filing the complaint.

I sent a copy of your complaint to Mr. Lyp. Mr. Lyp denied that any illegal act was taken during the October 11 executive session. During several public meetings of the Porter Town Council, motions were made by the Porter Town Council to start the process for acquiring ownership of the sewage treatment plant owned by Chesterton. On July 1, the council approved an action to move forward with an appraisal by Integra Realty Resources for the Chesterton Utility Facility. Mr. Lyp’s argument seems to be that there was no need for the Porter Town Council to specifically authorize the complaint to compel access to the sewage treatment facility, since the Town Council had already indicated its assent to perform the appraisal. Mr. Lyp stated in his complaint response, “No vote or other official action was taken during the executive session except to advise the Board (by me) that this was being done.” Mr. Lyp provided me with the memoranda of the October 11 executive session. The memoranda recite that the October 11 executive session was held pursuant to IC 5-14-1.5-6.1(b)(2)(B).

#### ANALYSIS

Except as provided in section 6.1 of the Open Door Law, 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. Ind. Code 5-14-1.5-3(a). “Executive session” means a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f). Executive sessions may be held only in the instances enumerated in IC 5-14-1.5-6.1(b). One of the purposes for which an executive session may be held is for discussion of strategy with respect to initiation of litigation or litigation that is either pending or has been threatened specifically in writing. IC 5-14-1.5-6.1(b)(2)(B). A final action must be taken at a meeting open to the public. IC 5-14-1.5-6.1(c). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. IC 5-14-1.5-2(g).

The memoranda of the October 11, 2005 executive session recite that the executive session was held for the purpose in IC 5-14-1.5-6.1(b)(2)(B). No other substantive actions were recorded in the memoranda. Mr. Lyp on behalf of Porter denies that any vote was taken during the executive session. He claims that he advised the Board that “this was being done,” presumably meaning that the complaint was being filed to compel access to the sewage facility to the appraisers. Mr. Lyp asserts that the purpose of the lawsuit was not to initiate condemnation proceedings, but rather, to obtain a court order to allow access to the facility to the appraisers. He also stated that “no vote or other official action was taken during the executive session” and that “if the Town Council intends to proceed with eminent domain proceedings, such would require a formal action.”

These assertions about the character of the lawsuit are irrelevant to the issue of whether the Porter Town Council met in executive session and took final action by approving a motion to initiate litigation, but Porter's line of discussion suggests that Porter may consider that this intermediate legal step that may lead to a full condemnation lawsuit would not require a final action of the Town Council. Of course, the instance allowing strategy discussions for initiation of litigation do not hinge on the character or nature of a lawsuit. The proscription on final action taken in an executive session also is not affected by the type or purpose of the lawsuit.

In previous guidance from this office, the public access counselor opined that the memoranda from an executive session indicated that two motions were made and carried, proving that the Board took final action on those motions, which allowed an attorney to move forward to arbitrate a contract dispute. The public access counselor observed that the Open Door Law does not prescribe a certain method of voting. *Opinion of the Public Access Counselor 00-FC-12.*

Although Porter asserts in its complaint response that no final action was taken during the executive session of October 11, Mr. Lyp's October 17 correspondence to you belies this assertion. Mr. Lyp stated in his letter that the Porter Town Council had recently met in executive session, and that he was requested to file a complaint concerning access to the waste water plant. He further stated that "other than filing the Complaint, I was instructed to take no further action..." This suggests that the Porter Town Council may have done more than just be apprised by its attorney that he intended to file an action compelling access to the sewage treatment facility.

In any case, I cannot resolve factual disputes. A court of competent jurisdiction would evaluate the evidence in an action filed by any person to obtain a declaratory judgment, enjoin violations of the Open Door Law, or declare void any policy, decision, or final action taken at an executive session in violation of section 3(a) of the Open Door Law. IC 5-14-1.5-7(a).

#### CONCLUSION

For the foregoing reasons, I cannot determine conclusively whether the Town Council of Porter took a final action in the October 11 executive session, but if a final action was taken, it violated the Open Door Law.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Patrick Lyp