

June 10, 2005

Donna M. McCleery
135 W. McCLung Rod
La Porte, IN 46350

Re: Formal Complaint 05-FC-94; Alleged Violation of the Open Door Law by the La Porte Board of Public Works and Safety.

Dear Ms. McCleery:

This is in response to your formal complaint alleging that the La Porte Board of Public Works and Safety ("Board") violated the Open Door Law ("ODL") by meeting, without notice, in a closed meeting. I find that the La Porte Board of Public Works and Safety violated the Open Door Law.

BACKGROUND

On May 11, 2005 you filed a formal complaint alleging violations of the ODL by the Board. Your complaint was assigned formal complaint number 05-FC-94.

Regarding the Board meeting of April 13, 2005, which you attended, you state, "In the middle of the meeting the Mayor Leigh Morris, City Attorney Art Roule Jr. and both members of the Board Marilyn Poeg and Richard Schmitt left to have a private meeting for approximately 10 min. No one knew of this meeting. I feel this is a [sic] Open Door Violation." You included copies of the minutes for the Board's public meeting of April 13, 2005. Those minutes state, "Mayor Morris announced a brief recess for legal consultation and left the meeting with Board members Poag and Schmitt and City Attorney Roule."

A copy of your complaint was forwarded to the Board. Mr. Arthur L. Roule, Jr. responded on behalf of the Board by letter dated May 25, 2005. A copy of that letter is enclosed for your reference. Mr. Roule explained that he requested a recess to address his concern with the Mayor over language in a proposed resolution. He stated that it was his intention to only meet with the Mayor to suggest a modification. Regarding his intention to meet only with the Mayor he stated, "I apparently did not make that clear in requesting a recess, because Mrs. Poag and Mr. Schmitt, (the remaining members of the board) followed us into the Mayor's office and

heard my comments to the Mayor.” Additionally, he said that neither he nor the Mayor had solicited the opinion of Mrs. Poag or Mr. Schmitt during the discussion in the Mayor’s office. He further stated, “The presence of Mrs. Poag and Mr. Schmitt during my conversation with the Mayor was not invited nor intended and was inadvertent. There certainly was no intent to circumvent the letter or spirit of the open-door law.”

Mr. Roule asserts, “[i]n my opinion, the recess called by the Mayor at my request in order that I could recommend a change in the language of the resolution was not a violation of the open-door law.”

ANALYSIS

The intent and purpose of the Open Door Law 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.” IC 5-14-1.5-1. Toward that end, except under very limited circumstances, all meetings of the governing body of a public agency must be open for the purpose of permitting members of the public to observe and record the meetings. IC 5-14-1.5-3(a). A “meeting” 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.” IC 5-14-1.5-2(c). “Public business” means “any function upon which the public agency is empowered or authorized to take official action.” IC 5-14-1.5-2(e). “Official action” is very broadly defined by our state legislature to include everything from merely “receiving information” and “deliberating” (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. IC 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. IC 5-14-1.5-5(a).

At issue here is whether a majority of the Council gathered together outside a public meeting for the purpose of taking official action on public business. Clearly, the Board is a governing body of a public agency and any gatherings of a majority of its members would constitute a meeting subject to the requirements of the Open Door Law. IC 5-14-1.5-2(a) and (b). There is no question that a majority of the members of the Board were present during the recessed discussion in the Mayor’s office. It is also clear that the purpose of the gathering was to take official action on public business, the discussion of the language of a resolution that the Board intended to pass in the near future.

For the purposes of the ODL a meeting “does not include . . .any chance or social gathering not intended to avoid this chapter.” IC 5-14-1.5-2. Mr. Roule asserts that the discussion that took place in the Mayor’s office was a chance gathering, not intended to circumvent the requirements of the ODL. Inadvertent though it may be, the discussion which took place, concerning public business, is not the type of event contemplated by the ODL exception for any social or chance gathering.

“To say that a governing body’s intent in gathering, however innocent, absolves it of any violation for whatever discussions and events occur

after it gathers would defeat the purpose of the statute and the clear intent of the General Assembly that ‘the official action of public agencies be conducted openly.’ *See generally* IC 5-14-1.5-1.” *Opinion of the Public Access Counselor 04-FC-72.*

The purpose of gathering in the Mayor’s office likely was not intended to circumvent the requirements of the ODL. However, the purpose of the gathering was to discuss public business. The unintentional nature of the gathering does not excuse the fact that once the gathering of a majority of the Board occurred the intention of discussing official business was carried out. It also does not matter that the majority of the Board did not take part in the discussion; they “received information” and that is sufficient “official action.” The Board, having retired from the public meeting to a private office, for the purpose of discussing public business, violated the Open Door Law. Having found that a meeting, subject to the ODL, did occur, I must also find that the failure to provide public notice of that meeting is also a violation of the ODL.

Additionally, I must note that you have also raised the concern that this meeting was an executive session in violation of the ODL. The Board does not claim that the meeting was subject to the executive session exceptions and rightly so. An executive session is a "meeting from which the public is excluded," but the governing body may allow other persons to attend if their presence is necessary to the purpose of the meeting. IC 5-14-1.5-2(f). The meeting in question did exclude the public. However, none of the exceptions for which an executive session might be held applies to the purpose of that meeting. Therefore, had the Board claimed an executive session occurred it would have been in violation of the ODL for failing to meet the exceptions of an executive session as well as violations of the public notice and memoranda requirements of an executive session.

CONCLUSION

For the foregoing reasons, I find that the La Porte Board of Public Works and Safety violated the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Mr. Arthur L. Roule, Jr.