

October 20, 2005

Shelley S. Erwin
11304 E. County Road 600 S
Crothersville, IN 47229

Ardell Mitchell
11220 E. County Road 600 South
Crothersville, IN 47229

*Re: Formal Complaint 05-FC-191; Alleged Violation of the Open Door Law by the
Crothersville Town Council*

Dear Ms. Erwin and Mr. Mitchell:

This is in response to your formal complaints alleging that the Crothersville Town Council ("Council") violated the Open Door Law.

BACKGROUND

You each filed separate complaints on September 20, 2005. Your allegations match, except that Mr. Mitchell added an additional allegation. I have consolidated your separate complaints and am issuing this joint advisory opinion.

Some of the meetings that you contend were improper were held in April and in early August, more than 30 days before you filed your complaint. Ind. Code 5-14-5-7(a) requires that a person who chooses to file a formal complaint must file the complaint not later than thirty (30) days after the denial, or after the person filing the complaint receives notice in fact that a meeting was held by a public agency if the meeting was conducted secretly or without notice. You have not stated when you received notice that the April or early August meetings occurred; therefore, I cannot determine whether you have met the timeliness requirement. Other meetings that you allege as part of your formal complaint occurred on August 19 and 26. Because I can issue an informal inquiry response at any time, to the extent that your formal complaint is untimely with

respect to the April and early August meeting dates, I hereby incorporate my informal inquiry response in this formal advisory opinion.

Generally, your complaints center on decisions of the Council that you contend were made behind closed doors. I summarize your concerns as follows:

1. Two members of a three-member council meet at least weekly at the Crothersville School Superintendent's office to share information and deliberate on town issues;
2. The Council has never approved the construction of a fourth ball diamond at the Town's Countryside Park, yet the Council reviews and approves expenditures for the park;
3. The Council receives information and deliberates after meetings are adjourned and the public has left the meeting;
4. Executive sessions are conducted for purposes other than those stated in the notices and for improper purposes;
5. Contractors and volunteers received permission from the Council to work at the park without "board" (read, Council) approval in a public meeting;
6. Council members whisper and begin deliberation without an introduction to the discussion;
7. Final action is taken after public meetings have adjourned, when one Council member, Sara Hillenburg instructed town attorney Travis Thompson to prepare and send a letter to a company to move a modular home off the property in question;
8. On September 1, 2005, Council member Bill Nagle told you that in reference to a change order request submitted by Commonwealth Engineering on the Town's sewer project, the "board" (read, Council) had decided to go with the original plan. The Council then met in public on September 9 to vote on that issue.

I sent the Council a copy of your complaint. On behalf of the Council, members Bill Nagle and Sara Hillenburg responded. A copy of the Council's response is attached for your reference. Specific points of the Council will be discussed in my analysis below. In a nutshell, the Council denies any meetings outside of the public other than properly noticed executive sessions; all official action was taken in a public meeting or in situations where a gathering could occur without the formalities required by the Open Door Law.

ANALYSIS

It is the intent of the Open Door Law 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. 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. IC 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. IC 5-14-1.5-2(c). A meeting does not include any social or chance gathering not intended to avoid the Open Door Law. IC 5-14-1.5-2(c)(1). A meeting also does not include a caucus. IC 5-

14-1.5-2(c)(4). “Caucus” means a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action. IC 5-14-1.5-2(h). A secret ballot vote may not be taken at a meeting. IC 5-14-1.5-3(b). Any final action adopted by reference to agenda number or item alone is void. IC 5-14-1.5-4(a). Public notice of the date, time, and place of any meetings or executive sessions shall be given at least forty-eight hours (excluding Saturdays, Sundays, or legal holidays) before the meeting. IC 5-14-1.5-5(a).

The meeting requirement of section 5 does not apply to the executive of a county or the legislative body of a town if the meetings are 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. “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. IC 5-14-1.5-5(f)(2). The town council is the town legislative body. IC 36-5-2-2.

Majority of the Council Meeting in School Superintendent’s Office

As the Council’s response observes, you have not specifically alleged the two members that you observed at the Superintendent’s office. Mr. Nagle and Ms. Hillenburg admit being at the Superintendent’s office together, but their gathering did not involve taking official action on public business. Ms. Hillenburg is an employee of the Superintendent’s office; Mr. Nagle is a former employee of the school system. The Council avers that “the vast majority” of the times that the two have gathered at this location, the purpose was purely social. They also claim that recent gatherings have been political caucuses that were necessitated by the resignation of Vaughn Eisenhower as President and member of the Council.

Taking the averment of the Council as true, no violation of the Open Door Law would have occurred where the gatherings of the majority of the Council were truly social gatherings or caucuses, and no official action on public business was taken. A majority of a governing body may gather, but no duties under the Open Door Law arise where the gathering is not for the purpose of taking official action on public business.

The Town’s Countryside Park Ball Diamond Has Never Been Publicly Approved

You allege that the fourth ball diamond at Countryside Park has never been publicly approved by the Council, yet the Council continues to approve expenditures. Therefore, the Council must have met in private to determine that the park expenditures should be approved. In your allegation number 5, you allege in relation to the work done by contractors on the Park, that the Council must have decided to approve that work, but no public discussion of that issue took place. The Council’s response to these allegations is essentially that the Council is statutorily obligated to approve Town expenditures. The Town previously had a Parks Board that had authorized the improvements to the Park pursuant to a master plan. The Parks Board was dissolved on May 11, 2005, and the Council assumed direct control of the Town parks. Hence, the Council, by approving expenditures that were in pursuance of the master plan that had been approved by the now-defunct Parks Board, had ratified the continuance of the work on

Countryside Park. No secret meeting was held to accomplish this work. Again, unless a gathering of a majority of the Council actually occurred, no violation of the Open Door Law is evident from the averment of the Council.

The Council Meets After Adjournment

Your allegation that the Council receives information and deliberates after the meeting is adjourned and the public disperses was met with a denial by the Council. At most, the Council contends, the Council lingered after the meeting to discuss who would inform the various department heads of the town of the actions taken at the public meeting. The Council's response resembles the type of administrative functions that the legislative body of a town may carry out on matters relating to the internal management of the unit. So long as these discussions are carried out in public while a majority of the Council are gathered, no notice is required, in accordance with IC 5-14-1.5-5(f). However, I would caution the Council that discussions after adjournment, and out of earshot of the public, in the nature of recapping the meeting could well constitute official action, which includes deliberating or making recommendations. IC 5-14-1.5-2(d).

Executive Sessions

You allege that the Council has conducted executive sessions for purposes not stated in the notice. In particular, you point to an April 13, 2005 executive session where the notice stated "personnel and litigation." You allege that a contractor was present to provide information on the placement of the ball diamond at Countryside Park. You also allege that on April 5, 2005, the fire department's financial shortfall was discussed, with the Council deciding to pay the expenditures. To this allegation, the Council responded that on April 13, no matters were discussed other than those involving litigation and complaints about Town employees. The contractor coincidentally delivered letters addressed to the Council about the park's ball diamond, but the contractor did not participate in the executive session. The Council did not state whether the letters were reviewed or discussed during the executive session.

The Council could meet in executive session to discuss 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). Also, the Council could meet to receive information concerning the alleged misconduct of an individual over whom the Council has jurisdiction and to discuss, before a determination, the individual's status as an employee. IC 5-14-1.5-6.1(b)(6). You do not allege specifically that the Council's purpose in meeting did not at least include these types of discussions, and I do not have sufficient information to make a determination whether the discussions as described meet these exceptions. You also do not raise the adequacy of the April 13 notice, which must describe these purposes in terms more specific than "litigation" or "personnel." See IC 5-14-1.5-6.1(d). If, and only if, the Council met to discuss only the matters specifically stated in the executive session exceptions, and posted a notice that stated the subject matter by specific reference to the enumerated instance or instance for which executive sessions may be held, then the Council did not violate the Open Door Law. Moreover, any discussion or review of the matters contained in the delivered letters would have violated the Open Door Law, since receiving information and deliberating is taking official action. However, the mere receipt

of the letters as the executive session was starting, without more, would not violate the Open Door Law, in my opinion.

With respect to the April 5, 2005 executive session, the Council simply denies any discussion of fire department financial matters at this or any executive session. The allegation that the Council president (now resigned) stated the Council had already approved an expenditure with respect to the Council is not recalled by the responding Council members. Again, in the absence of more compelling evidence that the Council undertook a discussion of this nature, I cannot determine that the Council violated the Open Door Law.

Council Members Whisper and Deliberate Without Introducing the Matter

You allege two meetings in which members whispered or deliberated on issues without an introduction to the discussion: April 5 and August 9. The Council in reply believes that the informality of its proceedings, the lack of adherence to Robert's Rules of Order, and the tendency for the public's conversations during the meeting to drown out the Council member's voices, may have contributed to your belief that the meeting was conducted in secret. The Council expressed doubt that a viable Open Door Law allegation of secrecy could be made in the context of an open meeting, but I observe several provisions of the Open Door Law that assume a public meeting is being conducted with an element of secrecy that the Act prohibits. For example, no secret ballot votes may be taken at a public meeting. IC 5-14-1.5-3(b). Also, a rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void. IC 5-14-1.5-4(a). It is true that the Open Door Law does not prescribe formal requirements for the conduct of a meeting.

If the Council has not taken a secret ballot vote or considered final action without properly introducing the matter, no violation of the Open Door Law likely occurred. A governing body should provide for some semblance of order during a meeting so that its proceedings can be heard by the public, however.

Final Action Taken After Adjournment of August 19 Meeting

The Council responds that after a special meeting of the Council on August 19, one Council member, Ms. Hillenburg, conferred with the town attorney on a matter involving litigation around the removal of a structure in the town. Although the Council's response includes more background regarding the issue, your allegation raises only the question regarding the lone Council member's discussion, after a public meeting, with the town attorney. It is only where a gathering of a majority of a governing body occurs that a meeting has taken place. *See* IC 5-14-1.5-2(c). As no meeting occurred where only Ms. Hillenburg spoke about town business with the attorney, no violation of the Open Door Law occurred.

Your Conversation with Bill Nagle About Change Orders

You allege that Mr. Nagle told you on September 1, 2005 that the Council had decided to go with the original plan on the town's sewer project, in reaction to a change order submitted to the town by Commonwealth Engineering. The Council voted in a public meeting on this same

decision on September 9, you allege. The Council explains that the change order request was taken up for the first time at the Council's special meeting of August 26. The Council voted to approve all change order items except one, which affected the property of Mr. Mitchell. The Council tabled that item. Mr. Nagle admits that he had a discussion with Mr. Mitchell around the first of September, regarding the tabled issue. As Mr. Nagle recalls the conversation, he told Mr. Mitchell that unless the Council met before its regular meeting of September 6 to consider a change with respect to the sewer project, the original construction plan would stay in place. He did not intend to imply that the Council had met outside a public meeting and decided the change order issue between August 26 and September 6. Rather, in the absence of any affirmative action on the tabled change order item, the construction order with respect to the Mitchell property would remain in effect.

The Council's explanation of how the conversation proceeded is certainly plausible. In any event, it is not the characterization of the conversation that determines whether a violation occurred, but whether in fact the Council met without posting notice and permitting the public to attend. If no gathering took place on this matter, the Council did not violate the Open Door Law.

CONCLUSION

For the foregoing reasons, the Crothersville Town Council does not appear to have violated the Open Door Law. However, the April 13 executive session notice would have violated the Open Door Law if it failed to state the purpose of the executive session by reference to the enumerated instance or instances for which an executive session may be held.

Sincerely,

Karen Davis
Public Access Counselor

cc: Ardell Mitchell
Shelley S. Erwin