

March 29, 2006

Deborah A. Walters  
2631 Autumn Drive  
Crown Point, IN 46307

*Re: Formal Complaint 06-FC-46; Alleged Violation of the Open Door Law by the St. John Township Board*

Dear Ms. Walters:

This is in response to your formal complaint alleging that the St. John Township Board (“Board”) violated the Open Door Law by meeting in executive session for personnel matters, and by meeting for an illegal reason.

#### BACKGROUND

You alleged that on December 20, 2005 and January 3, 2006, the Board met in executive session. You state that the fact that these executive sessions were held can be substantiated by tape recordings and by the Township Trustee Jean Shepherd. You ask that I declare that these meetings did occur.

You also allege that you were advised that an executive session of the Board would take place on February 18, 2006 regarding “personnel.” You stated that it is your understanding that the planned executive session for “personnel” matters is an illegal meeting because the Board does not have any personnel under their control or employment. You ask that I issue a ruling that the Board has no jurisdiction over “personnel” matters.

I sent a copy of your complaint to the Board. Mr. Eugene Feingold, the Board’s attorney, responded by letter, a copy of which is enclosed for your reference. He stated that the Board did not meet on February 18, having cancelled the meeting. As a consequence, the notice issue is moot. In addition, Mr. Feingold stated that under its enabling statute, a Township Board has authority to fix salary, wages, and rates of hourly pay with respect to officers and employees of

the Township. In furtherance of that authority, the Board has the right to review and evaluate the job performance of individual employees in order to properly carry out its duty of fixing their salary, wages and hourly rates for each annual period. The Board may also receive information regarding alleged misconduct of a township employee, discuss the standards for employment of individual employees, and inquire as to any bias or prejudice exercised by the Township Trustee in making decisions regarding hiring.

Mr. Feingold also stated that there are other statutory provisions (without citing them) in which the Board as a legislative body is given the statutory authority to approve conduct of the Trustee vis `a vis her employees. Hence, the Board can discuss in executive session whether these individual employees are performing their duties in accordance with the requirements of the office he or she occupies. Mr. Feingold maintains that even if the executive session had occurred, it would have met the requirements of the Open Door Law as to notice and purpose.

## 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. Except as provided in IC 5-14-1.5-6.1, 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). "Meeting" means 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). "Official action" means to: 1) receive information; 2) deliberate; 3) make recommendations; 4) establish policy; 5) make decisions; or 6) take final action. IC 5-14-1.5-2(d). "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).

The Board is a public agency and a governing body under the Open Door Law. IC 5-14-1.5-2(a)(2); IC 5-14-1.5-2(b). Any gathering of a majority of the Board for the purpose of taking official action upon public business is a meeting for which notice must be posted. *See* IC 5-14-1.5-5. A governing body may meet in executive session for only certain limited purposes. IC 5-14-1.5-6.1(b). If a governing body meets in executive session for one or more of these purposes, it may exclude the public from the meeting. *See* IC 5-14-1.5-2(f)(defining "executive session").

A person who has been denied the right to attend a meeting may file a formal complaint within 30 days of the date of the denial of access to the meeting. IC 5-14-5-6, -7. The issue presented by your complaint concerns three executive sessions. Your complaint concerning the December 20, 2005 executive session and the January 3 executive session was not timely filed because the meetings occurred more than 30 days prior to the date you filed your complaint. Moreover, your complaint does not set out the nature of any violation of the Open Door Law with respect to those meetings; you request only that I declare that those meetings occurred. Because your complaint does not assert any denial of access with respect to those meetings, and was untimely filed with respect to those meetings, I do not issue any opinion with respect to the December 20 and January 3 meetings.

With respect to the February 18 meeting, your complaint is timely. Again, you do not allege a denial of access under the Open Door Law, because you assert that the Board met in executive session to discuss “personnel” matters, and the Board does not have authority to do so. You asked that I declare the meeting illegal as one which the Board did not have authority to conduct, not under the Open Door Law, but presumably under the Board’s enabling statute. The Public Access Counselor issues opinions on the public access laws. *See* IC 5-14-4-10(5) and (6). The Public Access Counselor does not have authority or jurisdiction to declare an action or meeting of a public agency to be outside the public agency’s statutory authority, which is the finding I believe you solicit.

In any case, Mr. Feingold states that the executive session was cancelled and did not take place. The matter of whether the Board did or did not gather on February 18 may be in contention because your complaint alleges that prior meetings have occurred that the Board may dispute. My office is advisory only. Any factual matters must be resolved by a trier of fact, i.e., a court of law.

Having stated the foregoing, I offer the following. First, notice of an executive session must state with particularity the purpose of the executive session. *See* IC 5-14-1.5-6.1(d). If the Board has met or will meet to discuss a job performance evaluation of an individual employee, for instance, its notice must state the purpose by reference to the text and citation to this instance for which an executive session may be held. IC 5-14-1.5-6.1(d). Your complaint hints that the notice stated only “personnel” as the purpose of the executive session. Had the Board met on February 18 under a notice of executive session that stated only “personnel,” it would have violated the Open Door Law. In that respect, I disagree with Mr. Feingold’s assertion that had the Board met it would have complied with the statute with respect to notice.

Second, the question whether the Board could take official action with respect to personnel issues (either on February 18 or at some future date) is relevant to the Open Door Law in one respect that may not give you the result you seek. The Board’s gathering to discuss a Trustee employee’s evaluation or misconduct, advanced by Mr. Feingold as matters within the statutory authority of the Board, is a meeting only if the elements of a meeting are met. The element of the definition of “meeting” in controversy is whether the “public business” of the Board was the subject of the gathering. If it was not, no “meeting” that is subject to the Open Door Law took place, and no violation of the Open Door Law would have occurred. “Public business” means any function upon which the public agency is empowered or authorized to take official action. Hence, if the Board is not empowered or authorized to take official action with respect to employees of the Township Trustee, the Board would not have conducted a “meeting” in the first place.<sup>1</sup>

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<sup>1</sup> Mr. Feingold argues that IC 36-6-6-10 provides ample statutory authority for the Board to take official action with respect to any township employee, as I read his response. IC 36-6-6-10(b) states that the township legislative body (the Board) shall fix the salaries, wages, rates of hourly pay, and remuneration other than statutory allowances, of all officers and employees of the township. The Board appears to argue that this gives wide latitude for the Board to evaluate, receive information regarding alleged misconduct, discuss employment standards for individual employees, and inquire into the Trustee’s bias in making hiring decisions for township employees. My research uncovered IC 36-6-7-2. That law provides that an officer of a township may appoint and remove all deputies and other employees in his office, shall appoint deputies and other employees necessary for the proper discharge of his duties, and is responsible for the official acts of his deputies and other employees. IC 36-6-7-2.

## CONCLUSION

In my opinion, in order for the St. John Township Board to gather for a “meeting” under the Open Door Law, the gathering must be for the purpose of taking official action upon the public business of the St. John Township Board. If the Board gathered for a purpose that is not the public business of the Board, the Board did not hold a “meeting” as that term is defined by the Open Door Law. If the Board meets in an executive session for the purpose of taking official action upon its public business, the Board must post a notice that states the purpose of the meeting by specific reference to the enumerated instance for which an executive session may be held.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Eugene Feingold

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Hence, this provision appears to confer on the Trustee, who is an officer of the township, authority to appoint and remove employees in the Trustee’s office, just as the Township Assessor may do the same for the employees in the Assessor’s office.