

May 17, 2007

Cheryl Gridley
137 E. Pendle
South Bend, IN 46637

*Re: Formal Complaint 07-FC-101; Alleged Violation of the Open Door Law by the
Town of Roseland*

Dear Ms. Gridley:

This is in response to your formal complaint alleging that the Roseland Town Council (“Council”) violated the Open Door Law by posting an incorrect notice for an executive session. I find that the Council violated the Open Door Law.

BACKGROUND

You alleged in your formal complaint that the Council posted notice of an April 11, 2007 executive session for the purpose of considering applications for the appointment of a public official. You enclosed the notice showing a checkmark indicating this purpose for the April 11 executive session. You contend that because the Council was interviewing a candidate for town attorney, the purpose was for interviewing a prospective employee, not a public official.

I sent a copy of the complaint to the Town. Attorney Michael Lipsky responded on behalf of the Council. He stated that the purpose for the “properly posted and advertised” executive session was to take applications for the position of town attorney. The Council accepted his application and adjourned. The session lasted a few minutes. No final decision or vote was made during the executive session. A public meeting on April 13 resulted in a vote to hire Mr. Lipsky as interim town attorney. Thereafter, an April 25 public meeting was planned to vote on a permanent town attorney. Because the Council held a public meeting on April 13 and had set a public meeting to vote on a permanent town attorney, the Council had cured any potential defect. Therefore, it is the Council’s opinion that there was no violation of 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. 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. IC 5-14-1.5-3(a).

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. Ind. Code 5-14-1.5-5(a). Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under [IC 5-14-1.5-6.1(b)]. IC 5-14-1.5-6.1(d).

The stated purpose of the executive session of April 11 was to consider applications for appointment of a public official. A governing body may hold an executive session when considering the appointment of a public official, to consider applications as well as take other specific actions. *See* IC 5-14-1.5-6.1(b)(10). “Public official” means a person who is a member of a governing body of a public agency or whose tenure and compensation are fixed by law and who executes oath. IC 5-14-1.5-6.1(a).

The response of the Council does not address your contention that the Council posted a notice for a different purpose than the purpose for which it met. The Council has not argued that the town attorney is a public official under the definition found in the Open Door Law. The Council has not provided an ordinance that sets the town attorney’s tenure and compensation. The Council has not stated that the town attorney executes an oath. For purposes of this opinion I find that a town attorney is not a member of the town council and also is not a person whose tenure and compensation are fixed by law. Therefore, the Council could not hold an executive session to consider applications for appointment of a town attorney.

Moreover, unless the town attorney is an employee of the town of Roseland, the Council could not have held an executive session at all. A governing body may hold an executive session “to receive information about and interview prospective employees.” IC 5-14-1.5-6.1(b)(5). If the town attorney is an independent contractor rather than an employee (as I believe to be the case), the Council may not meet in executive session regarding the selection of the town attorney.

The Council argues that its actions in an executive session were cured by later meetings in which the Council voted to hire an interim town attorney and to hire a permanent town attorney. In a lawsuit filed to void any final action that is taken in whole or in part upon official action taken at any executive session in violation of the Open Door Law, the court may not find

the violation was cured by the governing body by only having taken final action at a meeting that complies with the Open Door Law. *See* IC 5-14-1.5-7(c).

Among other factors, the court would consider the extent to which the violation denied or impaired access to any meetings that the public had a right to observe and record, and the extent to which the violation prevented and impaired public knowledge or understanding of the public's business. IC 5-14-1.5-7(d).

It is my opinion that the Council could not hold an executive session because the town attorney was neither a prospective town employee nor a public official. It is also my opinion that the notice did not recite the specific purpose for which the executive session was actually held. Finally, it is my opinion that the violations both denied access to meetings that the public had a right to observe and record, and prevented or impaired public knowledge of the public's business.

CONCLUSION

For the foregoing reasons, I find that the Roseland Town Council violated the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Michael L. Lipsky