

October 11, 2007

John Davis  
204 North Lafayette  
Cloverdale, Indiana 46120

*Re: Formal Complaint 07-FC-250; Alleged Violation of the Open Door Law by the  
Cloverdale Town Council*

Dear Mr. Davis:

This is in response to your formal complaint alleging the Cloverdale Town Council (“Council”) violated the Open Door Law (“ODL”) (Ind. Code §5-14-1.5) by conducting an emergency meeting failing to meet the criteria set forth in the ODL for holding such a meeting. I initially issued an opinion dated September 17, 2007. Since then I have learned the Council did respond to the complaint at my invitation to do so. Because of the mail and call volume our office receives and the limited resources, we inadvertently labeled that communication as a separate request for an informal opinion. Understanding now that it was a response to your complaint, I am amending my opinion in light of this new information. I find that the Cloverdale Town Council did not violate the Open Door Law by conducting an emergency meeting when it believed there was a threat of disruption of governmental activity. Further, it is my opinion this personnel discussion would not be an appropriate use of the administrative function exception to the notice requirements under the ODL.

#### BACKGROUND

In your complaint you allege that on July 27, 2007 you were notified the Council intended to hold an emergency meeting that day. You inquired of the Clerk whether the subject matter met the criteria in the ODL for holding an emergency meeting, and the Clerk indicated the Council President indicated the Town attorney had indicated it did meet the criteria. When the meeting was under way, you learned the water plant operator had failed a drug test, a discussion of which was the purpose of the meeting. You assert that the Town utility manager indicated he had suspended the operator and that the utility manager had the authority to hire a replacement. You assert the meeting does not meet the criteria established in I.C. §5-14-1.5-5(d) to conduct an emergency meeting. You filed your complaint on August 17. You requested priority status but did not allege any of the criteria listed in 62 IAC 1-1-3, so priority status was not granted.

The Council responded to your complaint by letter from attorney Allan Yackey dated August 31. Mr. Yackey first asks guidance from the counselor whether the administrative

function exception to the notice requirement under the ODL may apply here. If it does not apply, the Council submits the meeting was necessary to prevent governmental disruption because the employee in question had not yet been terminated, and the utility manager refused to do so without Council direction. The Council contends the meeting was necessary for the Council to assure a qualified operator was in place and to terminate the employee. The Council clarifies that the meeting notice first indicated the meeting was an executive session, but upon discovering it was not, the Council adjourned, prepared a new notice for the emergency meeting, and conducted the emergency meeting.

## 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. I.C. §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. I.C. §5-14-1.5-3(a).

The Council is clearly a governing body of a public agency for the purposes of the Open Door Law. I.C. §5-14-1.5-2. As such, except where authorized by statute, the meetings of the Council must be conducted openly and with proper notice to the public. I.C. §5-14-1.5-3.

An executive session may be held only in an instance listed in I.C. §5-14-1.5-6.1. An executive session may be held to discuss records classified as confidential by state or federal statute. I.C. §5-14-1.5-6.1(b)(7). An executive session may be held to discuss a job performance evaluation of individual employees. I.C. §5-14-1.5-6.1(b)(9).

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. I.C. §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 the executive sessions may be held under subsection (b). I.C. §5-14-1.5-6.1(d).

If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event, the time requirements of notice under this section shall not apply, but

- (1) news media which have requested notice of meetings must be given the same notice as is given to the members of the governing body; and
- (2) the public must be notified by posting a copy of the notice according to this section. I.C. §5-14-1.5-5(d).

The notice provisions of the ODL do not apply to the executive of a county or 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. I.C. §5-14-1.5-5(f).

Here you learned that an emergency executive session would be held on the same day you were notified. The meeting was held to address the water plant operator’s failed drug test. You do not allege the subject matter was not appropriate for an executive session or that the notice did not properly identify the specific instance in the ODL which would allow an executive session. The issue you present is whether an emergency meeting was appropriate. The Council clarifies that while the meeting was originally posted and started as an executive session, the Council realized the subject matter was not for an executive session, terminated the meeting, created a new notice, and started the meeting anew.

The ODL allows an emergency session, which essentially means a meeting without the required 48-hour notice, only to deal with an emergency involving actual or threatened injury to person or property or actual or threatened disruption of governmental activity under the jurisdiction of the public agency by any event. I.C. §5-14-1.5-5(d). Here the plant operator failed a drug test. The utility manager suspended the operator. You indicate the utility manager had the authority to suspend the operator and to hire a replacement without a meeting of the Council. You indicate the Council was still able to stay in compliance with the Indiana Department of Environmental Management’s requirement for a licensed operator to oversee the water plant up to the time the operator was dismissed. You indicate that as of the date you filed your complaint, the Council still has not hired a new operator, further demonstrating that there was no threat of disruption of governmental activity.

The Council contends that although the utility manager may have authority related to personnel matters, the utility manager sought Council direction before making a determination regarding the employee’s status. Because the problem was discovered on a Friday afternoon, the Council was concerned for the safety of the Town’s citizens during the weekend if a qualified operator was not in place, since the plant supplies water to the entire Town. At the time the Council President called the meeting, he believed the Town would not be in compliance with state statutes if a licensed operator were not in place, and at the time it was unclear whether anyone had the requisite skill to operate the plant.

It is my opinion the Council believed there to be a threat of disruption of governmental activity if they did not meet to address the issue of the operator’s employment and, more importantly, to address who would be operating the plant at that point. It is my opinion the Council neither intended to violate nor actually violated the notice provision of the ODL because this meeting constituted an emergency meeting under I.C. §5-14-1.5-5(d).

Regarding the Council’s query whether this meeting would fit under the “administrative function” exception listed in I.C. §5-14-1.5-5(f), I do not believe it does. The administrative function exception allows meetings of members of the legislative body and staff of the agency or governing body to meet to carry out certain administrative functions. I.C. §5-14-1.5-5(f). The statute specifically lists actions which are not administrative functions, awarding of contracts,

entering into contracts, or any other action creating an obligation or otherwise binding a county or town. I.C. §5-14-1.5-5(f).

I do not believe the instant meeting constitutes a meeting to carry out administrative functions for two reasons. First, the administrative functions exception does not allow the exception to be used to create an obligation or otherwise bind a county or town. I.C. §5-14-1.5-5(f). Because the present issue dealt with personnel matters, it was arguably the case that the Council made a decision to create an obligation when it decided who would operate the plant in the absence of the terminated employee. I assume the person operating the plant would be paid, and that salary, stipend, or contracted payment would be paid from Town funds, which would create an obligation.

Second, the ODL sets forth thirteen instances in which executive sessions may be held. I.C. §5-14-1.5-6.1(b). Of those thirteen instances, four address specific personnel issues. One specifically addresses an executive session to discuss an individual's alleged misconduct, which I believe to be the issue here. I.C. §5-14-1.5-6.1(b)(6). Since there are only thirteen instances for which an executive session may be held, it is my opinion these thirteen functions rise to a level beyond that of an administrative function carried out by an agency, as they address sensitive issues that the General Assembly has indicated a governing body must be able to discuss privately. In my view, the administrative functions exception may be used to carry out everyday or routine tasks necessary to manage the office of the agency. I do not view termination of an employee as an everyday or routine task but rather one that often requires deliberation and sometimes final action of the governing body. Previous opinions from this office are consistent with this approach. In *Opinion of the Public Access Counselor 03-FC-05*, Counselor O'Connor opined that a discussion how to handle the Clerk-Treasurer's absence at a meeting where the Clerk-Treasurer was responsible for keeping minutes was an administrative function.

## CONCLUSION

For the foregoing reasons, I find that the Cloverdale Town Council did not violate the Open Door Law by conducting an emergency meeting when it believed there was a threat of disruption of governmental activity. Further, it is my opinion this personnel discussion would not be an appropriate use of the administrative function exception to the notice requirements under the ODL.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: Don Sublett, President, Cloverdale Town Council  
Allan Yackey