

December 5, 2007

Richard Hancock  
5400 East 300 South  
Whitestown, Indiana 46075

*Re: Formal Complaint 07-FC-347; Alleged Violation of the Open Door Law by the  
Worth Township Trustee*

Dear Mr. Hancock:

This advisory opinion is in response to your formal complaint alleging the Worth Township Trustee (“Trustee”) violated the Open Door Law (“ODL”) (Ind. Code 5-14-1.5) by failing to provide proper notice for two executive sessions and by taking final action in an executive session. I have enclosed the Trustee’s response to your complaint for your reference. In my opinion the Trustee did not provide proper notice for the November 12 executive session but may have provided proper notice for the November 5 meeting if the Trustee can demonstrate the meeting was held for a discussion of records declared confidential by state or federal statute. Further, in my opinion the Trustee and Board did not violate the Open Door Law by making a decision in executive session to seek the fire chief’s resignation.

#### BACKGROUND

You allege the Trustee scheduled an executive session for the Trustee and the Worth Township Advisory Board (“Board”) for November 5, 2007, for which notice was posted on October 30. The notice indicated the executive session was “for the discussion of confidential records per IC 5-14-1.5-6.1(b).” You allege the notice seems to refer to I.C. 5-14-1.5-6.1(b)(7), but you allege the Trustee and Board actually discussed the fire chief’s job performance, which could be discussed in executive session pursuant to I.C. §5-14-1.5-6.1(b)(9). A second executive session was scheduled for November 12. Notice was posted on November 8, and it indicated the following: “The Worth Township Board and Trustee will be meeting 11/12/2007 at 6:30pm in continuous of the Executive Session from 11/5/2007.” You contend this was a new executive session, the notice for which must meet the notice requirements of the ODL.

Finally, you allege that a decision was made at the November 12 meeting to seek the resignation of the fire chief. You contend this was final action which should have taken place at

an open meeting. You filed this complaint on November 16. On November 24 you sent me a copy of the fire chief's resignation letter.

The Trustee responded to your complaint by letter dated December 3. The Trustee, Robert Guest, responded on behalf of the Township Advisory Board as well as himself. Mr. Guest contends the November 5 meeting was held to discuss confidential records as allowed by I.C. §5-14-1.5-6.1(b)(7). Mr. Guest contends that the November 5 meeting was recessed, and the November 12 meeting was a continuation of the November 5 meeting. As such, no notice was required for the November 12 meeting. In an attempt to be open as to the proceedings, the Township posted notice that the meeting would continue. Regarding the decision made in the executive session, Mr. Guest contends that while final action may not be taken in an executive session, other official action may be taken as defined in I.C. §5-14-1.5-2(d).

### 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). Executive sessions may only be conducted for the enumerated instances listed in the ODL. I.C. §5-14-1.5-6.1.

A "meeting" means a gathering of the majority of the governing body of a public agency for the purpose of taking official action upon public business. I.C. §5-14-1.5-2(c).

"Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. I.C. §5-14-1.5-2(d).

"Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. I.C. §5-14-1.5-2(g).

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). Notice shall be given by posting a copy of the notice at the principal office of the public agency or at the building where the meeting is to be held if no principal office exists and by delivering to the news media who submit an annual request for notices by January 1. I.C. §5-14-1.5-5(b). Public notice of executive sessions must state the subject matter by reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). I.C. §5-14-1.5-6.1(d).

You first allege the Trustee violated the ODL by posting notice of an executive session for a discussion of records classified as confidential by state or federal statute when in reality the Trustee and Board were meeting to discuss a job performance evaluation. The ODL allows an executive session for either reason, under I.C. §5-14-1.5-6.1(b)(7) for the former and I.C. §5-14-

1.5-6.1(b)(9) for the latter. The Trustee claims the notice was proper because the meeting was held to discuss confidential records. The Trustee did not, though, indicate under what state or federal statute(s) the records they discussed were made confidential. Further, the Trustee agrees that in the November 12 meeting, the decision was made to ask for the fire chief's resignation. This sounds to me like a job performance evaluation, which is an enumerated instance for holding an executive session. I.C. §5-14-1.5-6.1(b)(9). If the Trustee can provide further information as to the state or federal statute(s) declaring confidential the records discussed in the meeting, the Trustee and Board did not violate the ODL. If the Trustee and Board instead discussed a job performance evaluation of the fire chief, they violated the executive session notice provision of the ODL by failing to indicate the appropriate enumerated instance for the meeting.

You further allege that the Trustee violated the ODL by posting an incomplete notice for the November 12 executive session. The Trustee contends this meeting was a continuation of the November 5 executive session, so no notice was required. The notice requirement does not apply to reconvened meetings (not including executive sessions) where announcement of date, time, and place of the reconvened meeting is made at the original meeting and recorded in the memoranda and minutes thereof, and there is no change in agenda. I.C. §5-14-1.5-5(a). This section specifically excludes executive sessions from the waiver of notice. No other provision in the ODL addresses reconvened executive sessions. As such, it is my interpretation that each time a governing body meets in executive session, it is a new meeting for which a new public notice is required. This is not to say that a governing body cannot break briefly for a meal or other reason. But when the subject matter is addressed again on a different day by a governing body, it is my opinion that constitutes a new executive session for which notice must be posted in accordance with I.C. §5-14-1.5-5 and I.C. §5-14-1.5-6.1(d). In my opinion the Trustee and Board violated the ODL by posting an insufficient notice for the November 12 meeting.

Finally, you allege that the Board and Trustee made a decision during the November 12 meeting to seek the fire chief's resignation. The Trustee contends that a governing body may make decisions during an executive session. The ODL provides that a final action must be taken at a meeting open to the public. I.C. §5-14-1.5-6.1(c). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. I.C. §5-14-1.5-2(g).

While narrow construction of the executive session exceptions under the ODL is the general rule, the Indiana Court of Appeals has allowed a more liberal reading of this provision. In *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), Town Marshal Baker alleged that during an executive session to discuss his job performance, the Town Council had violated the ODL by compiling a list of persons to be rehired and keeping his name off the list. The list was later used in a public meeting to make decisions on who would be rehired. The court held that the compilation of the list was not "final action" and that creating the list did not go beyond the scope of the General Assembly's expressed intent to permit governing bodies the ability to meet privately to discuss certain personnel matters. *Id.* Similarly, here the Board and Trustee did not take final action. Instead, they made a decision to seek the resignation of the fire chief or consider taking final action related to the fire chief's employment at a public meeting.

In my opinion the Trustee and Board did not violate the ODL by making a decision in the executive session to seek the fire chief's resignation.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Trustee did not provide proper notice for the November 12 executive session but may have provided proper notice for the November 5 meeting if the Trustee can demonstrate the meeting was held for a discussion of records declared confidential by state or federal statute. Further, in my opinion the Trustee and Board did not violate the Open Door Law by making a decision in executive session to seek the fire chief's resignation.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: Robert Guest, Worth Township Trustee  
Ken McCormack, Worth Township Advisory Board