

January 16, 2007

Sent Via Facsimile

Allan Yackey
320 North Meridian Street
Suite 906
Indianapolis, IN 46204

Re: Formal Complaint 07-FC-5; Alleged Violation of the Open Door Law by the Avon Town Council

Dear Mr. Yackey:

This is in response to your formal complaint alleging that the Avon Town Council ("Council") violated the Open Door Law by holding an executive session for an improper purpose. I find that the Council violated the Open Door Law.

BACKGROUND

You filed this formal complaint on January 8, 2007. You have alleged circumstances for which I may issue an opinion on a priority basis. *See* 62 IAC 1-1-3. Therefore, this opinion has been issued within seven days of the filing of your complaint, taking into account the Monday state holiday.

You have filed this formal complaint on behalf of Kathryn Miller. From the response complaint filed by the Council, I have learned that Ms. Miller was a member of the Council when the meeting occurred.

You allege that the Council met in executive session on January 2, 2007. During the executive session, the Council President Michael Rogers informed the Council that he had appointed a new police chief, Jack Miller, and re-appointed the assistant chief, Bill Weems. You provided a rough draft of that part of the executive session transcript concerning representation of the various town boards and commissions when litigation is anticipated or filed.

The notice that was posted for the executive session of that date was a preprinted notice on which the Council selected the boxes applicable. The purposes selected by placing an "x" in the boxes were these three: 1) when authorized by federal or state statute; 2) for initiation of litigation or litigation which is either pending or has been threatened specifically in writing; and 3) with respect to any individual over whom the governing body has jurisdiction: (B) To discuss, before a determination, that individual's status as an employee, a student or independent contractor who is a physician. I note that the preprinted notice has inserted a separate box for this latter purpose, so that the Council could select one, not both, of the clauses set out in IC 5-14-1.5-6.1(b)(6)(A) and (B).

Initially, your complaint specifically disclaimed any violation of the Open Door Law for the litigation discussion. However, you amended your complaint to allege a violation of the Open Door Law with respect to the legitimacy of the Council's meeting in executive session for litigation strategy discussions as well.

Your first complaint alleges that the Council did not both receive information about and discuss, before a determination, the misconduct of an individual over whom the Council had jurisdiction. You claim that: 1) the Council did not, in fact, have jurisdiction over the person because the Council President removed the Police Chief from that post and merely informed the Council of that decision; 2) the President's refusal to provide any reason for the Chief's removal violated the Open Door Law because the executive session for which the Council met requires that the governing body meet where misconduct has been alleged; 3) it is wrong to assert that what happens during an executive session is confidential; and 4) the effort of the Council President to silence the members of the Council shows that the President was deliberate in his attempts to hide the actions taken during the meeting.

In addition, you contend that the Council violated the Open Door Law because the discussion that was claimed to be for litigation strategy included a discussion relating to legal representation of all of the boards and commissions of the town whenever litigation is pending or is threatened.

I sent a copy of your formal complaints to the Council. Council President Michael Rogers supplied a response, a copy of which is attached for your reference. Mr. Rogers denies that the Council violated the Open Door Law. Initially President Rogers anticipated discussing an employment matter relating to an employee, which had been raised by former council member Eva Yackey (your wife) during 2006. That matter was not discussed. Mr. Rogers confirmed that he announced as a courtesy to the Council his decision to make the appointments to the police department. He made the appointments prior to the executive session. He planned to inform the affected individuals after the executive session, and before a press release was issued later in the day. He simply wanted the Council members to be informed of the appointments and what would happen later in the day.

With respect to the litigation strategy discussion, Mr. Rogers stated that the discussion of attorney representation of boards and commissions was part of an effort of the town attorney to explain to the new member of the Council how threatened litigation would be handled. Town Attorney Dan Taylor explained that under the previous administration, the Council's position had been that although boards and commissions hire their own attorneys, the Council would not appropriate money for any attorneys other than those chosen by the Council. If a violation of the Open Door Law occurred, it was not intentional.

In addition to the above explanations, Mr. Rogers referred to the rough draft of the transcript from the executive session that you provided to me. He stated his concern that the Office of the Public Access Counselor has a confidential document in its possession that may be inaccurate, and asked that I keep it under seal so that litigation strategy discussions remain protected.

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. The purposes of the Open Door Law are remedial, and its provisions are to be liberally construed with the view of carrying out its policy. IC 5-14-1.5-1. Except as provided in section 6.1 of this chapter, 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). "Official action" includes receiving information, among other things. IC 5-14-1.5-2(d)(1).

Executive sessions may be held only in the following instances:

(2) For discussion of strategy with respect to any of the following:

(B) 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);

and

6) With respect to any individual over whom the governing body has jurisdiction:

(A) to receive information concerning the individual's alleged misconduct; and

(B) to discuss, before a determination, the individual's status as an employee, a student, or an independent contractor who is:

(i) a physician; or

(ii) a school bus driver.

IC 5-14-1.5-6.1(b)(6).

Discussion Concerning Appointments to the Police Department

The Council has not set forth any facts that diverge from your version of the discussion concerning the reassignment of the chief and assistant chief. I agree that the announcement of the President's appointments to the police department were not a proper purpose for which an executive session could be held. The Council implies that its original purpose in meeting, to discuss an employment matter, was no longer applicable, but it is unclear to me how that impacts your complaint. You alleged that the announcement of the President's appointments should have occurred in a public meeting, and no executive session purpose would cover this discussion. With this contention I completely agree. The presiding officer of a governing body may not make announcements in executive session to control the timing of the public announcement of appointments. Announcing the appointments may have seemed innocuous because the appointments were a *fait accompli*, but the announcements involved official action of the

Council, since the Council received information. In addition, the discussion did not involve any misconduct allegations; hence, the discussion in executive session concerning the President's appointments, under the authority of IC 5-14-1.5-6.1(b)(6) was not appropriate. I write also to observe that the Council may not use a preprinted notice for an executive session that separates clauses (A) and (B) of IC 5-14-1.5-6.1(b)(6), or meet to receive information but not to discuss the person's status as an employee. *See Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. Ct. App., 2001).*

Litigation Strategy Discussions

You allege that the Council discussed in executive session the legal representation of all boards and commissions of the town when the board or commission is sued. You contend that this discussion was a violation of the Open Door Law. Again, your factual allegations are not disputed by the Council. Wholly aside from the transcript of the executive session (which I found difficult to follow), the Council explained that "the discussion of attorney representation of boards and commissions was part of an effort of our town attorney to explain to our new member how threatened litigation *would* be handled." (Emphasis supplied.) Litigation strategy discussions in executive session are permitted only for situations in which the Council would initiate litigation, or for litigation that is either pending or is threatened specifically in writing. The Council has not referred me to any written threat of litigation, and its summary of the discussion indicates that the discussion concerned purely hypothetical situations. In addition, a discussion concerning who would be retained to represent boards or commissions and what funding source would be available are not strategy discussions concerning litigation, even if the backdrop for these discussions was pending or threatened litigation. As set forth in the executive session purpose, strategy discussions must be necessary for competitive or bargaining reasons. It is not apparent that a discussion concerning who would provide legal representation and funding for that representation is necessary for competitive or bargaining reasons.

With respect to Mr. Rogers' request that I maintain under seal the rough draft transcript of part of the executive session, I must respectfully decline. First, the enabling authority for the Office of the Public Access Counselor contains no authority for me to place under seal any public record that is filed with my office. *See IC 5-14-4* (describing the powers and duties of the Office of the Public Access Counselor). In addition, although a public agency may withhold in its discretion material that is specifically prepared for discussion or developed during discussion in an executive session, IC 5-14-3-4(b)(12), this provision does not make a transcript or recording of an executive session *confidential*, because the public agency may also disclose it in its discretion. The Office of the Public Access Counselor is a public agency and is subject to the Access to Public Records Act. *See generally IC 5-14-3*. Finally, as stated above, I did not rely on the transcript for any part of this opinion.

CONCLUSION

For the foregoing reasons, I find that the Avon Town Council violated the Open Door Law when it met on January 2, 2007 for the purpose of discussing the appointments of the police chief and assistant chief, and for the purpose of discussing how threatened or pending litigation would be handled when such litigation arose.

Sincerely,

Karen Davis
Public Access Counselor

cc: President Michael Rogers