

May 10, 2007

Sent Via Facsimile

Judy G. Whitaker
62 Diana Street
Cloverdale, IN 46120

*Re: Formal Complaint 07-FC-91; Alleged Violation of the Open Door Law by the
Cloverdale Town Council*

Dear Ms. Whitaker:

This is in response to your formal complaint alleging that the Cloverdale Town Council ("Council") violated the Open Door Law by taking a final action in an executive session.

BACKGROUND

You allege that during the April 9, 2007 executive session of the Council, three members of the Council signed a mediated agreement. This, you allege, was a final action that should have been taken in a public meeting. You are a member of the Council but did not sign the mediated agreement, which you enclosed. The agreement was executed by the Council, the Cloverdale Volunteer Fire Department, and the Cloverdale Township Trustee. The agreement recites that litigation had ensued between the parties except for the township. The causes were pending in Putnam Circuit Court and Putnam Superior Court. The Putnam Circuit Court ordered the parties to mediation, which occurred on October 24, 2006 and concluded on April 9, 2007. The mediated agreement is dated April 9, 2007.

I sent a copy of your complaint to the Council. Mr. Allan Yackey, attorney for the Council, responded. I enclose a copy of his response. Mr. Yackey acknowledged that the Council, which he represented during the mediation, was subject to two seemingly conflicting provisions, the Open Door Law and the rules regarding alternative dispute resolution (ADR). The ADR rules are binding on the parties and require that parties negotiate in good faith and come to mediation with authority to settle the lawsuit. The Council was a party to the lawsuit; accordingly, a quorum of the Council was required to participate in mediation.

The Council met in executive session for discussion of strategy with respect to pending litigation. Recognizing the difficulty of complying with the court ordered mediation and observing the Open Door Law, the attorneys for the parties determined that the bargaining adversaries would not meet jointly, and instead would remain in separate rooms during the negotiation. In addition, although the parties may be able to resolve their differences provisionally, the provisional agreement would have to be approved by a vote in an open meeting of the Council. The vote did in fact occur during an April 10 public meeting of the Council, which was held between 7:00 p.m. and 9:00 p.m. This public meeting actually occurred after the filing of your complaint if the time stamped on your faxed complaint is reliable.

The discussion during the public meeting was spirited. The mediated settlement was approved by a vote of 3 to 2. Only after the vote were the dismissals of the litigation executed. The parties had already planned for the contingency that the public vote might be inconsistent with the provisional outcome of the mediation. In that event, the parties agreed to submit the outcome to the Putnam Circuit Court judge to determine the status of the matter.

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). "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).

Section 6.1 of the Open Door Law provides the specific purposes for which an executive session may be held. IC 5-14-1.5-6.1(b). An executive session is a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f).

Executive sessions may be held only in the following instances:

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.

...

However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries. IC 5-14-1.5-6.1(b)(2)(B).

A final action must be taken at a meeting open to the public. IC 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. IC 5-14-1.5-2(g).

The Open Door Law does not provide a specific executive session exemption for mediation where a party to the lawsuit is a governing body of a public agency. Moreover, a mediation is a proceeding governed by rules promulgated by the Indiana Supreme Court. Courts are not included in the definition of “public agency” in the Open Door Law. *See* IC 5-14-1.5-2(a)(1). Consequently, a party to a mediation order that is a governing body under the Open Door Law is subject to the rules concerning ADR and to the Open Door Law. As Mr. Yackey notes in his response, it is difficult to harmonize these two provisions. I wonder whether the legislature considered the situation where a governing body was required to participate in court proceedings when it enacted the Open Door Law.

My records show that Mr. Yackey sought guidance from my office on February 12, 2007. I advised him that where the governing body was gathered to participate in mediation, it was a gathering for the purposes of taking official action on public business, and hence a meeting. In addition, I advised him that a governing body participating in mediation would be permitted to do so under the plain language of IC 5-14-1.5-6.1(b)(2)(B), for strategy discussions with respect to pending litigation, so long as the adverse parties did not meet in the same room. A vote would have to occur in a public meeting.

I agree that where a majority of a governing body signs an agreement in an executive session, the execution of the agreement, without more, could be final action. In this circumstance, the parties agreed that the need to indicate assent to the terms of the negotiated settlement under the terms of ADR would prevail unless the public vote did not uphold the decision in the executive session. These facts resemble those in *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), where the Court of Appeals approved the town council’s decision in an executive session to omit the town marshal from the rehire list because the decision was instituted by an actual vote in the public session of the town council.

Because the actions of the Council appear consistent with the *Baker* case and because the Council met during a court-ordered mediation for a purpose that meets the “litigation strategy” executive session purpose, I think that the Council did not violate the Open Door Law when it signed the mediation agreement in the executive session.

CONCLUSION

For the foregoing reasons, I find that the Cloverdale Town Council did not violate the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Allan Yackey