



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

June 25, 2012

Jane Neulleb  
2201 Florimond Drive  
Long Beach, Indiana 46360

*Re: Formal Complaint 12-FC-136; Alleged Violation of the Open Door Law by  
the Long Beach Town Council*

Dear Ms. Neulleb:

This advisory opinion is in response to your formal complaint alleging the Long Beach Town Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Michael S. Bergerson responded on behalf of the Council. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that the Council held an executive session on May 29, 2012 to discuss "pending litigation". As a member of the Council, you were in attendance at the executive session. Attorney Michael Knight was invited to attend the executive session representing certain lakefront residents who had submitted written notice that litigation would be possible if the Council did not amend an ordinance.

At the executive session, Attorney Knight presented his arguments to the Council regarding the ordinance. At that point, you asked that the meeting be stopped due to you believed a violation of the ODL had occurred, as Mr. Knight was an adversary of the Council. You thereafter repeated your assertion regarding the alleged violation, and noted that Mr. Knight had at the executive session provided a printed resolution to the Council, that if passed, would resolve the legal argument. You then took pictures of the proceedings after the executive session continued; shortly thereafter the session was adjourned.

In response to your formal complaint, Mr. Bergerson advised that no violation of the ODL occurred at the May 29, 2012 executive session. Initially, the Council unanimously approved holding an executive session, as defined under I.C. § 5-14-1.5-2(f), on May 29, 2012 at an April 20, 2012 public meeting. Further, I.C. § 5-14-3-2(f) provides that the governing body may admit to an executive session those persons necessary to carry out its purpose. The fact that Mr. Knight was going to be present was

or should have been known to all. There is no litigation pending on this issue. I.C. § 5-14-6.1(b)(2) prohibition against adversaries is not applicable in matters related to threatened litigation, only those related to competitive bargaining matters. Further, no vote of the Council was taken or even contemplated.

## ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, 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. *See* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, “To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.*

I.C. § 5-14-1.5-6.1(b)(2)(B) provides that:

(b) Executive sessions may be hold 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 in writing.

However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.

As provided by the Affidavit of Jeffrey Thorne, Council Attorney, on or about February 15, 2012, Council members received a “Notice of Potential Claim” correspondence from Attorney Michael V. Knight. As a result of receiving the letter, the Council held a special meeting on April 20, 2012, open to the public, to discuss, in part, an appropriate response. At the April 20, 2012 meeting, the Council voted to hold an

executive session to meet with Attorney Knight on May 29, 2012. The Council thereafter posted notice of the executive session and on May 29, 2012 the executive session commenced at 7 p.m., with Mr. Knight in attendance.

It is my opinion that the Council could have held an executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) on May 29, 2012 after it received from Mr. Knight the “Notice of Potential Claim” correspondence, as this can be construed as “litigation that has been threatened in writing.” However, while a governing body may normally admit into an executive session those persons necessary to carry out its purpose, I.C. § 5-14-1.5-6.1(b)(2) provides that executive sessions held pursuant to this subsection may not include competitive or bargaining adversaries and the discussion must be necessary for competitive or bargaining reasons. As applicable here, the Council could have meet in executive session for a discussion of strategy, as it related to the threatened litigation by Mr. Knight, and such discussion must have been necessary for competitive or bargaining reasons.

Webster’s Dictionary defines “adversary” as “one actively hostile; an opponent; enemy.” *New Webster’s Dictionary and Thesaurus*, Trident Press International, 2000. Mr. Knight represents those persons who have stated their intent in writing to file a legal claim against the Council should the Council not take certain action. At the May 29, 2012 executive session, Mr. Knight outlined his client’s position in an attempt to persuade the Council to rescind the previously passed ordinance. Based on the following, it is my opinion that, as to the issue for which the Council met in executive session on May 29, 2012, Mr. Knight and his clients were competitive and/or bargaining adversaries of the Council. Accordingly, it is my opinion that the Council violated the ODL when Mr. Knight was admitted into the executive session to discuss litigation that had been threatened in writing pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B). It should be noted that the Council could have held an open, public meeting and allowed Mr. Knight make an identical presentation; however such conduct would not be allowed in an executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B).

## CONCLUSION

Based on the foregoing, it is my opinion that the Council violated the ODL.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage  
Public Access Counselor

cc: Jeffery L. Thorne