



STATE OF INDIANA

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February 28, 2012

Mr. Jeffery J. Weir
513 W. 7th Street
Sheridan, Indiana 46069

Re: Formal Complaint 12-FC-33; Alleged Violation of the Open Door Law by the Sheridan Town Council

Dear Mr. Weir:

This advisory opinion is in response to your formal complaint alleging the Sheridan Town Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Ann O'Hara, Attorney, responded on behalf of the Council. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on January 12, 2012 at 10:00 a.m. you were removed as Chief of Police of the Sheridan Police Department by Council members Glenn Bougher and Dave Kinkead. You were told that the Council had been meeting since December 30, 2011. You provide that the new Council was sworn in on December 30, 2011 and the first advertised meeting was on January 12, 2012 at 6:00 p.m., eight hours after you were removed as Chief. You provided draft minutes of the Council's January 12, 2012 meeting where the Council voted to demote you to your prior position as Deputy Chief. In essence you allege that the Council conducted meetings prior to January 12, 2012 meeting that it failed to provide proper notice for and that you were removed as Chief prior to the Council taking final action at an open public meeting.

In response to your formal complaint, Ms. O'Hara advised that on November 8, 2011, the following individuals were elected to the Council: Glen Bougher, Brenda Bush, Silas Devaney III, Steve Fishers, and David Kinkead. All five members were new to the Council and took their oath of office on December 30, 2011. Pursuant to I.C. § 36-5-2-3(a), the term of office of the members of the Council began at noon on January 1, 2012. As such, any discussions by Mr. Bougher, Ms. Bush, Mr. Devaney, Mr. Fisher, and Mr. Kinkead prior to January 1, 2012 would not have been subject to the ODL as each individual did not take office and become a member of a governing body until

January 1, 2012. Only the then serving Council could act on behalf of the Town of Sheridan prior to January 1, 2012.

In response to the allegations that Mr. Bougher stated to you that the Council had been meeting after January 1, 2012, Mr. Bougher refutes this assertion and has submitted an affidavit in his defense. A copy of the affidavit is enclosed for your reference. The Council does not dispute that Mr. Bougher met with you on January 12, 2012 with Mr. Kinkead. The purpose of the meeting was to inform you of Mr. Bougher's intention to present a motion at the Council meeting held that evening to demote you from Chief of Police to Captain in accordance with I.C. § 36-5-2-13 and name an interim Chief of Police. It was intended as a courtesy to you, so that you would be aware of the possible demotion and allow you the option of forgoing the Council meeting that evening. Mr. Bougher also discussed the transition process should his motion be approved. No final action could nor was intended to be taken at the meeting with you since only two of the five members of the Council were present. The Town Council must have the approval of a majority of the Council before it may reduce a police office in grade under I.C. § 36-8-3-4.

The Council meeting held on January 12, 2012 was properly noticed. At the public meeting, Mr. Bougher made a motion to demote you to Chief Deputy (which is the rank of Captain) effective January 12, 2012, which four members of the Council voted to approve the motion. The motion was the official action of the Council as defined by statute and taken at a properly noticed meeting pursuant to the ODL.

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).

The ODL requires that 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. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

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. *See* 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. *See* I.C. § 5-14-1.5-2(d). "Public

business” means any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14-1.5-2(e). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c).

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. The factual circumstances you have alleged in your formal complaint regarding your demotion and the actions of the Council vary greatly from those submitted by the Council. Accordingly, I will address each allegation based on both parties’ version of the events. The parties do not dispute that all five members of the Council were newly elected in 2011, took office on January 1, 2012, and that the Council would be considered a governing body pursuant to I.C. § 5-14-1.5-2(b). As such, all meetings of the Council must comply with the ODL. I.C. § 36-5-2-3(a) provides that the term of office for a member of a legislative body commences at noon January 1 after the member’s election. As the newly elected members did not take office and were not empowered to act on behalf of the Council until January 1, 2012, the ODL would not apply to their actions prior to January 1, 2012. As such, I will only address those allegations that occurred after January 1, 2012, at which point the newly elected members of the Council had taken office.

You allege that you were removed as Chief of Police on January 12, 2012 at 10:00 a.m. by Council members Bougher and Kinkead. The Council provides that you were removed as Chief at the properly noticed public meeting of the Council on January 12, 2012 at 6:00 p.m. pursuant to I.C. § 36-8-3-4, which is further established by the minutes of the January 12, 2012 meeting. The Council maintains that the meeting that occurred the morning of January 12, 2012 between yourself, Bougher, and Kinkead was to inform you of Mr. Bougher’s intent to present a motion at the Council meeting that evening to demote you from Chief to Captain. Neither party disputes that demoting you from Chief to Captain constituted “final action” by the Council. As such, if the Council removed you as Chief prior to voting on the measure at the open public meeting held on January 12, 2012 at 6:00 p.m., then it acted contrary to the ODL. However, if the Council removed you as Chief at an open public meeting held on January 12, 2012 at 6:00 p.m., after a vote of the entire Council, then the Council did not violate the ODL.

You further allege that Mr. Bougher stated to you on the morning January 12, 2012 that the Council had been meeting since December 30, 2011, which you provide is contrary to the ODL as the first advertised meeting of the newly elected Council did not occur until January 12, 2012 at 6:00 p.m. In response, Mr. Bougher specifically provided that “at no time did I state that the Town Council had been meeting prior to its initial meeting scheduled for January 12, 2012.” As such, if a majority of the Council met prior to the January 12, 2012 meeting and took official action on public business, then the Council violated the ODL if the meeting was not properly noticed pursuant to I.C. § 5-

14-1.5-5. However, if the Council did not meet until the initial meeting of the new term held on January 12, 2012, then it did not act contrary to the ODL.

CONCLUSION

It is my opinion that if the Council demoted you prior to voting on the measure at an open public meeting, then it acted contrary to the ODL. But, if the Council demoted you at a properly noticed meeting of the public after a vote of the entire Council, then it did not violate the ODL. Further, if the Council did not conduct a meeting, pursuant to the definitions and requirements of the ODL, prior to January 12, 2012, then it did not act contrary to 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: Ann O'Hara