



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

March 12, 2012

Ronald N. Hunt
323 N. Meridian Street
Dunkirk, Indiana 47336

*Re: Formal Complaint 12-FC-59; Alleged Violation of the Open Door Law by
the City of Dunkirk*

Dear Mr. Hunt:

This advisory opinion is in response to your formal complaint alleging the City of Dunkirk ("City") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Phonnie M. Kesler, Clerk Treasurer, responded on behalf of the City. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint you allege that City Clerk, Phonnie Kesler, called an emergency meeting of the City Council ("Council") on February 6, 2012 to allow the Council to approve the hiring of temporary help for the City. You further allege that the City Council did not provide proper notice of the meeting, stating it was an "emergency meeting". However, Ms. Kesler stated in the meeting that "It's my understanding that I did not need to have this meeting, but I wanted to." You believe that the meeting held on February 6, 2012 would not qualify as an emergency meeting pursuant to the ODL.

In response to your formal complaint, Ms. Kesler advised that on Friday, February 3, 2012, the Deputy Clerk-Treasurer resigned from her position, without notice. Ms. Kesler was scheduled to attend a training seminar on February 7-9, 2012 in Daleville, Indiana and was required to be in Peru, Indiana for further training on February 10, 2012. As the Clerk's Office only maintains a total of two employees, the Office would have been forced to close on February 7-10, 2012 in light of Ms. Kesler's absence and the Deputy Clerk's sudden resignation. After consulting with the Mayor on February 3, 2012, Ms. Kesler called an emergency meeting for February 6, 2012 to bring the Council up to date regarding the Deputy's departure and inform the Council of Ms. Kesler's intentions regarding the Office for February 7-10, 2012.

In preparing for the meeting, Ms. Kesler reviewed and followed the requirements of holding an emergency meeting pursuant to I.C. § 5-14-1.5-5(d). The local media were

notified and a copy of the notice was posted at the City Building and the Police Department. Ms. Kesler was under the impression that the Clerk was under no obligation to hold the meeting, but as an informative measure chose to call it to keep the Council apprised of the situation. At the meeting, Ms. Kesler asked the Council to create a position for a part-time clerical position to assist the office. The person requested to fill the position is a former clerk who would be able to ensure the Clerk's Office would not be forced to close on February 7-10, 2012. The Council voted to create the position and Ms. Kesler informed the Council that an advertisement had been placed in the local newspaper for a full-time clerical employee.

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).

Public notice of the date, time, and place of any meeting, executive session, or any rescheduled or reconvened meeting of a public agency shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) prior to meeting. *See* I.C. § 5-14-1.5-5(a). In addition to providing notice to any news media who by January 1 of the year have requested notice, the agency must post notice at the principal office of the agency or, if there is no office, at the building where the meeting will be held. *See* I.C. § 5-14-1.5-5(b). Notice has not been given in accordance with Section 5 of the ODL if a governing body of a public agency convenes a meeting at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting. *See* I.C. § 5-14-1.5-5(h).

The General Assembly has provided an exception to the forty-eight hour notice requirement in the event that an emergency meeting is warranted. If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice do not apply. *See* I.C. § 5-14-1.5-5(d). However, news media that have requested notice of meetings must be given the same notice as is given to members of the governing body, and the public must be notified by posting a copy of the notice according to section 5. *Id.* Counselor Davis analyzed the meaning of this provision in a 2006 opinion:

Since there is no case law interpreting Indiana Code 5-14-1.5-5(d), I must rely on the rules of statutory construction to interpret this statute. When construing a statute, the interpreting body attempts to give words their plain and ordinary meaning. *Indiana Wholesale Wine v. State of Indiana*,

Alcoholic Beverage Commission, 695 N.E.2d 99, 103 (Ind. 1998). “Emergency” is defined as “an unforeseen combination of circumstances or the resulting state that calls for immediate action.” Merriam-Webster On-Line Dictionary (2007). The term “disruption” is defined as “to throw into disorder” or “to interrupt the normal course or unity of” and “event” means “something that happens.” *Opinion of the Public Access Counselor 06-FC-223*.

Ms. Kesler has provided that the meeting was called after the sudden resignation of the Deputy-Clerk and upon realizing the Clerk’s Office would be forced to close in light of her scheduled training for the week of February 7-10, 2012. It cannot be disputed that the Deputy Clerk’s resignation was unforeseen and that closure of the Clerk’s Office would have disrupted governmental activity. It is not apparent however whether the Council was required to act or if Ms. Kesler retained the authority to hire a part-time employee. As Ms. Kesler has provided that the City complied with all requirements of the ODL in holding an emergency meeting, it is my opinion that the City did not violate the ODL in regards to the emergency meeting held on February 6, 2012 if the Council was the sole entity that was empowered to hire a part-time employee so that the Clerk’s Office would not be forced to close on February 7-10, 2012. However, if Ms. Kesler, as Clerk-Treasurer, had the authority to hire part-time help without the Council consent, as you have alleged, it is my opinion that the meeting held on February 6, 2012 would not have been considered to be an emergency meeting pursuant to I.C. § 5-14-1.5-5(d).

CONCLUSION

It is my opinion that the City did not act contrary to the requirements of the ODL by holding an emergency meeting pursuant to I.C. § 5-14-1.5-5(d) on February 6, 2012, if the City Council was the sole entity empowered to hire part-time help to prevent the closure of the Clerk’s Office on February 7-10, 2012.

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Phonnice M. Kesler