



# STATE OF INDIANA

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January 13, 2014

Mr. Shannon M. Spence  
608 North Main St.  
Carthage, IN 46115

*Re: Formal Complaint 13-FC-350; Alleged Violation of the Open Door Law by the Town of Carthage*

Dear Mr. Spence,

This advisory opinion is in response to your formal complaint alleging the Town of Carthage ("Town") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.* The Board responded to your complaint via Mr. Adam G. Forrest, Esq., Town Counsel. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on December 16, 2013.

## BACKGROUND

Your complaint alleges the Town of Carthage violated the Open Door Law by conducting a meeting without notice.

You allege in your formal complaint the Town Council convened in an executive session on November 20, 2013. Your understanding was the executive session was called to discuss and clarify the Town's bereavement pay policy. According to your complaint, the executive session began with the Town's Works Manager discussing the performance of Town employees. The conversation then allegedly evolved into a discussion about the Works Manager entering into a contract with a service provider and then how to mitigate that potential problem.

Your contentions are two-fold. First, you take exception to the purpose of the meeting. It was your understanding that the executive session was called to discuss bereavement pay, but turned into a discussion of job performance. Secondly, you contend that the Town Council acted inappropriately in discussing the service provider contract.

The Town, in its response, argues the executive session notice was properly advertised and all discussions were limited to appropriate topics.

## ANALYSIS

It is the intent of the Open Door Law (ODL) 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 Ind. Code § 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 Ind. Code § 5-14-1.5-3(a).

Ind. Code § 5-14-1.5-6.1(d) mandates public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. All of the subject matters intended to be discussed fall under the permissible discussion topics for a closed door executive session under the ODL.

Notice of an executive session must be given 48 hours in advance of every session, excluding holidays and weekends, 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 Ind. Code § 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 Ind.Code § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice.

Addressing your first concern, discussion of leave policy or paid-time-off compensation considerations would not be an appropriate topic for an executive session. The General Assembly has very narrowly constructed the executive session statute to limit the scope of closed-door meetings. In fact, Ind. Code § 5-14-1.5-6.1(b)(9) specifically excludes discussions of compensation when meeting to evaluate job performance.

Although I do not have the benefit of the actual executive session notice before me, it appears from the information provided the notice was proper. And it does seem as if the executive session began with a conversation of Town Works employees, including the manager’s own performance.

The Town Works manager brought an issue to the table regarding a potential situation wherein a Works employee contracted with a service provider which may or may not have been authorized by the Council. The Town denies that it was any Councilperson’s intention to keep the service provider contract from the public, rather it was an admission by the Town Works Manager that the Department may have entered into an unauthorized agreement without Council knowledge. Presumably, this may have performance-related ramifications and would be a permissible discussion under the executive session statute.

As I have stated in prior opinions, the Public Access Counselor is not a finder of fact. Therefore I cannot read into the intention of the Council. If the service provider agreement was brought up by the Town Works Manager as admission of job-related wrongdoing and therefore indicative of his performance as a public employee, then it would be an appropriate discussion topic. It is suggested, however, that the discussion allegedly didn’t end there.

There was also talk of the consequences to the Town, financial ramifications and mitigation strategies.

Public agencies invite scrutiny when they meet behind closed doors in executive session. Therefore they should tread very carefully when engaging in tangential subject matters. My impression is that the conversation began with the intention of discussing the shortcomings of the Town Works employee's work performance, but digressed into other matters of public importance, such as how to remedy a potential issue with the service contract. I recognize the discussion of the service contract could be interpreted as relating to the Town Works Manager's work performance. But it can also be perceived as discussing public business behind closed doors.

A permissible executive session dialogue can quickly become a departure into public business that should be discussed in an open meeting. Frankly, that is the inherent risk of any executive session. So it is commendable that you, as a Council member, filed your complaint when you had suspicions that the subject matter may be illegal. Any public employee suspecting any sort of wrongdoing should come forward, even if it turns out that no unlawful activity has taken place.

Factually, I cannot make a determination of whether the executive session went too far. Part of my decision to abstain from making a definitive statement is due to your signing of the executive session memorandum which states:

“The members of the Carthage Town Council that were present at the above referenced executive session hereby certify that no subject matter was discussed in the executive session other than the subject matter specified in the public notice...”

So while I decline to state whether a violation occurred, I appreciate the opportunity to provide guidance to the Town going forward. If an executive session deviates from the authorized topic, the session should immediately cease or return to the permissible subject matter. Likewise, if there is even a question as to the legality of the conversation, the agency should err on the side of transparency and hold the discussion in an open meeting.

Regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a large, sweeping flourish underneath.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Adam Forrest, Esq.