



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317) 234-0906
Fax: (317) 233-3091
1-800-228-6013
www.IN.gov/pac

March 8, 2013

Mr. Benjamin W. Conner
302 S. Sycamore Street
Odon, Indiana 47562

*Re: Formal Complaint 13-FC-45; Alleged Violation of the Open Door Law by the
Odon Town Council*

Dear Mr. Conner:

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

BACKGROUND

In your formal complaint, you allege that the Council violated the ODL by conducting an executive session for the purpose of discussing a formal complaint that had been filed with the Public Access Counselor's Office. The executive session was conducted on January 11, 2013 and the notice provided that the Council was meeting pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) in order to discuss the initiation of litigation or litigation that is pending or been threatened in writing. You maintain that filing a formal complaint with the Public Access Counselor is not considered "litigation" under the statute, nor are you aware of any other statute that would justify holding an executive session for this reason. You further provide that the Council's attorney admitted that the formal complaint was discussed at the January 11, 2013 executive session during the special public meeting held by the Council on the same date. You believe a prior advisory opinion of the Public Access Counselor, 01-FC-16, is relevant and should apply to the actions of the Council.

In response to your formal complaint, Ms. Baldwin advised that no action was taken by the Council at the executive session conducted on January 11, 2013. The executive session was called to discuss a formal complaint that you have filed with the Public Access Counselor's Office against the Council. The executive session was held pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) with respect to the initiation of litigation or litigation that is pending or threatened in writing.

The Town notified its insurance carrier upon receipt of the formal complaint based on the potential of the Town being exposed to either the filing of a complaint in court, dependent on the Counselor's opinion, and/or the imposition of fees or costs that may be levied pursuant to the statute. Given these potential outcomes, the Council considered to be threatened with litigation or litigation that had been initiated. In essence, the filing of the formal complaint is the first step in filing a complaint with a court; which is a prerequisite to doing so. The discussion in the executive session was referenced in the public meeting thereafter and a vote was conducted by the Council for the Town's attorney to work with the Clerk and respond to the formal complaint.

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). A governing holding an executive session may admit those persons necessary to carry out its purpose. *See* I.C. § 5-14-1.5-2(f). The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). "Final action" is defined as 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).

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.

In order for a governing body to meet in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B), the topic of discussion must be in regard to the initiation of litigation or litigation that is either pending or has been threatened in writing. The Council met in executive session on January 11, 2013 after receiving a formal complaint filed with the Public Access Counselor's Office. The executive session was not held to discuss the initiation of litigation by the Council; rather the Council interpreted the formal complaint as either a threat of litigation or litigation that was pending. The term "litigation" is not defined in the APRA. Previous advisory opinions have referred to Black's Law Dictionary for insight, which defines "litigation" as a "lawsuit or a contest in a court of law for the purpose of enforcing a right or seeking a remedy." *See Opinion of the Public Access Counselor 01-FC-16*. Counselor O'Connor opined that a governing body may not be in executive session pursuant to (b)(2)(B) to discuss an administrative hearing; which I endorsed in a 2012 informal opinion. *Id.*; *See also Opinion of the Public Access Counselor 12-INF-33*. Since Counselor O'Connor's opinion in 2001, there has been no case law or amendment made to the ODL by the General Assembly that would alter the analysis provided by Counselor O'Connor. *Id.*

There are no hearings conducted by the Public Access Counselor; nor is the counselor considered to be an administrative law judge. The agency is not a judicial agency or a court of law. The opinions issued by the counselor are advisory in nature only. Contrary to what has been provided by the Council, a person filing a lawsuit against a public agency alleging violation of the ODL is not required to first seek an opinion of the Public Access Counselor. *See* I.C. § 5-14-1.5-7. Further, I would estimate that the percentage of formal complaints filed with the Public Access Counselor that subsequently result in litigation between the parties is exceedingly low. It is my opinion that if a formal complaint filed with the Public Access Counselor's Office whereupon the complainant stated in the complaint that he or she intended to file a lawsuit, that would be a situation where a governing body could meet in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B). However, in review of your previous formal complaint filed against the Council that was the basis for the executive session, I nor the Council have been unable to cite to any statement where you provided that you intended to file a lawsuit against the Council. As such, it is my opinion that the Council acted contrary to the requirements of the ODL by holding an executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) solely to discuss a formal complaint that had been filed with the Public Access Counselor's Office that did not contain any threat by the complainant that a lawsuit would be filed.

CONCLUSION

Based on the foregoing, it is my opinion that the Council acted contrary to the requirements of the ODL by holding an executive session pursuant to I.C. § 5-14-1.5-

6.1(b)(2)(B) solely to discuss a formal complaint that had been filed with the Public Access Counselor's Office that did not contain any threat by the complainant that a lawsuit would be filed.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Beth Haseman