



STATE OF INDIANA

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October 7, 2016

Amy M. Stutzman
10095 County Road 16
Middlebury, Indiana 46540

Re: Formal Complaint 16-FC-221; Alleged Violation of the Open Door Law by the Middlebury Town Council

Dear Ms. Stutzman:

This advisory opinion is in response to your formal complaint alleging the Middlebury Town Council (“Council”) violated the Open Door Law (“ODL”), *Indiana Code § 5-14-1.5-1 et. seq.* The Council has responded via Mr. Craig M. Buche, Esq. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 1, 2016.

BACKGROUND

Your complaint begins Monday, August 1, 2016, in which members of the Council held an Executive Session following a regular Council meeting with the (then) Town Manager Mark Salee (“Salee”). You claim the public notice for the meeting did not specify the exact subject matter of the meeting or future of Salee as Town Manager. Additionally, at that session you state a final action was taken by the Council in regards to Salee’s position – specifically requesting his resignation.

In response to your complaint filed with our Office, Council states the notice which was posted was in compliance with ODL and explicitly stated it was to discuss an employee’s performance. There was no final action which took place and the Council is allowed to make decisions during executive sessions.

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 Indiana Code § 5-14-1.5-1.* Section 6.1 provides an exception, allowing public agencies to conduct executive sessions which are closed to the public in order to discuss strategies with respect to certain specified topics.

An executive session may be held for following purpose: to discuss a job performance evaluation of individual employees. *Id.* See *Indiana Code 5-14-1.5-6.1(b)(9)*. As stated in the notice given to the public, the executive session was to discuss an individual's status as an employee and job performance evaluations. You are correct in stating no final action must be taken at an executive meeting; final action as defined in the statute "means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order". During the executive meeting Council discussed the resignation of Salee, it does not appear they voted on a regulation or order to be considered a final action. Council did in fact take "official action" meaning to receive information, deliberate, make recommendations, make decisions or establish policy in executive sessions. See *Indiana Code 5-14-1.5-2(d)*. Council was in compliance with the ODL and did not take a final action during its executive session. The Indiana Court of Appeals has stated that requesting a resignation during an executive session is not a violation of the Open Door Law. See *Guzik v. Town of St. John*, 875 N.E.2d 258 (Ind. App. 2007).

Moreover, there is no conclusive evidence this was a coercive resignation which would require the Council to release a 'factual basis for termination' under the Access to Public Records Act. However, given the apparent controversial nature of the resignation, it may be prudent for the Council to perhaps expound a bit more on the details leading up to the situation at the next public meeting while also balancing the employee's expectation of privacy. Executive sessions are meant to be pre-determinative in order that the public may be fully aware of a governing body's decision-making process. Based on the information provided, the Council may have given the appearance of a determination made during the executive session – the *Guzik* case notwithstanding. While the actions taken may not rise to the level of a court voiding the action, it still leaves the public in the dark regarding what took place at the executive session. While the intent of the Open Door Law is not necessarily to protect the due process rights of a public employee, it is the intent to protect the public's right to know how a governing body is managing taxpayer's personnel and resources. The Council would do well to be mindful of this consideration.

Council properly noticed public pursuant to *Indiana Code 5-14-1.5-6.1(d)* informing the public of the executive session and stated the subject matter by specific reference to the enumerated instance or instances for which the executive session may be held. A copy of that notice is attached for your review. Contrary to your complaint, it clearly gives more information than merely "personnel issues".

CONCLUSION

Based on the foregoing, it is the Opinion of the Indiana Public Access Counselor the Middlebury Town Council did not violate the Open Door Law.

Regards,



Luke H. Britt
Public Access Counselor

Cc: Mr. Craig M. Buche, Esq.