

February 20, 2003

Mr. Tim Putnam  
123 Kent Street  
South Bend, IN 46637

Re: *Advisory Opinion 03-FC-5*; Alleged Violations of the Indiana Open Door Law during an Executive Session by the Town of Roseland.

Dear Mr. Putnam:

You filed a formal complaint with this office concerning the legality of an executive session called by the Town of Roseland ("Town," "Town Council" and "Water/Sewer Committee) on January 25, 2003. Specifically, you have asked whether action taken during that executive session was permissible under the Indiana Open Door Law, Indiana Code 5-14-1.5-1 et. seq. (ODL.) Your complaint was received on February 10, 2003. Ms. Margaret M. Jones, attorney for the Town, filed a written response on February 10th and a copy of that response is enclosed for your reference. For the following reasons, it is my opinion that the Town did not violate the ODL.

### BACKGROUND

According to your complaint, during its regular meeting on January 9, 2003, the Town Council scheduled an executive session to be held January 25th with the Water/Sewer Committee to discuss litigation pertaining to a water/sewer lawsuit. The memoranda for the meeting states that the meeting started at 11:30 am instead of the scheduled meeting time of 10:00 am and that the Town Council consulted with Ms. Jones on a question about the town clerk-treasurer. Ms. Jones' bill to the Town indicates that on that date, she met with the Town Council about the Hayes Tower. You believe neither of these two discussions was appropriate because they did not pertain to "pending litigation" against the Town and that the meeting was scheduled to discuss the water/sewer lawsuit only. You then filed your formal complaint with this Office.

In response to your complaint, Ms. Jones responded that she had informed the Town Council that she could not attend their January 25th executive session because she has a conflict concerning the water/sewer lawsuit. The Town Council president, however, asked her to speak to him prior to the commencement of the executive session. When she arrived, the Town Council President, Mr. Shields, and member Ms. Paul were present. She indicated that Mr. Snyder, a member of the Water/Sewer Committee may have also been present at that time as well. Mr. Shields asked Ms. Jones how they

should proceed since the Town Clerk-Treasurer was not present. Ms. Jones advised Mr. Shields and Ms. Paul how to proceed with the meeting and how to deal with similar situations in the future.

After Ms. Jones provided the above-stated advice, she was asked another question about potential litigation regarding the Hayes Tower. She did not anticipate this question but since the notice stated that the meeting was being held under the exception for the "initiation of litigation" as well as pending litigation, then this was not inappropriate to discuss in that executive session. In conclusion, Ms. Jones stated that it is her position that the issues raised in your formal complaint do not address any of the public access issues "envisioned by the drafters of the Open Door Law."

## ANALYSIS

The intent and purpose of the Open Door Law is that the "official action of public agencies be conducted and taken openly, unless otherwise expressly permitted by statute, in order that the people may be fully informed." Ind. Code §5-14-1.5-1. The provisions are to be "liberally construed with the view of carrying out its policy." Id.

A "meeting" is a gathering of the majority of the members of a governing body, or in this case a meeting involving two (2) governing bodies, the Town Council and Water/Sewer Committee, who met for the purpose of "taking official action on public business" on January 25, 2003. Ind. Code §5-14-1.5-2 (c). Indiana Code section 5-14-1.5-3 provides that "all meetings of the governing bodies of public agencies must be open at all times." There are, however, exceptions to this general rule of openness, which are known as "executive sessions." Ind. Code §5-14-1.5-6.1.

An executive session is defined as "a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." Ind. Code §5-14-1.5-2(f). An executive session, therefore, constitutes an exception to the general rule granting a right of public access to meetings of governing bodies of public agencies. "Any exceptions to the statute must be strictly construed . . . (t)hus, all doubts must be resolved in favor of requiring a public meeting and all exceptions to the rule requiring open meetings must be narrowly construed." *Evansville Courier v. Willner*, 553 N.E.2d 1386, 1388 (Ind. App. 1990), vacated in part and adopted in part, 563 N.E.2d 1269 (Ind. 1990). The governing body of a public agency bears the burden of showing that its gathering is an executive session within one of several strict statutory exceptions.

One of the exceptions to hold an executive session is "(f)or discussion of strategy with respect to initiation of litigation or litigation that is either pending or threatened specifically in writing." Ind. Code §5-14-1.5-6(b)(2)(B). The notice of the January 25th meeting indicates that this was the basis for the executive session. The issues raised by your complaint are whether the discussions during this executive session with Ms. Jones about the absence of the clerk-treasurer and the Hayes Tower issue, which are not "pending litigation," violated the ODL.

*Discussion regarding Clerk-Treasurer*

According to your complaint and Ms. Jones' response, there was a discussion that involved a majority of the Town Council and purportedly a majority of the Water/Sewer Committee <sup>1</sup> concerning the fact that the Town Clerk-Treasurer was not present for the executive session. Town Council President Shields asked Ms. Jones to arrive before the commencement of the executive session so that he could ask her how they should proceed. While the original intent may have been a one-on-one discussion between Ms. Jones and Town Council President Shields, it appears that a majority of the members of the Town Council were present for this discussion and possibly a majority of the Water/Sewer Committee as well.

As noted above, a meeting is defined as a gathering of the majority of the members of a governing body. Ind. Code §5-14-1.5-2(c). Governing bodies must post notice of their meetings, whether these meetings are executive sessions or public meetings under Indiana Code section 5-14-1.5-5. Clearly, the Town had posted notice of the executive session to be held on January 25th. The stated purpose for this executive session, however, was for the discussion of strategy with respect to the initiation of litigation or pending litigation, not how to deal with the absence of the clerk-treasurer.

Town councils do have one other option for meeting under the ODL. Under Indiana Code section 5-14-1.5-5(f)(2), a town council, as the executive for the town, may hold administrative function meetings without posting notice, but these meetings are to be open to the public. At such meetings, a town council may receive information or recommendations to carry out administrative functions, carry out administrative functions or confer with staff members on matters relating to internal management of the town. Ind. Code §5-14-1.5-5(f)(2). The discussion held, concerning how to deal with the absence of the clerk-treasurer, who would draft the meeting memoranda and how to deal with this in the future certainly appear to be an administrative function. Further, the fact that the Town Council President asked Ms. Jones to attend prior to the commencement of the executive session to discuss this issue indicates that his intention was not to deal with this as part of that executive session. It is my opinion that the discussion held concerning the absence of the clerk-treasurer and how to deal with it was an administrative function meeting for which no notice was required, and should have been open for any member of the public to attend.<sup>2</sup> Consequently, it was not a violation of the ODL for the Town Council to conduct this administrative function meeting prior to their scheduled executive session.<sup>3</sup>

### *Discussion regarding Hayes Tower*

You have also complained there was a violation of the ODL when the Town Council discussed the Hayes Tower issue with Ms. Jones, purportedly as part of their January 25th executive session. The notice of the executive session indicated that that meeting was being held under Indiana Code section 5-14-1.5-6.1(b)(2)(B), for the discussion of strategy regarding the initiation of litigation or litigation that is pending or that has been threatened in writing. You point out that the Town Council, during its regular meeting on January 9th, stated that they would meet in executive session to discuss the water/sewer lawsuit only. Nothing in the ODL prohibits a governing body from dealing with other issues that fall within the stated executive session exception, so long as proper notice of the executive session was provided.<sup>4</sup>

In this case, the Town did provide notice that it would meet in executive session under a valid statutory exception under the ODL. If the Hayes Tower issue concerned the possible initiation of litigation, it is my opinion that the Town Council could discuss this in the executive session scheduled for January 25, 2003. Therefore, it was not a violation of the ODL for the possible initiation of litigation concerning the Hayes Tower to be discussed during that executive session.

## CONCLUSION

It is my opinion that the Town of Roseland did not violate the ODL during its January 25, 2003 executive session by discussing an administrative function issue or the possibility of the initiation of litigation at that meeting.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Ms. Margaret M. Jones, Attorney  
Town of Roseland

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<sup>1</sup> It is not clear to me from the information provided how many people are on the Water/Sewer Committee. From past contacts to this Office, I know that Ms. Paul and Mr. Snyder are members of the Committee, and I have assumed for the purpose of this Opinion that they constitute a majority of the Committee.

<sup>2</sup> I understand that since this took place on a Saturday and prior to an executive session that was not open to the public, it is unlikely that there were any members of the public present. The Town Council should be aware that any administrative function meetings held in the future are open to the public even though no notice must be provided under Indiana Code section 5-14-1.5-5.

<sup>3</sup> I realize that the executive session was scheduled to begin at 10:00 am, and that the meeting memoranda indicate that it did not begin until 11:30 am. There was no explanation provided for this in the Town's response to your complaint.

<sup>4</sup> A governing body could, by policy or resolution for example, limit the topics in their executive sessions, but there has been no indication from your complaint or Ms. Jones' response that the Town of Roseland has done so.