

April 24, 2003

The Honorable Renee A. Gatchell  
Clerk-Treasurer  
Town of Roseland  
123 Kent Street  
South Bend, IN 46637

Re: *Advisory Opinion 03-FC-19*; Alleged Violation of the Indiana Open Door Law by the Roseland Town Council.

Dear Ms. Gatchell:

You filed a formal complaint with this office concerning the legality of an executive session called by the Town Council of Roseland ("Town Council") on March 27, 2003. Specifically, you have complained that the Town Council violated the Indiana Open Door Law, Indiana Code 5-14-1.5-1 et. seq. (ODL) when it held an executive session to discuss the job performance of the town attorney and excluded you, the Clerk-Treasurer. Your complaint was received on March 28, 2003. Mr. Glenn L. Duncan, Town Attorney<sup>1</sup>, filed a written response on April 17th and a copy of that response is enclosed for your reference. For the following reasons, it is my opinion that it was not a violation of the ODL for the Town Council to exclude you from the March 27th executive session. It is also my opinion that the Town Council did violate the ODL when it conducted an executive session under Indiana Code section 5-14-1.5-6.1(b)(9) to discuss the job performance of the former town attorney because she was not a town employee, but rather an independent contractor.

## BACKGROUND

According to your complaint and the supplemental information you provided to this Office, the Town Council members decided during their public meeting that was held on March 20, 2003 to conduct an executive session to discuss the town attorney's billing statements. The Town Council apparently posted notice appropriately under Indiana Code section 5-14-1.5-5, and listed the purpose of the executive session as the discussion of the job performance of individual employees under Indiana Code section 5-14-1.5-6.1(b)(9). On Thursday, March 27th, you arrived at the scheduled executive session and were advised by Town Council President Charlie Shields that you were excused from the meeting. It is your position that the Town Council could not bar you from the executive session since Indiana Code section

36-5-6-6 provides that it is your duty as clerk-treasurer to "serve as the clerk of the legislative body by attending its meetings and recording its proceedings." You and Town Councilor Elizabeth McCombs objected to your removal on the basis of your statutory duties under Indiana Code section 36-5-6-6. Ms. Margaret Jones, the Town Attorney, was present and she was asked to provide legal advice in this situation. Ms. Jones apparently indicated that she could not provide advice on the issue at that time. You then left the meeting, albeit reluctantly and later filed your formal complaint with this Office.

In response to your complaint, Mr. Duncan stated that the Town Council did in fact hold an executive session on March 27, 2003 after posting appropriate notice under the ODL that the purpose of the executive session was to discuss the job performance of individual employees. At the executive session, all of the Town Council members were present. He confirmed that you were in fact asked to leave after voicing your protest and that the executive session took place as scheduled. Mr. Duncan also stated that your complaint to this Office is inappropriate because the Public Access Counselor is only authorized to issue opinions related to the state's public access laws, not the enabling act for the town clerk-treasurer, Indiana Code chapter 36-5-6. Also, it is the Town Council's position that by statute you may appoint a deputy to attend the meeting and that this alternative was not presented to the Town Council at the time for consideration. According to Mr. Duncan's response, you failed to lodge a specific complaint about the stated purpose of the executive session and for this reason; this Office should also refrain from issuing an advisory opinion on the issue.

## 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.* The Town Council is clearly a governing body under the ODL. Ind. Code §5-14-1.5-2(b).

A "meeting" is a gathering of the majority of the members of a governing body. 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 that permits a

governing body to hold an executive session is for the discussion of the "job performance evaluation of an individual employee." Ind. Code §5-14-1.5-6.1(b)(9). The notice of the March 27th meeting indicates that this was the basis for the executive session. The issues raised by your complaint are addressed in the paragraphs below.

### *Removal of Clerk-Treasurer from Executive Session*

The first issue raised by your complaint is whether the Town Council violated the ODL by refusing to allow you to attend the March 27th executive session. Mr. Duncan raises the point in his response to your complaint by stating that, while this may concern a violation of Indiana Code section 36-5-6-6, it is not an ODL issue and that the Public Access Counselor is not authorized to render an opinion on it.

Under Indiana Code section 5-14-4-10(6), the Public Access Counselor is authorized to issue advisory opinions "to interpret the public access laws." Within the statutory formal complaint process, a person who files a complaint with this Office must state proper grounds for the complaint. Ind. Code §5-14-5-6. In the case of the ODL, a person or public agency must have been denied:

- (2) (t)he right to attend any public meeting of a public agency in violation of Indiana Code 5-4-1.5; or
- (3) any other right conferred by . . . Indiana Code 5-14-1.5 or any other state statute or rule governing access to public meetings or public records.

Ind. Code §§ 5-14-5-6(2) and (3). A person, therefore, must have been denied the right to attend a public meeting or any other right, for example the right to notice of an executive session, which has been granted under the ODL.

As Mr. Duncan pointed out in his response to your complaint, the technical requirements of the ODL for notice and conduct of the executive session appear to have been met with respect to the Town Council's March 27th executive session, including the preparation of meeting memoranda. The ODL provides that a governing body may conduct an executive session, which by definition is a meeting that is not open to the public. Ind. Code § 5-14-1.5-2(f). Under Indiana Code section 5-14-5-6, a person may file a formal complaint, and receive an advisory opinion from this Office, on issues related to the right to attend public meetings or any other right conferred by public access laws. The failure to allow you to attend the executive session does not appear to raise any issues under the ODL or any other public access law, but rather Indiana Code section 36-5-6-6, which states that a clerk-treasurer must attend and keep records of all of the Town Council's proceedings.

While the Town Council's failure to permit you to attend the March 27th executive session may raise a problem under Indiana Code section 36-5-6-6, there does not appear to have been a violation of the ODL. For this reason, it is my opinion that the failure of the Town Council to permit you to attend the March 27th executive session did not violate the ODL. Whether or not this action violated Indiana Code section 36-5-6-6, is an issue that I cannot address due to the limited authority of this Office.

## *The Purpose of the March 27th Executive Session*

The second issue raised by your complaint is whether the discussions during the March 27th executive session concerning the former Town Attorney were appropriate under Indiana Code section 5-14-1.5-6.1(b)(9). Mr. Duncan contends that since you did not specifically discuss the purpose of the executive session in your complaint, that this Office may not address it. I have reviewed the statute governing formal complaints filed with this Office and do not find any prohibition on addressing this issue. See, Ind. Code chapter 5-14-5.

Under the ODL, a governing body must state the specific, statutory purpose or purposes for conducting an executive session in the meeting notice. Ind. Code §5-14-1.5-6.1(d). For the March 27th executive session, the stated purpose was to "discuss a job performance evaluation of individual employees," which is authorized at Indiana Code section 5-14-1.5-6.1(b)(9). From the information provided in your complaint documents and Mr. Duncan's response, it appears that the Town Council discussed its relationship with and apparently, the work performance of the former Town Attorney during this executive session.

The purpose stated for the Town Council's executive session under the ODL would have required them to discuss the job performance of a town employee. Exceptions under the ODL, as noted above, are to be construed narrowly, in favor of openness. *Evansville Courier*, at 1388. Since the term "employee" is not defined under the ODL, we must rely upon the rules of statutory construction to determine its meaning. "Generally, when construing a statute, the interpreting body attempts to give words their plain and ordinary meanings." *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99,103 (Ind. 1998), *citations omitted*. Non-technical, undefined words are to be defined by their ordinary and accepted dictionary meaning. *Bulkomatic Transport v. Department of Revenue*, 629 N.E.2d 955, 957 (Ind. Tax 1994), *citations omitted*.

"Employee" means "one employed by another usually for wages or salary." MERRIAM-WEBSTER ON-LINE DICTIONARY (2003). From the information provided, Ms. Jones was paid by the Town Council to serve as Town Attorney, however, it does not appear that she was an "employee" of the Town. Ms. Jones had an agreement with the Town Council that specifically stated that she was not an employee of the Town. All three (3) of the current members of the Town Council signed this agreement with Ms. Jones. This agreement, therefore, appears to make Ms. Jones' relationship with the Town Council that of an independent contractor, not an employee. The ODL distinguishes between independent contractors and employees. See, Ind. Code §5-14-1.5-6.1(b)(6)(B). It is my opinion that given the information provided to me, the Town Council did violate the ODL by conducting an executive session to discuss the former Town Attorney under Indiana Code section 5-14-1.5-6.1(b)(9).

## CONCLUSION

It is my opinion that the Town Council of Roseland did not violate the ODL by failing to allow you to attend its March 27, 2003 executive session. It is also my opinion that the Town Council did violate

the ODL by discussing the town attorney during an executive session held under Indiana Code section 5-14-1.5-6.1(b)(9) because she was an independent contractor, not a Town employee.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Glenn L. Duncan, Attorney  
Town of Roseland

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<sup>1</sup> Mr. Duncan was not the Town Attorney at the time you filed your formal complaint, but was retained by the Town on or after April 14, 2003.