January 11, 2005

Concerned Citizens of Burlington
c/o Greg Holderbaum
P.O. Box 253
Burlington, IN 46915

Re: Formal Complaint 05-FC-4; Alleged Violation of the Open Door Law by the Burlington Town Council

Dear Mr. Holderbaum:

This is in response to your formal complaint alleging that the Burlington Town Council ("Council") violated the Open Door Law ("ODL") by deciding outside a public meeting not to renew the town marshal's contract, and by failing to properly reconvene a meeting.

BACKGROUND

You allege that at a meeting held by the Burlington Town Council on January 3, 2005, a letter was read explaining the reasons why the Council would not renew the contract of the town's marshal, Jeramie Dodd. You also allege that at the January 3 meeting, the Council stated that it had typed the letter 2 or 3 days prior to the meeting. You allege that the letter evidences the fact that a decision to not renew the marshal's contract must have been made behind closed doors. You also allege that at the January 3 meeting, Council President Richard Davis adjourned the meeting, then immediately called a meeting to discuss and decide Marshal Dodd's replacement. You allege that the President's action was in response to a question posed by a member of the public immediately upon adjournment regarding who would replace the outgoing marshal.

Your complaints were filed on January 4, 2005, and were consolidated under 05-FC-4 for purposes of this advisory opinion. You requested priority status pursuant to 62 IAC 1-1-3, which I granted because you intend to file a lawsuit to declare void the decision to not renew Marshal Dodd's contract.

I sent a copy of your complaints to the Town Council President. In response, I received a letter from the Council's attorney, Florence Briggs. A copy of her response is enclosed for your reference. In her response, Ms. Briggs stated that on December 29, 2004, the Council met in executive session to discuss the marshal's job performance. Ms. Briggs included a copy of the December 29 executive session notice, which I enclose for your reference. No final action was taken at the executive session. Rather, a vote of the Council to not renew the marshal's contract was undertaken at the public meeting on January 3. It was only then that the pre-drafted statement was read at the meeting. Had the vote not resulted in nonrenewal of the marshal's contract, the statement would not have been read. Also, she stated that the President adjourned the meeting when the public called for the Council's resignation following the vote. He had forgotten that the business of appointing an interim marshal had not been completed. Once the Council President realized his omission, he immediately reconvened the meeting and the Council completed that business.

ANALYSIS

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. IC 5-14-1.5-3(a). The Open Door Law provides for certain delineated exceptions to the requirement that a meeting be conducted openly. An executive session is defined as a meeting from which the public is excluded. IC 5-14-1.5-2(f).

The several instances in which an executive session may be held are found at IC 5-14-1.5-6.1(b). In the notice of the Council's December 29 executive session, the Council has marked the exception described as: "To discuss job performance evaluation of individual employees." This is an instance where a governing body may meet in executive session. IC 5-14-1.5-6.1(b)(9).

It is the public policy of the Open Door Law that it is to be construed liberally in favor of openness, and its exceptions are to be narrowly construed. IC 5-14-1.5-1. While this general rule of narrow construction prevails, the Indiana Court of Appeals has allowed a more liberal interpretation of the "employee evaluation" instance. In *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind.Ct.App. 2001) an employee had alleged that the Town Council had taken final action during the executive session to discuss his employee evaluation when it compiled a list of persons to be rehired and omitted his name from the rehire list. The Court held that the act of compiling the list was not "final action" and that compiling the list in connection with the employee's evaluation did not go beyond the scope of the legislature's intent to shield personal information about employees from public discussions.

From the description of the Council's discussions contained in Ms. Brigg's letter as well as from the statement read by the Council, I believe that the Council's December 29 executive session was consistent with the Open Door Law, following *Town of Middlebury*. No final action was taken, although it appears likely that the Council discussed and took other official action in connection with the marshal's job performance evaluation that led to a decision not to renew the marshal's contract. Hence, I do not find that there was a violation by the Council of the Open Door Law, given the facts as stated by the Town's attorney.

Turning to the question of the Council President's adjourning and then re-opening the public meeting of January 3, I point out the requirements contained in the Open Door Law regarding reconvening of a meeting. IC 5-14-1.5-5(a) states that notice is not required when a meeting is reconvened (not including executive sessions), where announcement of the date, time, and place of the reconvened meeting is made at the original meeting and recorded in the memoranda and minutes thereof, and there is no change in the agenda. Here, the Council does not dispute that it did not make any such announcement prior to adjourning the meeting. The adjournment was done hurriedly because of the highly charged climate of the meeting, and the President had forgotten that important business remained. The meeting was reconvened immediately after it was adjourned, in response to questions of the public.

I find that there was a technical violation of the Open Door Law when the Council reconvened the meeting without having provided the announcement required by IC 5-14-1.5-5(a). My finding of the technical violation is not altered by what appears to be a well-intentioned reason for reconvening the meeting after improvidently adjourning. However, I note that, following IC 5-14-1.5-7(d), courts have held that a governing body may be in substantial compliance with the Open Door Law although failing to meet its technical requirements. *See Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind.Ct.App. 1998). The "substantial compliance" standard may be met depending upon: 1) the extent to which the violation denied or impaired access to a meeting; and 2) the extent to which public knowledge or understanding of the public business conducted was impeded.

Applying these elements to the violation here, I opine that the Council was in substantial compliance with the Open Door Law, under the facts that have been presented to me. The meeting was reconvened immediately after adjournment, and therefore the persons in attendance were present to witness and record the business that the Council conducted after reconvening. I discern no impaired access to this "second" meeting and no impediment to the public's knowledge or understanding of the public business that was conducted.

CONCLUSION

For the foregoing reasons, I find that the Burlington Town Council did not violate the Open Door Law when it met in executive session to discuss the town marshal's job performance evaluation. I also find that the Council violated the Open Door Law in reconvening a meeting without making the proper announcement, but was in substantial compliance with the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Florence Briggs