



STATE OF INDIANA

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September 22, 2008

Gary VanHook
PO Box 155
Atlanta, Indiana 46031

*Re: Formal Complaint 08-FC-208; Alleged Violation of the Open Door Law
by the Atlanta Town Council*

Dear Mr. VanHook:

This advisory opinion is in response to your formal complaint alleging Atlanta Town Council ("Council") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) by deciding during an executive session to hire a new Town Marshal and deputy. A copy of the Council's response to the complaint is enclosed for your reference. In my opinion the Council did not violate the ODL.

BACKGROUND

You filed a complaint on September 12, 2008, alleging the Council violated the ODL by deciding during a September 2 executive session to hire a new Town Marshal and deputy. You complain that while the Council voted in a meeting open to the public, the decision made in the executive session eliminated any possible public scrutiny on the matter.

The Council responded to the complaint by letter dated September 18. The Council indicates it interviewed three applicants for the positions during executive sessions held on September 2 and September 4. The Council President then contacted references, after which he telephoned each of the other Council members to discuss his findings. During the calls, the Council members each agreed on the applicants to hire for the positions. The Council President made calls to the applicants to offer the positions on September 5 and September 8. During the September 9 public meeting of the Council, a motion carried to appoint the Marshal and deputy.

ANALYSIS

It is the intent of the Open Door Law 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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of

the Open Door Law, 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. I.C. § 5-14-1.5-3(a).

Executive sessions, which 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). Here, the executive sessions were held for the purpose of receiving information about and interview prospective job applicants, which is allowed pursuant to I.C. § 5-14-1.5-6.1(b)(5).

A final action must be taken at a meeting open to the public. I.C. § 5-14-1.5-6.1(c). “Final action” means a vote by a governing body on a motion, proposal, resolution, rule, regulation, ordinance or order. I.C. § 5-14-1.5-2(g). Had the Council made the decision to hire the individuals in executive session, that action would have been permissible pursuant to *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), so long as a vote was not taken at the executive session.

In *Baker*, Town Marshal Baker alleged that during an executive session to discuss his job performance, the Town Council had violated the ODL by compiling a list of persons to be rehired and keeping his name off the list. The list was later used in a public meeting to make decisions on who would be rehired. The court held that the compilation of the list was not “final action” and that creating the list did not go beyond the scope of the General Assembly’s expressed intent to permit governing bodies the ability to meet privately to discuss certain personnel matters. Instead, the court said the “final action” consisted of the Council’s vote at the public meeting. *Id.* at 71. Similarly, any decisions made by the Atlanta Town Council during executive session in the present matter would not constitute final action. Final action was the vote on the motion to hire the applicants, and that final action was taken at a public meeting.

To the extent the Council members discussed the hiring decisions during telephone conversations, those discussions do not constitute meetings under the ODL. A meeting is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. I.C. § 5-14-1.5-2(c). While the ODL does not define “gathering,” this office has generally said that members must be physically present to be considered “gathering.” Further, the General Assembly has indicated any member who is not physically present at the meeting but communicates with members by telephone, computer, or other electronic means cannot be considered present at the meeting and cannot participate in final action. *See* I.C. § 5-14-1.5-3(d). If members participating by telephone cannot be counted as present, a telephone conversation between two people where each is at a different location would never constitute a meeting. As such, it is my opinion the Council members’ telephone conversations did not constitute meetings.

Finally, the Council did take final action (i.e. vote) on the hiring of the two individuals at the September 9 meeting. That meeting was open to the public. It is my opinion the Council followed the requirements of I.C. § 5-14-1.5-6.1(c) by taking final action in a meeting open to the public.

CONCLUSION

For the foregoing reasons, it is my opinion the Council did not violate the ODL.

Best regards,

A handwritten signature in cursive script that reads "Heather Willis Neal".

Heather Willis Neal
Public Access Counselor

Cc: Andy Emmert, President, Atlanta Town Council