



STATE OF INDIANA

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April 26, 2011

Mr. Jay Meisenhelder
136 East Market Street, Suite 200
Indianapolis, IN 46204

Re: Informal Inquiry 11-INF-13; Open Door Law Issues

Dear Mr. Meisenhelder:

This is in response to your informal inquiry regarding the Linden Town Council ("Council"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Indiana Open Door Law ("ODL"), I.C. § 5-14-3-1 *et seq.* My office forwarded a copy of your inquiry to the Council on February 24, 2011, but we have not yet received a response. This opinion, therefore, will be based solely upon the contents of your inquiry.

Your inquiry presents several alleged violations of the ODL. The enumerated items below are the allegations as you presented them. My response follows each allegation.

1. Excluding the Town Clerk-Treasurer from regular and/or Executive Sessions of the Town Council. The Town Clerk-Treasurer is designated by statute (Ind. Code 36-5-6-6(9)) as the clerk of the Council and is statutorily required to attend its meetings and record its proceedings.

In support of your argument that statute requires the Town of Linden's ("Town") clerk-treasurer to attend the Council's executive sessions, you cite to I.C. § 36-5-6-6. That section states that the clerk-treasurer shall "[s]erve as clerk of the legislative body by attending its meetings and recording its proceedings." I.C. § 36-5-6-6(a)(10). Under the ODL, 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." I.C. § 5-14-1.5-2(f) (emphasis added). I.C. § 36-5-6-6 pertains to meetings of the Town generally, while section 6.1 of the ODL prescribes conditions for executive sessions in particular. Under the rules of statutory construction, "specific statutory provisions take priority over general statutory provisions." *White v. Indiana Parole Board*, 713 N.E.2d 327, *329 (Ind. App. 1999), citing *Ezzell v. State*, 246 Ind. 268, 271, 205 N.E.2d 145, 146 (Ind.1965). Consequently, it is my opinion that the Town did not

violate the ODL by excluding the clerk-treasurer from an executive session because it is permitted to do so under I.C. § 5-14-1.5-2(f).

However, I see no basis to exclude the clerk-treasurer from the Council's regular meetings. The clerk-treasurer has the same right as any other person to attend the Council's regular public meetings. I.C. § 5-14-1.5-3(a). The Council has not cited any other legal basis to exclude the clerk-treasurer from its regular meetings. Consequently, to the extent that the Council prohibited the clerk-treasurer from attending a regular, public meeting, the Council violated section 3 of the ODL.

2. Failing to provide notice for regular and/or Executive Sessions of Town Council. (Ind. Code 5-14-1.5-4(a)).

The ODL requires that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. I.C. § 5-14-1.5-5(a). Consequently, the Council violated the ODL if it held regular meetings or executive sessions without posting notice of such meetings at least 48 hours in advance.

3. Failing to record minutes for regular and/or executive sessions of Town Council meetings. (Ind. Code 5-14-1.5-4(b)(1)).

The ODL does not require that a governing body prepare "minutes" of its meetings. *See Op. of the Public Access Counselor 04-FC-50*. However, governing bodies are obligated to create memoranda of the meeting as the meeting progresses, and that memoranda need only contain certain limited information regarding the meeting. I.C. § 5-14-1.5-4(b) (date, time and place of the meeting, the members present and absent, the general substance of matters discussed, a record of any votes taken, and any items required under specific statutes not applicable to all meetings). Consequently, the Council did not violate the ODL if it merely failed to create minutes of its meetings so long as the Council created memoranda in accordance with subsection 4(b) of the ODL.

4. Failing to provide a posted agenda for regular sessions of the Town Council meetings. (Ind. Code 5-14-1.5-4(a)).

Under the ODL, a governing body is not required to utilize an agenda, but a governing body who does utilize an agenda must post a copy of the agenda at the entrance to the meeting location prior to the meeting. I.C. § 5-14-1.5-4(a). The ODL provides no guidelines for the content or structure of a meeting agenda, and this office has indicated that an agenda can take essentially any form. *Opinion of the Public Access Counselor 04-FC-02*. Thus, the Council did not violate the ODL if it failed to provide an agenda for its regular meetings. If, however, the Council utilized an agenda at a meeting, it should have posted the agenda at the entrance to the meeting place prior to the meeting.

5. Failing to notify the Clerk-Treasurer of an emergency meeting of the Town Council wherein the minutes were taken by an individual not authorized to do so by statute. (Ind. Code 5-14-1.5-6.1(d)).

The ODL provides the following regarding notice of meetings:

IC 5-14-1.5-5

Public notice of meetings

Sec. 5. (a) Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. This requirement does not apply to reconvened meetings (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.

(b) Public notice shall be given by the governing body of a public agency by:

(1) posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and

(2) delivering notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency....

* * *

(d) If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice under this section shall not apply, but:

(1) news media which have requested notice of meetings must be given the same notice as is given to the members of the governing body; and

(2) the public must be notified by posting a copy of the notice according to this section.

I.C. § 5-14-1.5-5. Nothing in this section requires the Council to provide notice of a regular or emergency meeting to the clerk-treasurer specifically. If the Council provided a notice of its emergency meeting that complied with subsection 5(d), the Council did not violate the ODL by failing to provide an additional notice to the clerk-treasurer.

6. An agreement by two of the three members of the Town Council to meet twice a month at a local tavern to organize and administer the Town Festival. These meetings are not posted, and no minutes are provided to the Town Clerk-Treasurer.

Except as provided in section 6.1 of the ODL, 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). The ODL

defines a “meeting” as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). If two members of the Council gathered to discuss the Town Festival, it is likely that a “meeting” as defined by the ODL occurred.

That said, generally, the ODL requires that public notice of the date, time, and place of any meetings be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. I.C. § 5-14-1.5-5(a). However, the requirements for posting notice do not apply when the executive of a county or the legislative body of a town (e.g., the Council, in this case) meets, if the meeting is held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. Administrative functions do not include the awarding of contracts, the entering into contracts, or any other action creating an obligation or otherwise binding a county or town. I.C. § 5-14-1.5-5(f)(2). Even though notice is not required, the “administrative function” meeting must be held in the public, since the notice provision of the ODL is *the only provision* that does not apply to an “administrative function” meeting. I.C. § 5-14-1.5-5(f)(2), emphasis added. If the Council members meet solely to organize and administer plans to hold the Town Festival, in my opinion such meetings would constitute administrative function meetings and the ODL’s notice requirements would not apply. The requirement that the meetings not be closed to the public, on the other hand, would still apply.

7. Holding an unannounced, unnoticed “pre-meeting” one hour prior to the scheduled start of a previously-announced Executive Session of the Town Council.

Again, the ODL defines a “meeting” as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. I.C. § 5-14-1.5-2(d). Unless the Council’s “pre-meeting” was an administrative function meeting, if a majority of the Council members gathered and deliberated or took other official action upon public business, the Council should have provided notice of such meeting in accordance with section 5 of the ODL and held the meeting in public.

8. Two of three Town Council members agreeing to hold a meeting at the offices of the Romney Water Board. No notice was provided to the Clerk-Treasurer, nor were any minutes of this meeting provided to the Clerk-Treasurer, who is charged by statute with recording the minutes.

My analysis of the Council’s alleged “pre-meeting” above also applies to this situation. However, I note that some gatherings of a majority of a governing body of a public agency are not “meetings” under the ODL because the General Assembly specifically excluded them from that definition. *See* I.C. § 5-14-1.5-2(c) (social or

chance gatherings, on-site inspections, traveling to and attending meetings of organizations devoted to the betterment of government, caucuses, gatherings to discuss industrial or commercial prospects, an orientation of members of the governing body, and a gathering for the sole purpose of administering an oath are not “meetings” under the ODL).

9. Substituting a revised agenda, containing several previously unannounced items, after the start of a previously-scheduled Executive Session.

I see no violation of the ODL under these facts. This office has stated many times that a governing body may add to or deviate from its agenda during the course of a meeting. *See, e.g., Op. of the Public Access Counselor 05-FC-147.*

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

cc: Rebecca Saunders