



STATE OF INDIANA

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November 30, 2012

Ms. Lu Ann Franklin
The Times Media Co.
Munster, Indiana 46321

Re: Informal Inquiry 12-INF-50; St. John's Town Council

Dear Ms. Franklin:

This is in response to your informal inquiry regarding the actions of the St. John Town Council ("Council") and its compliance with the Open Door Law ("ODL"). Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on the applicable provisions of the ODL, I.C. § 5-14-1.5 *et seq.* David M. Augsten, Attorney, responded on behalf of the Council. His response is enclosed for your reference.

BACKGROUND

In your informal inquiry you allege that the Council discussed certain financial matters during executive sessions held on July 10, 2012 and July 26, 2012. You provide that the financial matters that were discussed are not allowable topics for discussion in an executive session. For the July 10, 2012 executive session, the following is a passage from the official minutes submitted by St. John Clerk-Treasurer Sherry P. Surry:

"Other topics discuss – presentation by Jason Dravet, Information Technology Director/Computer Network Administrator, for purchase of radios, discussion regarding the budget and price for the Haunted House, and the reimbursement for the sale of Railcats tickets sold for the DARE Program."

You further provide that following the July 10, 2012 executive session, a public meeting was held. At that time, you maintain that members of the Council and Town manager, Steve Kil, repeatedly told Ms. Scurry that she had all receipts from the sale of the Railcat tickets. In response, Ms. Scurry stated that she did not have the revenue. You believe that \$35,000 is the amount at issue. The Council has refused to approve the meeting minutes from the July 10, 2012 executive session. At the September 27, 2012 Council meeting, you inquired with Council President, Michael Forbes, why the Council had not approved the minutes. Mr. Forbes advised that the minutes had not been

approved because they were in improper order. At the October 25, 2012 Council meeting, the Council issued a “verification for the July 10, 2012 Town Council Executive Session Meeting Minutes,” a copy of which you have provided. However, one member of the Council, Mr. Kenneth D. Gembala, did not sign the verification and abstained from voting on the issue at the October 25, 2012 public meeting.

As to the July 26, 2012 executive session, the minutes submitted by Ms. Sury provided in part:

“Other topics discussed – progress of the 911 consolidated dispatch and an update provided on the potential grant to hire a police office.”

:

The Council issued a verification of the July 26, 2012 executive session minutes at the October 25, 2012 public meeting. Mr. Gembala again did not sign the verification document and abstained from the vote on the issue.

Lastly, you noted that Ms. Sury and Mr. Jim Corridan of the Indiana Commission on Public Records have expressed concern that the Council has hired a private company to take minutes for all future Council meetings as a means to circumvent Ms. Sury and to provide possibly altered meeting minutes to be approved by the Council as official records.

In response to your informal inquiry, Mr. Augsten initially noted that the background that formed the basis of your informal inquiry is based exclusively on information reported by or obtained from Ms. Sury, the St. John Clerk-Treasurer. The Council does acknowledge that you did approach Council President Forbes to discuss certain issues on October 25, 2012, but he deferred to Mr. Augsten. The few questions that were asked concerning the Council’s disagreement with Ms. Sury executive session minutes were addressed. Mr. Augsten provides that you never inquired about the purpose and intent behind the Council approving and executing the verifications concerning the executive sessions. In addition, Mr. Augsten stated that Ms. Sury never addressed the issues that have been raised in your informal inquiry directly with the Council; instead the information has been channeled through a third-party for inquiry review, with the information being incomplete, inaccurate, and speculative.

Mr. Augsten provides that you have misconstrued Mr. Forbes statement that the executive session minutes from the September 27, 2012 were “in improper order” to mean that the Council had improperly acted or held an improper executive session. The Council provides that it did not improperly act, nor has it intentionally held an improper executive session. The Council has not approved the minutes for the executive sessions prepared by Ms. Sury. Instead, the Council executed verification for each executive session minutes that were prepared, identifying the inaccuracies that were originally submitted. The verifications provide as follows:

“The undersigned Town Council Members certify that they have not intentionally discussed instances that were not properly notified in this

executive session in conformance with I.C. 5-14-1.5 *et seq.* This verification is provided pertaining to the full contents of the above-referenced dated Executive Session Minutes and Meeting, including notation information added by the Town Clerk-Treasurer regarding additional instances reportedly improperly discussed. The Town Council hereby respectfully disagrees with the notation comments of the Town Clerk-Treasurer added to the aforementioned Executive Session Meeting Minutes, and makes this Verification action for clarification purposes consistent with applicable law, and upon opinion of the Town's Attorney."

As to the July 10, 2012 executive session, the Council does not dispute that Mr. Dravet, was present at the Town Hall prior to the commencement of the executive session. Before all attending members of the Council were present and before the door to the meeting was closed, Mr. Dravet announced to the present Councilmen that the Request for Purchases ("RFPs") for various items was ready for signature. Ms. Sury was in the room at this time, but again, the executive session has not commenced. No discussion, decision, or policy was established concerning the RFPs. As to the DARE fundraising matter through the sale of Railcat tickets, the matter was discussed as a personnel matter due to the alleged violations by a town employee of the handling and processing of the funds that were collected. The issues dealt with were violations of the Town's policies and a job performance evaluation. Mr. Augsten had provided that Ms. Sury mischaracterized the nature and manner of the discussions that took place. The matter was further discussed at the August 23, 2012 Council public meeting. The \$35,000 quoted in your inquiry as the total amount of funds raised in wholly inaccurate and Ms. Sury has been provided with all accountings related to the tickets. Lastly, discussions held concerning the price and budget for the Town's Haunted House were solely conducted at public meetings of the Council and were not a topic of discussion at the July 10, 2012 executive session except as permitted in relation to the personnel evaluation.

As to the July 26, 2012 executive session, Mr. Augsten stated that the Council did not discuss the progress of the 911 Consolidated Dispatch initiatives and the hiring of a Town Police Officer. Further, Ms. Sury expressed no concern regarding this issue before, during, or after either the July 10, 2012 executive session or the executive session held on July 26, 2012.

As to the method of recording the Council's regular meeting minutes, the Council had recently transitioned to a digital recording system due to concerns regarding long-term storage and record preservation and to increase efficiency. Ms. Sury has resisted the change due to the fear that the recordings may be altered. To address Ms. Sury's fears, that Council had discussed and will begin utilizing a hashing algorithm that will enable the Council to confirm whether the original recording has been edited in any fashion.

Regarding the Council contracting with a professional court reporter to record the meeting minutes, the Council has retained a private recording secretary who has an extensive background and experience in recording minutes for public agencies. Further,

Ms. Sury at the present time retains an independent contractor at the cost of \$70 per meeting to physically type the minutes of the Council. The independent contractor retained by Ms. Sury does not have the legal experience of the secretary retained by the Council. In addition, the current system in place by Ms. Sury is extraordinarily inefficient and monopolizes much of Ms. Sury's time that could be dedicated to addressing other Town matters. These inefficiencies impact the preparation of the minutes and prevent the Council in some instances from properly preparing for its upcoming meetings.

As to the recording of the executive session minutes, the private recording secretary hired by the Council has never attended an executive session of the Council, and any statement to the contrary is completely inaccurate. Ms. Sury is in attendance at all executive sessions of the Council, prepares certifications, and is the only individual to do so.

ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 5-14-1.5-1. Accordingly, 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. *See* I.C. § 5-14-1.5-3(a).

As an initial matter, it should be noted that the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. After reviewing the contents of your inquiry and the Council's response, the parties clearly have divergent views on the factual circumstances that led to the filing of the informal opinion. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. If this matter was before a court, the judge would retain the authority to issue an order containing findings of fact. Only those members who were in attendance at the executive sessions in question would be able to speak as to the topics that were discussed. As to the issues raised about the statutorily defined duties and responsibilities of the Clerk-Treasurer, such issues would be outside the purview of this office.

Executive sessions, which are meetings of governing bodies that 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). Exceptions include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). Notice of an executive session must be given 48 hours in advance, excluding nights and weekends, and contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and list the specific statutory citation. *See Opinions of the Public Access Counselor 05-FC-*

233, 07-FC-64; 08-FC-196; and 11-FC-39. Thus in order to satisfy the requirements of 6.1(d), a proper notice for an executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(9) would include, in addition to the time, date, and location of the executive session, the following statement: “To discuss a job performance evaluation of an individual employee pursuant to I.C. § 5-14-1.5-6.1(b)(9).”

As to the July 10, 2012 executive session, the minutes of the executive session prepared by Ms. Sury allege, in part, that the Council held discussions that went beyond what was allowable under the ODL, including issues related to the purchase of equipment, budget concerns as to the Haunted House, and the reimbursement of funds for the sale of athletic tickets sold for the DARE Program. In response, Mr. Augsten has provided that Mr. Dravet was only present in the meeting room where the executive session was held prior to the start of the executive session, at which time he announced to those members of the Council in attendance that the RFP for various city equipment was ready for signing. No discussion, decision, or policy was established concerning the RFPs. As to the DARE fundraising, the matter was discussed as a personnel matter due to the alleged violations by a town employee of the handling and processing of the funds that were collected. Lastly, Mr. Augsten has provided discussions held concerning the price and budget for the Town’s Haunted House were held at the public meeting of the Council and not at the executive session, except as it related to a personnel evaluation. As such, *if* the discussions of the Council at the July 10, 2012 executive session went beyond what was provided in the notice, it is my opinion that the Council acted contrary to the requirements of the ODL (emphasis added).

As to the July 26, 2012 executive session, the minutes provided by Ms. Sury stated that discussions were held regarding the progress of the 911 Consolidated Dispatch and the potential hire of a police officer. In response, Mr. Augsten stated that the progress of the 911 Consolidated Dispatch and the hiring of a Town Police Officer were not discussed at the July 26, 2012 executive session. Again, *if* the discussions of the Council at the July 26, 2012 executive session went beyond what was provided in the notice, it is my opinion that the Council acted contrary to the requirements of the ODL (emphasis added).

As to the approval of the minutes for the July 10, 2012 and July 26, 2012 executive session, governing bodies that conduct meetings are required to keep memoranda. I.C. § 5-14-1.5-4(b) provides that the following memoranda shall be kept:

- (1) The date, time, and place of the meeting.
- (2) The members of the governing body recorded as either present or absent.
- (3) The general substance of all matters proposed, discussed, or decided.
- (4) A record of all votes taken, by individual members if there is a roll call.
- (5) Any additional information required under I.C. § 5-1.5-2-2.4. I.C. § 5-14-1.5-4(b).

In the case of executive sessions, the memoranda requirements are modified in that the memoranda "must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given." *See* I.C. § 5-14-1.5-6.1(d). The public agency must also certify in a statement in the memoranda that no subject was discussed other than the subject specified in the public notice. *Id.*

Here, again the issue that arises with the minutes that were submitted by Ms. Sury and the verification issued by the Council is that the parties are not in agreement as to the topics that were discussed at the executive sessions in question. Members of the Council cannot be expected to approve minutes from an executive session that are not accurate. However, the Council is required to certify in a statement that no subject was discussed other than the subject specific in the public notice. In light of Councilman Gembala's refusal to sign the Council's verification and his abstention from the corresponding vote, there appears to even be a dispute amongst the members of the Council as to what topics were discussed. However, again the issue comes down to a question of fact. *If* Ms. Sury's minutes that have been submitted to the Council are accurate, then the ODL would require the Council to certify the record that has been submitted (emphasis added).

As to the allegation that the private secretary retained by the Council is also recording the Council's executive sessions, Mr. Augsten flatly denied this allegation. He provided that Ms. Sury is in attendance at all executive sessions of the Council, prepares certifications, and is the only individual to do so. Further, the private secretary retained by the Council has never attended an executive session. Our office has previously opined that the governing body would not violate the ODL by excluding the clerk-treasurer from its executive sessions. *See Opinion of the Public Access Counselor 10-FC-289.* Counselor Kossack provided:

"In support of your argument that, as clerk-treasurer, statute requires you to attend the Town'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(a)(10) 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 you from its executive session because it is permitted to do so under I.C. § 5-14-1.5-2(f)." *Id.*

As such, even if the Council was denying Mr. Sury admission to its executive session, it would not be in violation of the ODL as long as the Council followed all other

requirements for holding an executive session, including providing proper notice and taking memoranda.

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: David M. Augsten