



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

**PUBLIC ACCESS COUNSELOR  
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March 6, 2013

Benjamin Conner  
302 S. Sycamore St.  
Odon, Indiana 47562

*Re: Informal Inquiry 13-INF-10; Odon Town Council*

Dear Mr. Conner:

This is in response to your informal inquiry regarding the actions of the Odon Town Council ("Council") and its compliance with the Open Door Law ("ODL"), Ind. Code 5-14-1.5 *et. seq.* Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. Rita Baldwin, Attorney, responded on behalf of the Council. Her response is enclosed for your reference.

## BACKGROUND

You allege that the Council members discussed and made decisions concerning a formal complaint ("Complaint") that had been filed with the Public Access Counselor's Office outside the context of a meeting. The Complaint was filed on December 28, 2012. Councilman John Myers stated in the January 9, 2013 edition of the local newspaper that a Complaint has been filed and that the Town's Attorney would be issuing a response. On January 11, 2013, the Council held a meeting for the first time since receiving the Complaint; the Council voted to appoint the Town's attorney to answer the Complaint with the assistance of the Town's Clerk-Treasurer. You inquire whether it was appropriate for Councilman Myers to state that the Town's Attorney will answer the Complaint before the Council had met publically to discuss the issue and make a decision.

You further note that Councilman Myers stated in the January 11, 2013 Council meeting that the Town's insurance provider was notified of a threat of litigation and the Council voted to let the Town's Attorney communicate with the insurance company. You inquire whether it was appropriate for the Council to notify the insurance company that a "threat of litigation" had been received when no threat of litigation was received and whether it was appropriate for the Town Council to contact the insurance company without having previously conducted a public meeting to discuss the matter. You are concerned that the public should have been fully informed and aware of the decision by the Council in a public meeting and not informed by a Councilman in an interview.

You delivered a news media request to the Clerk-Treasurer prior to December 31, 2012 requesting notification of all meetings held by the Council for the year 2013. Councilman Noble discussed this issue in the January 11, 2013 public meeting and provided that you did not meet the definition of “news media” pursuant to state statute. You inquire whether it was appropriate for the Council to decide not to release any information to the news media of meeting notices without having first conducted a public meeting to discuss and ultimately decide the issue. Was it further appropriate for the Council to “silence you” when you attempted to make a statement at the January 11, 2013 meeting. Lastly, you inquire whether it appropriate for the Town Council to publically scold you for requesting news media notice.

In response to your informal inquiry as to whether it was appropriate for Councilman Myers to make a statement to the local newspaper that the Town’s attorney will answer the Complaint before the Council met publically to discuss the issue, Ms. Baldwin advised that the Council does not see an issue for determination by the Public Access Counselor. Councilman Myers made a statement to the news media that the Town Attorney would be responding to the Complaint. He did not reference that the Council had conducted a meeting on the issue, discussed the issued, or made a formal opinion. He was offering his opinion as a member of the Council. Ms. Baldwin is certain that Mr. Myers believed that this was a legal matter that the Town’s Attorney would be handling, not the Council individually or the Town Clerk, and therefore Councilman Myers felt comfortable in making that statement. The fact that the Board met and did just that on January 11, 2013 confirms that the statement was nothing more than that the Councilman’s belief. Ms. Baldwin has been the Town’s counsel for several years and routinely undertakes such matters for the Board and did so on this occasion.

As to your inquiry whether it was appropriate for the Council to notify the insurance company that a threat of litigation had been received when no threat had actually been received, again Ms. Baldwin does not see this as an issue for determination by the Public Access Counselor. It is not in the purview of Mr. Conner or the Public Access Counselor as to when the Town Council determines to notify its insurance carrier that a threat of litigation or any other potential claim has been received or has arisen. Ms. Baldwin advised the Clerk-Treasurer to notify the insurance carrier given the pending Complaint. From the Town’s and Ms. Baldwin’s perspective, it is wiser for the Town to report a potential liability or claim than not report it and be denied coverage later due to that failure. As the formal complaint can evolve into a court case and also based on the Town’s exposure to fines/costs, the Council certainly considered it to be litigation.

As to whether it was appropriate for the Town Council to contact the insurance company without having first conducted a public meeting, the Council did not contact the insurance company; the Clerk-Treasurer did. This was a business decision and a routine matter for the Town to report potential claims. The Clerk and Ms. Baldwin contacted the insurance company as there was a very narrow window of time to respond to the Complaint that had been filed. Ms. Baldwin felt it was prudent to contact insurance company immediately and this administrative task was within the realm of the Clerk-Treasurer’s authority.

As to your news media request, the Council did conduct a meeting to discuss your news media request that was submitted to the Council contrary to what was provided in your inquiry. No decision was made by the Council prior to the meeting held on January 11, 2013. The Town does not believe that you meet the requirement of “news media” pursuant to state statute.

## ANALYSIS

As an initial matter, I.C. § 5-14-4-10(6), the public access counselor has the authority to issue advisory opinions to interpret the public access laws upon the request of a person or public agency. Many of the issues that you have raised in your inquiry are outside the purview of this office. As such, I will only address those issues raised in your inquiry that concerns the Council’s actions respective of the requirements of the ODL. I would also note that the public access counselor is not a finder of fact. Advisory opinions are issued based on the facts presented. 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.*

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).*

You inquire whether it was appropriate for Councilman Myers to state to the media that the Town’s Attorney would be answering the Complaint before the Council had met publically to discuss the issue and make a decision. A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. *See 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. *See I.C. § 5-14-1.5-2(d).* “Public business” means to any functions upon which the public agency is empowered or authorized to take official action. *See I.C. 5-14-3-2(e).* The ODL does not instruct governing bodies as to what actions specifically require a meeting and/or vote. *See Opinions of the Public Access Counselor 08-FC-136 and 12-FC-144.* The ODL would not prohibit individual members of a governing body to respond to inquiries submitted by the public or media. There has been no allegation that the Council collectively responded to the inquiry; only that Councilman Myers responded individually. Ms. Baldwin advised that the Councilman’s response was his opinion in regards to a legal matter and at no time did the Councilman state that the members of the Council had met to discuss the issue or issue any decision. Thus, it is my opinion that the Councilman’s actions did not violate the ODL.

You inquire whether it was appropriate for the Town Council to contact the insurance company without having previously conducted a public meeting to discuss the issue. A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. *See* 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. *See* I.C. § 5-14-1.5-2(d). “Public business” means to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. 5-14-3-2(e). The ODL does not instruct governing bodies as to what actions specifically require a meeting and/or vote. *See Opinions of the Public Access Counselor 08-FC-136 and 12-FC-144*. There has been no allegation that the Council met in secret to discuss or vote on whether to notify the insurance company. Further, the Clerk-Treasurer, not the Council, contacted the insurance company at the request of the Council’s attorney. The Clerk-Treasurer is not considered to be a governing body of a public agency. As such, it is my opinion that the Council did not violate the ODL.

You inquire whether it was appropriate for the Council to decide not to release any information to the news media of meeting notices without having first conducted a public meeting to discuss and ultimately decide the issue. Ms. Baldwin states that the Council did conduct a meeting prior to making a decision whether to allow you to receive notice as a member of the news media. The meeting occurred on January 11, 2013 to which you were in attendance. Thus, if the Council conducted an open, public meeting regarding this issue to which a decision was made, the Council did not violate the ODL. As discussed in a previous informal opinion, it is my opinion that the Council would not violate the ODL by refusing to provide you with notice pursuant to section 5(b)(2) as you do not meet the definition of “news media” pursuant to I.C. § 5-14-1.5-2(j). *See Informal Opinion of the Public Access Counselor 13-INF-03*.

Lastly, you inquire whether appropriate for the Council to “silence you” when you attempted to make a statement at the January 11, 2013 meeting. Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. *See Opinion of the Public Access Counselor 08-FC-149, citing Brademas v. South Bend Cmty. Sch. Corp.*, 783 N.E.2d 745, 751 (Ind. Ct. App. 2003), *trans. denied*, 2003; *see also* I.C. § 5-14-1.5-3 (“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.”). “Indiana law does require a governing body to allow public testimony in certain instances (e.g. a hearing on a proposed budget), but as a general rule the ODL does not guarantee the right to speak at a meeting.” *See Opinions of the Public Access Counselor 08-FC-149 and 10-FC-240*. Minus a specific legal mandate, a governing body has the authority to determine whether it will receive public comment during a public meeting and if it elects to do so, the procedures that will be followed in carrying out this process. Thus, the Council did not violate the ODL if it refused to allow you to speak at the January 11, 2013 public meeting.

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: Beth Haseman