

September 13, 2004

Mr. Lou Valderas
210 E. Willow Drive
South Bend, IN 46637

Re: Formal Complaint 04-FC-143; Alleged Violation of the Open Door Law by the Roseland Town Council and Alleged Violation of the Access to Public Records Act by the Town of Roseland

Dear Mr. Valderas:

This is in response to your formal complaint alleging that the Roseland Town Council (“Council”) violated the Open Door Law (“ODL”) by denying you access to a meeting, and that the Town of Roseland (“Roseland”) violated the Access to Public Records Act (“APRA”) when Clerk Treasurer Cheryl Gridley denied you access to the minutes of the July Council meeting. You also complain that two of the three Council members are married, raising the possibility that a majority of the Council are discussing Council business at home. For the reasons stated below, I find that the Roseland Town Council violated the Open Door Law when a majority of the Town Council visited the site of property that was for sale. I also find that the Town of Roseland violated the Access to Public Records Act when it denied you access to Council minutes. Finally, I decline to find a violation of the ODL regarding the marriage of a majority of the Council on the bare allegations now before me.

BACKGROUND

You filed your complaint on August 13, 2004, after you discovered that on July 31, 2004 the Council and Clerk Treasurer of Roseland had viewed real property located at the northeast corner of Dixie Way North and Pendle Street to consider purchasing the building for a new police department. No notice of this gathering occurred. You also allege that on August 3, 2004, you requested from Clerk Treasurer Cheryl Gridley the minutes of the July Council meeting, and were denied access because the minutes were not yet approved.

After receiving your complaint, I forwarded a copy to Clerk-Treasurer Gridley. In response to the complaint, attorney Glenn L. Duncan, legal counsel for the Town of Roseland

filed a written response, which I enclose for your reference. In his response, Mr. Duncan does not dispute that the gathering occurred, or the purpose for the gathering. Mr. Duncan stated that several provisions of law allowed the gathering to occur without notice to the public. First, he claims that the gathering was nothing more than an “on-site inspection.” Second, he contends that the Council could meet without formal notice because they were carrying out town administrative functions, which would include evaluating the adequacy of town facilities or town services. Finally, Mr. Duncan states that the Council could have met to discuss the sale or lease of the facility under one of the instances in which a governing body may meet in executive session, although Mr. Duncan concedes that no notice of an executive session was posted. He explains that the Council had not determined it needed to replace the existing facility and did not want to send false hope to current owner that the Council was seriously considering the property.

With respect to the allegation that the Town violated APRA, Mr. Duncan states that the minutes were in “rough draft” form and would be subject to amendment or correction by the Council at its August 18 meeting, and were therefore not disclosable.

ANALYSIS

Open Door Law

The Open Door Law requires that 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. The Council is a governing body of a public agency and is therefore subject to the Open Door Law. Also, the Town of Roseland is subject to the Access to Public Records Act.

A “meeting” is defined as “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” IC 5-14-1.5-2(c). The definition of meeting excludes “any on-site inspection of any project or program.” IC 5-14-1.5-2(c)(2). If the gathering of the Council did not constitute a “meeting”, then the Council would not be required under the Open Door Law to provide notice or an opportunity for the public to attend. Conversely, if the gathering constitutes a meeting, the Council would have been required to post timely notice and allowed the public to attend.

Although members of the public generally must be given notice of meetings, the requirements of notice do not apply when the legislative body of a town meets:

“[S]olely 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.” [IC 5-14-1.5-5(f)].

Meetings subject to this exception are open to the public, but notice is not required.

The Council's response, although stating that the gathering was to carry out the administrative function of evaluating the adequacy of town facilities, does not state that the gathering was open to the public to observe and record the proceedings. Also, it does not cite to any authority that considering the sale or lease of property is an administrative function. Certainly considering or evaluating the sale or lease of real property is not a mere administrative function of a town, since the legislature has considered discussions strategizing on such matters a proper reason for an executive session, for which a governing body must provide notice. See IC 5-14-1.5-6.1(b)(2)(D). I conclude that the Council has not demonstrated that notice was not required under the "administrative function" exception to notice, and in addition, the Council does not assert that members of the public were free to attend this Saturday gathering.

Similarly, I conclude that the gathering did not constitute an "on-site inspection of a project or program." No Indiana court has construed "on-site inspection of a project or program" within the context of the Open Door Law. In *Office of the Public Access Counselor 98-5*, this Office found the plain meaning of "on-site inspection" as "an examination or review concerning a place or the setting of an event." In that decision, the commissioner's gathering with the hospital board to discuss the ambulance service program did not fall within the ordinary meaning of an on-site inspection because discussions regarding the service went beyond the scope of an on-site inspection.

Applying a narrow construction to this exception to the definition of a "meeting," I find that the gathering to view property that was being considered as the site of a new police station does not fall within the meaning of "on-site inspection." Although the Council has stated through counsel that it did not discuss the sale or condition of the property with the current owner, I find that even a mere inspection of the property does not meet the definition because the sale property is not a "program" or "project." The property may be in connection with a planned purchase or replacement of a police station, but the property itself is not a program or project. Again, I look to the plain meaning of project: "a proposal of something to be done; a plan; scheme;" and of program: "a plan or procedure for dealing with some matter." *Webster's New Collegiate Dictionary, 2nd Edition*. Hence, my determination that viewing property for sale is not an on-site inspection does not turn on whether the Council received information about the property from the current owner, although I note that if the Council did receive information about the property, that fact would also disqualify the event as an on-site inspection.

Finally, the Council's assertion that the meeting could have been considered a proper instance for an executive session does not aid it, since an executive session must be timely noticed to the public, and no such notice was provided.

Because the gathering of a majority of the Council at the Saturday viewing of the sale property does not constitute an "on-site inspection" and because the Council has not sustained its burden to show that the gathering was for an administrative function, I find that the Council violated the Open Door Law by failing to post a notice of the meeting at least 48 hours prior to the meeting for purposes of allowing the public to observe the gathering.

I decline to find a violation of the ODL regarding the marriage of two of the Council members. You raise the specter of possible communications on Council business outside the

hearing of the public between the couple, who constitute a majority of the Council. However, you do not allege that a gathering for purposes of taking official action on public business has occurred, and I cannot presume that from the mere fact of the marriage.

Access to Public Records Act

Any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in specific exemptions under the APRA. IC 5-14-3-3(a). Mr. Duncan indicated in his response that Clerk Treasurer Gridley declined to provide the minutes of the July Council meeting because they were a “rough draft” and would be subject to change at the next Council meeting, set for August 18. The draft minutes of the Council meeting are a public record as that term is defined at IC 5-14-3-2, in that the minutes are a writing that is created by a public agency. There is no exception to disclosure for writings that are in “draft” form, and the Office of Public Access Counselor has held many times that draft minutes of meetings conducted by governing bodies are disclosable public records. The concern expressed by the Town for disclosing any material that is subject to correction or change at a subsequent meeting of the governing body can be addressed by marking the minutes as “draft” or “subject to change.” I find that the Town violated the Access to Public Records Act when it denied you copies of the draft Council minutes for the July meeting.

CONCLUSION

For the foregoing reasons, I find that the Roseland Town Council violated the Open Door Law when it failed to post notice of its July 31, 2004 gathering. I decline to find any violation of the Open Door Law from the mere fact of marriage of two of the three Council members. I also find that the Town violated the Access to Public Records Act when it denied you access to draft Council minutes.

Sincerely,

Karen Davis
Public Access Counselor

cc: Glenn L. Duncan