



STATE OF INDIANA

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January 14, 2013

Joseph L. Weingarten
14066 Deer Stone Lane
Fishers, Indiana 46040

*Re: Formal Complaint 12-FC-370; Alleged Violation of the Open Door Law by
the Fishers Town Council*

Dear Mr. Weingarten:

This advisory opinion is in response to your formal complaint alleging the Fishers Town Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Douglas P. Church, Attorney, responded on behalf of the Council. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that the Council violated the ODL by holding discussions and agreeing on issues in executive session regarding the salary, compensation, or benefits of employees during the budget process. Although you do not provide the date of the alleged executive session, you note a local newspaper article where Councilman Michael Colby is quoted as stating, "We sat upstairs in executive session as a group and discussed the performance of the employee and employees and we agreed upon a salary."

In response to your formal complaint, Mr. Church advised that the Council held a properly noticed executive session on December 17, 2012 to discuss, amongst other allowable topics, a job performance evaluation of an individual employee. I.C. § 5-14-1.5-6.1(b)(9) allows a governing body to hold an executive session to discuss a job performance evaluation of an individual employee. Mr. Church noted that any final action must be taken at a meeting that is open to the public; however *Baker* held that the ODL does not prohibit a governing body from receiving information, making recommendations, establishing police, or *making decisions* in executive session (emphasis added).

Mr. Church provided that the Town of Fishers ("Town") utilizes incentive pay, which is contingent upon each individual employee's job performance. The annual job performance of several town employees was discussed during the executive session held

on December 17, 2012. No final action was taken by the Council during the December 17, 2012 executive session. The Town's budget for 2013 was approved by the Council at an open, public meeting held on October 15, 2012. Numerous public hearings were held prior to the budget's adoption. The budget established the funding for salaries for all Town employees. A Salary Ordinance ("Ordinance") was introduced to the Council at the December 17, 2012 open, public meeting. The Ordinance, which included salary increases for the Town Manager and others, was based upon job performance. The Ordinance was included on the posted agenda for the December 17, 2012 public meeting. Although the Ordinance was introduced at the December 17, 2012 meeting, no further action was taken following discussion. During the year-end Council meeting held on December 21, 2012, the Council unanimously voted to suspend the rules and hold both the second and third readings for the Ordinance. After allowing and receiving public comment, the Council approved the adoption of the Ordinance.

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).

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 listed pursuant to the statute 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 of every session, excluding holidays and weekends, and must 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 the citation to the specific instance; hence, "To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)" would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.*

The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001). "Final action" means a vote by a governing body on a proposal, motion, resolution, rule, regulation, ordinance or order. *See* I.C. § 5-14-1.5-2(g).

Pursuant to I.C. § 5-14-1.5-6.1(b)(9), a governing body may hold an executive session to discuss a job performance evaluation of individuals employees. However, this

subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process. *See* I.C. § 5-14-1.5-6.1(b)(9). Counselor O'Connor provided the following analysis regarding 6.1(b)(9) in a previous advisory opinion:

“Based upon the facts provided to me and applying the case law mentioned above, it is my opinion that the language of Indiana Code section 5-14-1.5-6.1(b)(9) does permit a governing body to discuss salary and benefit matters related to the job performance of individual employees. In this case, the language of Indiana Code section 5-14-1.5-6.1(b)(9) appears to recognize that salaries and benefits may be discussed in relation to a job performance evaluation. A governing body may not, however, use this same exception to discuss of salaries and benefits for groups of employees during a budget process.” *See Opinion of the Public Access Counselor 02-FC-24.*”

You allege in your formal complaint that “it appears the salary of a budget nature was discussed in executive session.” As such, the key inquiries are whether the discussions that were held by the Council in executive session on December 17, 2012 occurred during the budget process and if the Council took final action at the executive session. The Council has provided that its 2013 budget was adopted on October 15, 2012, after a series of public hearings and that no final action was taken on the Ordinance at the executive session held on December 17, 2012. The Ordinance, which included the salary increases for the Town Manager and other employees, was posted prior to its adoption. Final action was not taken on the Ordinance until the Council’s December 21, 2012 open, public meeting. Accordingly, it is my opinion that the Council did not violate I.C. § 5-14-1.5-6.1(b)(9) when it met in executive session on December 17, 2012 to discuss the job performance evaluation of certain employees, as the 2013 budget had previously been adopted on October 15, 2012 at an open, public meeting. Acknowledging the holding in *Baker* that a governing body does not violate the ODL by making decisions in executive session, it is my opinion that the Council has met its burden to demonstrate that it took final action on all matters related to the Ordinance at a public meeting held on December 21, 2012.

CONCLUSION

Based on the foregoing, it is my opinion that the Council did not violate the ODL.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with the first letter of the first name being a large, stylized capital 'J'.

Joseph B. Hoage
Public Access Counselor

cc: Scott Faultless, Douglas P. Church, Jennifer Messer