

September 24, 2001

Mr. William Church, Managing Editor
Palladium-Item
1175 North A Street
P.O. Box 308
Richmond, IN 47374

Re: Advisory Opinion 01-FC-51; Alleged Violation of the Open Door Law by the City of Richmond
Common Council.

Dear Mr. Church:

This is in response to your formal complaint, which was received on August 31, 2001. You have alleged that the City of Richmond Common Council ("Council") has violated the Indiana Open Door Law ("ODL") Indiana Code chapter 5-14-1.5. According to your complaint, the notice of and the alleged discussion of job performance evaluations in an executive session on August 1, 2001 was not proper under the ODL. Mr. Robert L. Bever, City Attorney, responded in writing to your complaint. A copy of his response is enclosed for your reference.

For the reasons set forth below, it is my opinion that the Council's executive session notice did comply with the requirements of Indiana Code section 5-14-1.5-6.1(c) because it did refer to one of the subject matters that permits an executive session under the ODL. It is also my opinion that the Council did not have authority to meet in executive session to discuss the job performance evaluation of a former City employee under Indiana Code sections 5-14-1.5-6.1(b)(1) or (b)(9) and that, to the extent that the August 1st executive session included such a discussion, it violated the ODL.

BACKGROUND

In your complaint, you allege that the Council issued a notice of an executive session to your newspaper that did not include a specific reference to the enumerated instance or instances for which an executive session may be held under Indiana Code section 5-14-1.5-6.1(b). The notice merely stated that the Council's business that day would be to "discuss job performance evaluations of certain City employees."

In addition, you later learned that the Council claimed that the executive session was held under Indiana Code section 5-14-1.5-6.1(b)(9), which permits discussion of the job performance evaluation of individual employees. You contend, however, that since the discussion concerned a former street commissioner who had been terminated by the Mayor on July 27, 2001, that this statutory exception to hold an executive session did not apply. Further, you contend that the Council had no other authority under Indiana Code section 5-14-1.5-6.1(b) and in particular, Indiana Code section 5-14-1.5-6.1(b)(6),

which permits discussions concerning alleged misconduct of persons over whom the governing body has jurisdiction. Since a street commissioner is a department head in the City, the Mayor and not the Council has jurisdiction over the person who occupies this post under Richmond Code §31.02(a), so the Council cannot claim that their discussion during the August 1st executive session was valid under this exception.

In his response, Mr. Bever stated that it is the position of the Council that the notice complied with the requirements of the ODL. While the Council acknowledges that the ODL includes a reference to the term "citation," this does not mean that they were required to provide the statutory citation when they had included the specific subject matter for the executive session. Specifically, the notice stated that the meeting was to "discuss job performance evaluations of individual employees." It is Mr. Bever's position that to interpret the word "citation" as used in the ODL to require a statutory citation without an explanation is not practical for most readers of the notice. A logical interpretation of the executive session notice provision, he contends, would indicate that including the verbatim language of the exception in the notice, as the Council did, is more meaningful to persons reading the notice.

Further, Mr. Bever addressed your concerns about the actual discussion that took place in the executive session on August 1st. The Council later stated that the statutory basis for the executive session was Indiana Code section 5-14-1.5-6.1(b)(9) and that the primary subject of discussion was the job performance evaluation of the street commissioner who had resigned some days prior. Mr. Bever, who was present at the meeting, however, noted that some of the discussion concerned the job performance evaluation of the person serving as the temporary replacement. Mr. Bever notes that your argument that the fact that the person discussed may or may not have been employed by the City any longer is not relevant under Indiana Code section 5-14-1.5-6.1(b)(9). The Council apparently wanted to learn from the Mayor the particulars of the employee's job performance evaluations, which could have had an impact on his resignation. A job performance evaluation remains the same whether the person is currently employed or not since it is Mr. Bever's position that such evaluations are confidential public records by state or federal statute and, thus, subject to discussion in executive session under Indiana Code section 5-14-1.5-6.1(b)(1). It is Mr. Bever's position that your reference to Indiana Code section 5-14-1.5-6.1(b)(6), for discussion of alleged misconduct of an employee is irrelevant since the Council has never asserted this as the basis for their August 1st executive session.

ANALYSIS

The intent and purpose of the ODL is 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." Ind. Code § 5-14-1.5-1. The provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Council is a public agency and a governing body subject to the ODL. Ind. Code §§ 5-14-1.5-2(a) and (b).

A meeting for the purposes of the ODL 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." Ind. Code §5-14-1.5-2

(c). As noted above, the general rule is that meetings of public agencies are to be held openly, so that the public may "observe and record them." Ind. Code §5-14-1.5-3(a). The exception to the general rule that a meeting of the governing body must be open to the public is an executive session. 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." Ind. Code §5-14-1.5-2(f). The two questions raised by your complaint concern the notice of the August 1st executive session and whether the discussion of the job performance evaluation of a former employee of the City was permissible under Indiana Code sections 5-14-1.5-6.1(b)(6) or (9).

Notice of the August 1st Executive Session

Notice of the date, time and place for an executive session must be provided at least forty-eight (48) hours in advance, not including Saturdays, Sundays or legal holidays. Ind. Code §5-14-1.5-5(a). The notice must also "state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under" Indiana Code section 5-14-1.5-6.1(b). Ind. Code §§5-14-1.5-5(a) and 5-14-1.5-6.1(c).

The Council did provide a written notice that they would meet in executive session, however, the purpose was listed as follows: "the business of the meeting will be to discuss job performance evaluations of certain City employees." As noted above, governing bodies are to provide a specific reference to the exception or exceptions at Indiana Code section 5-14-1.5-6.1(b) that would permit a meeting that excludes the public. It appears that the Council intended to conduct this executive session under Indiana Code section 5-14-1.5-6.1(b)(9), which permits an executive session to discuss "a job performance evaluation of an individual employee." Certainly, it was not difficult to determine which executive session exception was being used with respect to the August 1st meeting.

Earlier this year, I issued an Opinion that a board of county commissioners who had posted a notice that stated only that the purpose of their executive session was for "pending litigation" was not sufficient under the ODL. The reason that this notice was insufficient was that the board did not include what type of action they intended to take with respect to pending litigation and the ODL is specific in limiting such action to discussions of strategy with respect to pending litigation. It is my position, however, that the present case is distinguishable. The notice posted by the Council for their August 1st executive session did comply with the ODL because the Council did restate the text of Indiana Code section 5-14-1.5-6.1(b)(9). It is my opinion that the August 1st executive session notice was sufficient under Indiana Code section 5-14-1.5-6.1(c). I recommend to the Council, as I do to any governing body, that in the future they include not only the text of the exception, but also the statutory citation so that there will not be any question as to the legitimacy of their executive sessions.

Was the Council Authorized to Discuss the Job Performance of a Former Employee During an Executive Session?

Since it is the public policy of the ODL that it is to be construed liberally in favor of disclosure,

exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-1.5-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . "[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted.], quoting, Common Council of City of Peru v. Peru Daily Tribune, Inc. 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted].

According to your complaint and the Council's response, the August 1st executive session was held to discuss the job performance evaluation of a street commissioner who had either resigned or had been terminated in late July. The Council later indicated that the basis for this executive session was Indiana Code section 5-14-1.5-6.1(b)(9) and that the acting street commissioner's job performance evaluation was also discussed during that meeting. It is your contention that the Council could not discuss the former employee's job performance evaluation because he was no longer an employee of the City. In his response, Mr. Bever stated that Indiana Code section 5-14-1.5-6.1(b)(9) makes no distinction between a present or former employee so the Council was authorized to discuss the former employee in that meeting. Further, Mr. Bever stated that, since the job performance evaluations of present or former employees are confidential under state or federal statute, Indiana Code section 5-14-1.5-6.1(b)(1), then the Council could not have discussed them in a public setting.

There are no court cases in Indiana interpreting Indiana Code section 5-14-1.5-6.1(b)(9), therefore, we must rely upon the rules of statutory construction to interpret this provision.

In construing statutes, words and phrases will be taken in their plain or ordinary and usual sense unless a different purpose is clearly manifest by the statute itself

Indiana State Dept. of Revenue v. Colpaert Realty Corp., 109 N.E.2d 415, 418-419. The term "employee" is defined as "(o)ne who works for another in return for a salary, wages, or other consideration." WEBSTER'S DICTIONARY 318 (1992). Under this definition of "employee," a person who had resigned or been terminated would no longer be an employee of the City.

Mr. Bever contends that the General Assembly made no distinction between current and former employees of a public agency for the purposes of Indiana Code section 5-14-1.5-6.1(b)(9) and that given that fact, the Council was permitted to discuss the former street commissioner's job performance evaluation in executive session. It is my opinion that the Council was not authorized to discuss the job performance evaluation of the former employee in executive session. First, as was noted above, the exceptions to the ODL are to be narrowly construed given the General Assembly's directive that the ODL be liberally construed in favor of openness. Ind. Code §5-14-1.5-1. Given the plain and ordinary

dictionary meaning of employee, I do not agree with Mr. Bever that the exception can be read broadly to encompass both present and former employees of the City. If the General Assembly had intended to include present and former employees within this exception, they could have included a reference to "present or former" as was done with respect to personnel files under Access to Public Records Act ("APRA"). See, Indiana Code section 5-14-3-4(b)(8)(A).

Also, Mr. Bever argued that Indiana Code section 5-14-1.5-6.1(b)(1) would have also permitted the discussion of the former employee's job performance evaluation in an executive session. This exception provides that an executive session may be held "where authorized by federal or state statute." I believe the more appropriate executive session citation would have been Indiana Code section 5-14-1.5-6.1(b)(7), for the "discussion of records classified as confidential by state or federal statute." In any event, it is my opinion that neither of these two exceptions would have applied to the discussion that took place at the Council's August 1st meeting. It is the burden of the public agency to show that there is a state or federal statute that either permits an executive session or permits discussion of a record in executive session because it has been classified as confidential. Mr. Bever cited only to the APRA in general. Since the APRA governs access to public records, it does not authorize any executive sessions. Further, personnel files of public employees, present or former, are not "confidential," but are disclosable at the discretion of the public agency under Indiana Code section 5-14-3-4(b)(8). A public agency, therefore, has discretion over the disclosure of much of the information contained in a personnel file except for the items described under Indiana Code sections 5-14-3-4(b)(8)(A), (B) and (C), which must be disclosed upon request.

Based upon the facts presented and the foregoing analysis of the law, it is my opinion that under a narrow reading of the exception set forth at Indiana Code section 5-14-1.5-6.1(b)(9) for executive sessions, the Council's discussion of a former employee's job performance evaluation violated the ODL. The discussion of the job performance evaluation of the acting street commissioner, however, was permissible under Indiana Code section 5-14-1.5-6.1(b)(9) because that person is currently an employee of the City.

CONCLUSION

It is my opinion that the notice of the City of Richmond Common Council for their August 1, 2001 executive session was appropriate under the Open Door Law requirements at Indiana Code section 5-14-1.5-6.1(c). It is also my opinion that Indiana Code section 5-14-1.5-6.1(b)(9) does not provide authority for governing bodies to meet to discuss the job performance evaluations of former employees, and the Council's action to do so at its August 1st executive session violated the Open Door Law.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Robert L. Bever, City Attorney w/o enclosure html>