



STATE OF INDIANA

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October 24, 2005

Traci Moyer
Daily Reporter
22 W. New Road
Greenfield, IN 46140

Re: Formal Complaints 05-FC-193 and 05-FC-198; Alleged Violations of the Open Door Law by the City of Greenfield and the City of Greenfield Board of Works

Dear Ms. Moyer:

This is in response to your formal complaints alleging that the City of Greenfield ("City") and the City of Greenfield Board of Works ("Board") violated the Open Door Law ("ODL").

BACKGROUND

You filed two formal complaints with the Office of the Public Access Counselor alleging violations of the Open Door Law by the City and the Board. On September 23, 2005 you filed a formal complaint that the Board met on August 23, 2005 in violation of the ODL. Your complaint was assigned formal complaint number 05-FC-193. On September 29, 2005 you filed a formal complaint alleging that the City violated the ODL by failing to keep memoranda during the 2005 budget meetings. Your complaint was assigned formal complaint number 05-FC-198. Your complaints have been consolidated for the issuance of this formal advisory opinion.

Formal complaints must be filed with this office not later than thirty (30) days after the denial, or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. IC 5-14-5-7. Your formal complaint 05-FC-198 alleges that memoranda were not kept at six (6) budget meetings conducted in July 2005. The denial occurred on the date that the public agency failed to keep the memoranda, the date of the meetings. The meetings were not conducted secretly or without notice. Therefore, your complaint regarding the failure to maintain memoranda during those meetings would be untimely. However, under the APRA a denial occurs when a requestor is denied a record that is required or directed to be made by any statute or by any rule of a public agency. See IC 5-14-3-4(c) and IC 5-14-3-9(a). In this instance, the City denied your request for records because it did not maintain a record that it was required to make pursuant to IC 5-14-1.5-4. Therefore, your complaint is timely under the APRA. Additionally, pursuant to IC 5-14-4-10(5), I may issue an informal advisory opinion regarding your allegations which I may consolidate into the formal opinion regarding your other complaint, 05-FC-193.

City of Greenfield Board of Works

You allege that a majority of the Board met on August 23, 2005 in violation of the Open Door Law. Two members of the three member board attended a meeting on August 23, 2005 to discuss whether to permit R.L. Turner Construction Company (“Turner Construction”) to use a vacant lot, the old city hall site, while performing remodeling work on the Hancock County Courthouse. You provided a letter from Turner Construction to the city attorney in which Mr. Joe Aldridge, a representative of Turner Construction, summarized the outcome of the August 23, 2005 meeting. Mr. Aldridge indicated that all present in the meeting were in agreement that the site could be rented to Turner Construction and provided specific details about the agreement, including the amount to be paid on the contract.

Mr. C. Thomas Billings, attorney for the City, replied to your formal complaint by letter dated October 10, 2005. A copy of that letter is enclosed for your reference. Mr. Billings stated, “[a] meeting was scheduled on August 23, 2005, with the Mayor, Clerk-Treasurer Larry Breese, Councilman Richard Pasco, Chief of Police Clarke Mercer, and City Engineer Michael Fruth and [himself]. Immediately prior to the start of the meeting, Board member Sarah Wolf entered the room.” Mr. Billings only acknowledges Ms. Wolf’s attendance at the meeting; he does not otherwise describe her participation. Hence the Board does not dispute your assertion that two members of the three member Board were in attendance at the meeting, or that the meeting was not public or that proper notice had not been given regarding the meeting. The Board acknowledges that the subject of the meeting was a request by Turner Construction to use the vacant old city hall site during remodeling of the County Courthouse. Mr. Billings stated that “[a]fter Mr. Aldridge outlined his requests, the Mayor indicated an interest in accommodating Turner Construction but a contract would have to be prepared and presented to the Board of Public Works & Safety.” Mr. Billings asserts that no vote was ever taken. A few days after the meeting the Board was notified that Turner Construction was no longer interested in using the site; therefore, no further action was taken by the Board.

City of Greenfield

Your complaint concerns meetings held in July of 2005 regarding the 2006 budget, which you refer to as “budget hearings.” You allege that during the 2005 budget hearings the City failed to keep memoranda. You learned of the failure to keep memoranda on September 29, 2005 when you requested a copy of the memoranda. Your inquiries concerning the memoranda were directed to Mr. Larry Breese, the City Clerk-Treasurer. You indicate that it is Mr. Breese’s duty to keep the minutes and memoranda for City meetings. When you asked Mr. Breese for a copy of the memoranda, he replied that he does not keep minutes or memoranda for the budget workshops.

Mr. C. Thomas Billings, attorney for the City, replied to your formal complaint by letter dated October 11, 2005. A copy of that letter is enclosed for your reference. Mr. Billings explained that it is the custom of the City to conduct a series of what the City calls budget workshops in order to formulate a budget for all City departments. Mr. Breese advertised all six (6) of the workshops and posted notice of the workshops for 2005. The workshops were open to the public. The City acknowledges that the Clerk-Treasurer did not keep a log or memoranda of which Board members attended each workshop. The City asserts that no roll call of votes was ever taken and, therefore, no record of votes was made.

The City asserts that the general discussion at each workshop was the budget for the various departments of the City. The City provided a draft of the proposed budget which includes the Clerk-Treasurer's hand-written notes. Mr. Billings stated that he presumes that the draft budget with the Clerk-Treasurer's notes could be considered to be memoranda although no official memoranda were maintained.

ANALYSIS

The intent and purpose of the Open Door Law 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." IC 5-14-1.5-1. Toward that end, except under very limited circumstances, all meetings of the governing body of a public agency must be open for the purpose of permitting members of the public to observe and record the meetings. IC 5-14-1.5-3(a). 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). "Public business" means "any function upon which the public agency is empowered or authorized to take official action." IC 5-14-1.5-2(e). "Official action" is very broadly defined by our state legislature to include everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. IC 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. IC 5-14-1.5-5(a).

City of Greenfield Board of Works

You raised the issue that Board members Sarah Wolf and Mayor Fleming were both in attendance at the meeting on August 23, 2005. The Board does not dispute this assertion. The Board's response stated that Sarah Wolf entered the room immediately prior to the start of the meeting. The Board's response does not dispel the assumption that Ms. Wolf's presence in the room permitted her to hear the information and witness, or even participate in the discussion. Therefore, there is no dispute that on August 23, 2005 two members of the three member Board attended a meeting regarding the potential use of the old city hall site.

The Board indicated in its response to this complaint that the Mayor told Mr. Aldridge that a contract would have to be prepared and presented to the Board of Public Works. It is apparent that the use of the site is the public business of the Board. While the two Board members present for the meeting did not vote, they did receive information regarding the use of the site and at a minimum agreed to negotiate the terms of a contract, which it appears from Mr. Aldridge's letter may have been discussed in the meeting. The Board asserts that no vote was taken; however, the taking of any official action by the Board, including receiving information and deliberating, constitutes a meeting. The Board violated the ODL when a majority of its members met to take official action on public business, without posting notice of the meeting or allowing the public to attend.

City of Greenfield

Your complaint against the City of Greenfield is regarding the failure of the City to keep memoranda during what you call "budget hearings" and the City calls "budget workshops."

Both hearings and workshops are meetings subject to the ODL if a majority of the members of the governing body gather for the purpose of taking official action on public business. Under the Open Door Law, public agencies that conduct meetings are required to keep memoranda.

“As the meeting progresses, 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 Indiana Code 5-1.5-2-2.5 or Indiana Code 20-12-63-7.”

IC 5-14-1.5-4(b). These memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. IC 5-14-1.5-4(c).

The City asserts that the draft budget with the Clerk-Treasurer's handwritten notes could constitute the memoranda. However, the draft budget does not contain any of the first four items required to be included in the memoranda pursuant to IC 5-14-1.5-(4)(b). The draft budget fails to include the date, time, and place of the meeting. The draft budget provided by the City includes a page that lists the dates and times of the meetings. This page appears to be the notice made prior to the meeting as it indicates that “[a]ll budget hearings will start on the hour. . .” If a notice could suffice as memoranda, the ODL would say that. The memoranda must be recorded as the meeting progresses, resulting in a record of the actual date, time, and place of the meeting that occurred. Also, the proffered draft budget does not include the members of the governing body who were present or absent for each meeting.

Also, the memoranda must contain the general substance of all matters proposed, discussed, or decided. Although the draft budget includes a listing of the dates of the budget meetings, the single draft of the budget does not differentiate between notations made at each of the six (6) meetings held. The notations scattered throughout the draft budget include numerical figures, crossed out figures, an occasional “ok” and what appear to be initials. It is unlikely that the public would be able to determine from these notations the general substance of any matters proposed, discussed, or decided at any of the meetings.

Finally, the City asserts that no roll call votes were taken; therefore, no votes were recorded. The ODL requires that a record be kept of all votes taken. If a roll call vote is taken, the memoranda must record the votes by individual members. I find that the Clerk-Treasurer's notations on the draft budget are not sufficient to constitute the required memoranda. The City's failure to keep memoranda during the budget meetings is a violation of the ODL.

CONCLUSION

For the foregoing reasons, I find that the City of Greenfield Board of Works violated the Open Door Law when a majority of its members met on August 23, 2005 for the purpose of taking official action on public business in a meeting that was not open to the public and for which notice was not provided. I find that the City of Greenfield violated the Open Door Law when it failed to keep memoranda during the July 2005 budget meetings.

Sincerely,

Karen Davis
Public Access Counselor

cc: C. Thomas Billings