



STATE OF INDIANA

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February 14, 2013

Mr. David D. Kitchell
1423 North Street
Logansport, Indiana 46947

*Re: Formal Complaint 13-FC-40; Alleged Violation of the Open Door Law by the
Logansport City Council*

Dear Mr. Kitchell:

This advisory opinion is in response to your formal complaint alleging the Logansport City Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* John R. Molitor, Attorney, responded on behalf of the Council. His response is enclosed for your reference. I granted your complaint priority status pursuant to 62 IAC 1-1-3.

BACKGROUND

In your formal complaint, you allege that the Council called an executive session to be held at 11 a.m. on January 24, 2013 in Indianapolis, Indiana. The notice provided by the Council cited negotiations related to the operation of a new power plant in Logansport as the reason for the executive session. Based on information that you received from public officials who were in attendance, the Council did not conduct negotiations during the executive session. Rather, potential vendors for the project met with the Council, Mayor, and consultants. You provide that the media was not allowed access to the executive session, a member of law enforcement was present outside the executive session, the executive session was held in the middle of the week approximately 70 miles from Logansport, and no portion of the meeting was made public.

In response to your formal complaint, Mr. Molitor advised that the incident involves the interplay of two Indiana statutes, the ODL and the Public-Private Agreement Law. The Council has strived to follow both laws since embarking on its current initiative to replace its out modeled and obsolete coal-fired power plant without taking undue risks with public funds. To this end, Mayor Franklin noticed and scheduled an executive session for January 24, 2013 at 11 a.m. at the Columbia Club in Indianapolis, Indiana. The ODL provides no legal restriction on when and where an executive session may be held, other than the prohibition on holding a public meeting at a place

inaccessible to an individual with a disability. The notice stated that the purpose of the executive session would be for “contract negotiations related to the future power plant project.”

In navigating this process, Mayor Franklin understood that a governing body of a political subdivision (such as the Council) is allowed to hold an executive session for the purpose of conducting “interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects” pursuant to I.C. § 5-14-1.5-6.1(b)(4). Accordingly, Mayor Franklin provided notice in such a way to bring the session within the “negotiations” clause of the ODL. At the same time, Mayor Franklin had held discussions for some time with various private vendors under provisions of the Public-Private Agreements Law (e.g. I.C. § 5-23) in an effort to identify who might be able to make the best offer to the community for the construction of a new power plant. To protect the trade secrets of said vendors, six of whom having submitted offers, and in accordance with the City’s Request for Proposals from eligible offerors, Mayor Franklin determined that he would not share with the public all the details of the offeror’s proposals during the City’s negotiations. Per the Public-Private Agreement law, “the governmental body may refuse to disclose the contents of proposals during discussions with eligible offerors [and] shall negotiate the best and final offers of responsible offerors who submit proposals. . .” I.C. §§ 5-23-5-6, 7. Therefore, the Mayor’s notice also informed the media and the public that the executive session held on January 24, 2013 related to the City’s power plant initiative, ongoing under the Public-Private Agreement law. This constituted more notice to the public that what is required under the ODL; otherwise public would not have known that the executive session was held for this specific reason.

As to your allegation that “no negotiations were held” during the executive session; the term “negotiation” is defined plainly as the “process of achieving an agreement through discussion.” While the formal complaint provides that “no negotiations were held”, the complaint also provides that potential vendors for the project met with the Council, Mayor, and a team of consultants. The complaint does not allege what actual activities occurred at the executive session. The Council’s memoranda for the executive session, a copy of which is attached, provides that negotiations, which included interviews and discussions, were conducted by City officials and their agents with industrial prospects and their agents pursuant to a Request for Proposal that the City had previously issued under I.C. § 5-23-5-2. The memoranda further states that no subject matter was discussed in the executive session other than then future power plant project as specified in the public notice. Essentially, the participants held discussions about how they might best achieve a Public-Private Agreement related to a future power plant project; simply put, Mr. Molitor maintains, the parties engaged in negotiations.

As to your allegation that the executive session was guarded by a Logansport Police Officer, there is no law that would prohibit the Council from having a police officer present during a meeting of public officials to discuss an important project related to the City’s economic future. Despite the innuendo, Mr. Molitor advised there was nothing nefarious about the officer’s presence.

As provided in the formal complaint, the Council has scheduled a meeting on February 14, 2013, to which the primary purpose is to conduct a public hearing on the recommendation by the City's Utility Service Board that was made on January 29, 2013. The Board recommended that the Council endorse a particular vendor for the project. In accordance with the provisions of the Public-Private Agreement law, the City has duly published a notice of the public hearing in two newspapers as required by I.C. § 5-23-5-9. If the Council elects to take a vote at the February 14, 2013 meeting, it will only be to pass the proposed enabling ordinance through first reading. Pursuant to its own rules, the Council has not taken any votes on the proposed power plant project and will not be able to have its second reading on the proposed ordinance or take final action on the project until at least March 4, 2013, the date of its next regularly scheduled monthly meeting. Mr. Molitor also noted that the Board's recommendation of a vendor was made only after a spirited public discussion and debate during the Board's regular monthly meeting; a meeting that was duly noticed and ended with all five members voting unanimously to make the recommendation to the City Council.

As to your allegation that the media was not allowed to attend the executive session, such conduct is not contrary to the requirements of the ODL. However, the City did take extra steps to set up a media room at the Columbia Club on the day of the executive session so as to enable members of the media to conveniently interview various session participants about the power plant proposals. Three members of the media utilized the media room for just this purpose.

As to the location of the executive session, while the location and timing of the executive session may not have been convenient for all local residents, the Council did not violate the ODL by holding the executive session during the weekday in Indianapolis. The executive session's location did not deter the media from conducting interviews and the site's location facilitated full participation by all members of the City's team of consultants, which in turn enhanced the efficiency of the negotiation process.

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). A governing holding an executive session may admit those persons necessary to carry out its purpose. *See* I.C. § 5-14-1.5-2(f). Thus, it is my opinion that the Council did not violate the ODL

by not allowing the media to attend the executive session held on January 24, 2013. 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. *See* I.C. § 5-14-1.5-6.1(c). "Final action" is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). The ODL does not address where an executive session may or may not be physically held beyond the requirement that a public agency may not hold a meeting at a location that is not accessible to an individual with a disability. *See* I.C. § 5-14-1.5-8(d). Thus, the Council did not violate the ODL by holding the executive session on January 24, 2013 in Indianapolis. Further, the Council did not violate the ODL by holding the executive session on a Thursday at 11 a.m. or by having a member of law enforcement present outside the room where the executive session was held.

Notice of an executive session must be given 48 hours in advance of every session 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 notice posted by the Council called for:

"an executive meeting of the City Common Council for Thursday, January 24th at 11 a.m. at the Columbia Club located at 121 Monument Circle in downtown Indianapolis. The purpose of the meeting is for contract negotiations related to the future power plant project."

There is no dispute that the notice was posted more than 48 hours in advance of the executive session. While I would applaud the Council for providing additional, specific information regarding the subject matter of the executive session, it is my opinion that it violated section 6.1(d) of the ODL by failing to cite to the specific statute that would allow the Council to meet in executive session and further by failing to provide the language of the statute in the notice.

As to the discussions held by the those in attendance at the January 24, 2013 executive session, the executive session was held pursuant to I.C. § 5-14-1.5-6.1(b)(4), which allows that a governing body of a political subdivision may meet in executive session to conduct interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects. You have been informed by those in attendance at the executive session that no negotiations took place. In response, Mr. Molitor advised that negotiations, which included interviews and discussions, were conducted by City officials and their agents with industrial prospects and their agents pursuant to a Request for Proposal that the City had previously issued under I.C. § 5-23-5-2. This is further evidenced by the memorandum that was taken by the Council for the executive session. It should be noted that I was not in attendance at the January 24, 2013

executive session, nor is public access counselor a finder of fact. Advisory opinions are issued based upon 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*. Thus, *if* the Council and its agents limited its discussions to conducting interviews and negotiations with industrial prospects and their agents pursuant to section 6.1(b)(4) of the ODL during the January 24, 2013 executive session, it is my opinion that the Council complied with the requirements of the ODL (emphasis added).

CONCLUSION

Based on the foregoing, it is my opinion that the Council did not violate the ODL by holding the executive session on January 24, 2013 in Indianapolis. Further, the Council did not violate the ODL by holding the executive session on a Thursday at 11 a.m. or by having a member of law enforcement present outside room where the executive session was held. It is my opinion that the Council violated section 6.1(d) of the ODL by failing to cite in the notice to the specific statute that would allow the Council to meet in executive session and further by failing to provide the language of the statute cited. Lastly, *if* the Council and its agents limited its discussion to conducting interviews and negotiations with industrial prospects and their agents pursuant to section 6.1(b)(4) of the ODL during the January 24, 2013 executive session, it is my opinion that the Council complied with the requirements of the ODL (emphasis added).

Best regards,

A handwritten signature in black ink, appearing to read 'J. Hoage', written in a cursive style.

Joseph B. Hoage
Public Access Counselor

cc: Paul R. Molitor