

January 4, 2006

Elaine Campbell
256 South Street
Cloverdale, IN 46120

Judy G. Whitaker
P.O. Box 487
Cloverdale, IN 46121

John Davis
204 North Lafayette Street
Cloverdale, IN 46120

Re: Consolidated Formal Complaints 05-FC-245; 05-FC-246; 05-FC-247; 05-FC-265; Alleged Violations of the Open Door Law and the Access to Public Records Act by the Cloverdale Town Council

Dear Sir and Madams:

This is in response to your formal complaints alleging that the Cloverdale Town Council ("Council") violated the Open Door Law when three of its members held an illegal meeting and took improper action in two executive sessions. In addition, Ms. Whitaker alleged that the Access to Public Records Act was violated when the Council ignored her requests for records.

BACKGROUND

These complaints arose following a lawsuit against the Town of Cloverdale by Simon Fire Equipment and Repair, Inc. ("Simon"). The lawsuit was filed in Iowa state court. Although none of the parties has specifically stated what the lawsuit alleges, it is apparent that the lawsuit resulted from a dispute regarding whether the Town would purchase a fire truck from Simon. On November 14, three Council members, Mr. Padgett, Mr. Sublett, and Mr. Vickroy ("Council Members") executed a single *pro se* Motion to Dismiss the Council Members as defendants from the Simon lawsuit. The motion was served by U.S. Mail by Mr. Sublett. Attached to the Motion

to Dismiss was a joint affidavit of the Council Members, executed by each Member on November 12, 2005.

Ms. Campbell alleged that the Council met in executive session on November 30, 2005, and the Council Members signed a letter engaging the services of an Iowa law firm in the Simon matter.

Ms. Whitaker alleged the same facts. In addition, Ms. Whitaker alleged that a November 11 executive session of the Council occurred to discuss the Simon litigation matter. On November 14, 2005, the Council Members filed a Motion to Dismiss with respect to them as defendants. This action was taken without holding a public meeting. In addition, on December 16, Ms. Whitaker filed a complaint against the Council alleging a denial of her request for records when the Council failed to respond. Specifically, Ms. Whitaker alleged that the Council denied her November 29, 2005 request to each of the Council Members for copies of statements or documents supporting each member's statement in the affidavit supporting the Motion to Dismiss, that Ms. Whitaker as a council member made decisions and acted independently of the Council as a whole. In addition, in a complaint filed on December 27, 2005, Ms. Whitaker alleged that an illegal meeting occurred among the Council Members after a December 13 public meeting, when only the Council Members executed signatures on a letter accompanying the bid check that the Town returned to Simon. Ms. Whitaker stated in this complaint that the action taken in the December 13 meeting was solely to approve returning the check to Simon. Acting on the letter went beyond the scope of authority that the Council approved at the December 13 meeting.

John Davis alleged the same improprieties regarding the November 14 Motion to Dismiss and the November 30 executive session as the other complainants.

John Davis is the Council President. Judy Whitaker is the Vice President of the Council.

I sent a copy of the complaints to the Council Members. I enclose the December 16 response for the complainants' reference. With respect to the November 11 executive session, the Council Members stated that during the executive session, the Council attorney advised the Council regarding the timeframes for responding to the lawsuit. Ms. Truax, the Clerk Treasurer said that the Town did not have money for the action. The Town attorney advised the Council Members that they had the right to retain an Iowa attorney. Because the Council Members did not want to be defaulted, the three prepared a *pro se* Motion to Dismiss, which was filed by Mr. Sublett on November 14, 2005.

At the November 30 executive session, the Town attorney presented to the Council the engagement letter from the Iowa law firm of O'Connor & Thomas. The Council Members explained that it was "absolutely critical to sign this letter to begin legal action and transfer the lawsuit to federal court in Indianapolis." The Council members stated that final action was taken in a public meeting on December 13 by the majority of the Council. Finally, the Council Members contend that the complaint filed by Ms. Campbell should be dismissed because she did not attend the November 30 executive session about which she complains.

ANALYSIS

Open Door Law

The intent of the Open Door Law is that 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. Except as provided in section 6.1 of IC 5-14-1.5, 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(a). An executive session may be held only under the instances stated in IC 5-14-1.5-6.1(b). The provisions of the Open Door Law are to be liberally construed with a view to carrying out its policy. IC 5-14-1.5-1.

An executive session may be held for discussion of strategy with respect to initiation of litigation or litigation that is either pending or has been threatened specifically in writing. IC 5-14-1.5-6.1(b)(2). A final action must be taken at a meeting open to the public. IC 5-14-1.5-6.1(c).

There are three actions that comprise the allegations against the Council with respect to the Open Door Law. The complainants allege that the letter engaging the Iowa law firm was signed by the majority of the Council during the executive session held on November 30. In my opinion, the signing of the agreement to engage the Iowa law firm by a majority of the Council was a final action that was required to occur during a public meeting, in accordance with IC 5-14-1.5-6.1(c). Moreover, the execution of the engagement letter went beyond the discussion of strategy with respect to the pending litigation. Therefore, the engagement letter was executed in violation of the Open Door Law. This violation is actionable under IC 5-14-1.5-7(a). Also, a plaintiff need not allege or prove special damage different from that suffered by the public at large. IC 5-14-1.5-7(a). Hence, the Council Members' assertion that Ms. Campbell's complaint should be dismissed because she was not at the executive session misses the mark. The Open Door Law confers the right of the public to observe and record a meeting. If a meeting is closed to the public in violation of the Open Door Law, members of the public who were deprived of the right to attend may file a complaint under the Open Door Law, either in court or with the Public Access Counselor. IC 5-14-1.5-7(a); IC 5-14-5-6(2).

The complainants also challenge the action of the Council Members in filing a Motion to Dismiss, again outside of a public meeting. After an executive session on November 11, 2005, the Council Members signed a *pro se* Motion to Dismiss. The complainants have inferred from evidence of the Motion to Dismiss that the Motion must have been discussed, drafted, and signed, or all three, in a meeting of the Council Members, who constitute a majority of the Council. The response of the Council Members to the complaint does not dispel this inference. The need to move swiftly in legal matters cannot justify a private meeting. *See* IC 5-14-1.5-2(c)(defining "meeting" as "a gathering of the majority of the governing body for the purpose of taking official action on public business"). Because the Council Members must have met in

order to accomplish the Motion to Dismiss, and because they did so as members of the Council as recited in the Motion to Dismiss, the Council violated the Open Door Law.

With respect to the complaint of Ms. Whitaker regarding the action to draft the December 20 letter and return the check to Simon, the Council Members told me that this action was not taken illegally. Rather, the decision to return the check was approved in the public meeting of December 13, and each Council Member came in individually to sign the letter. I have not reviewed the minutes of the December 13 meeting. Ordinarily, the duty to carry out approved action of the Council may be delegated to a particular member of the governing body, or to the clerk-treasurer. A majority of the legislative body of a town may meet without posting notice to carry out administrative functions of the Town. IC 5-14-1.5-5(f)(2). "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)(2). Ms. Whitaker concedes that the check's return was approved at the December 13 public meeting. Ms. Whitaker's complaint is that the letter was acted upon by the Council Members without a public meeting and without the knowledge or approval of the Council as a whole. The letter refers to the Council's December 13 meeting approving returning the check, and except for a few pleasantries, does no more than purport to transmit the check to Simon. In the absence of evidence that the letter was more than an administrative function, or that the majority of the members met to discuss, draft, or sign the letter, I cannot determine whether the Council Members violated the Open Door Law.

Access to Public Records Act

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). IC 5-14-3-3(a). "Public record" means any writing, paper, report, or other material that is created, received, retained, maintained, or filed by or with a public agency. IC 5-14-3-2(m). The Cloverdale Town Council is a public agency. See IC 5-14-3-2(1)(2). A public agency that receives a request for a public record must respond within 24 hours or seven (7) days, depending on how the public agency receives the request. IC 5-14-3-9(a) and (b).

Ms. Whitaker complains that her November 29 request for a record was denied by the Council. However, an individual member of the Council is not a public agency. Ms. Whitaker directed her requests for records to the individual Council Members, each at different addresses, none of which were the Town address of P.O. Box 222 or 154 South Main Street. It was not a violation of the Access to Public Records Act for individual members of a public agency to not respond to a request for records directed to them as individuals. This is because a public agency is required to respond under the APRA, not individuals. Also, the records requested are not public records unless they are created, received, retained, maintained, or filed by or with a public agency. See *Opinion of the Public Access Counselor 00-FC-38*.

CONCLUSION

For the foregoing reasons, I find that the Cloverdale Town Council violated the Open Door Law, but did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Cloverdale Town Council