



STATE OF INDIANA

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July 30, 2012

Jeffrey L. Dickerson
9547 East U.S. Hwy 40
Terre Haute, Indiana 47803

Re: Formal Complaint 12-FC-205; Alleged Violation of the Open Door Law by the Town of Seelyville

Dear Mr. Dickerson:

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

BACKGROUND

In your formal complaint, you allege that on July 13, 2012 the Town held an executive session to which it failed to properly post notice for. The meeting notice was only posted at the Water Office and the Town Post Office.

In addition, you allege that on July 10, 2012, the Town Council, in acting as the Water Utility Board, approved an ordinance setting the new rates for the water utility at a special meeting held just prior to its regular monthly meeting. In the public notice for the July 10, 2012 meeting, the Town Clerk made it known that the ordinance was first presented at a special meeting held on June 22, 2012. During the July 10, 2012 meeting, an inquiry was made whether the Town posted notice in the newspaper for the June 22, 2012 meeting. The Town provided that no notice was posted in the local newspaper regarding the June 22, 2012 meeting. You allege that this lack of notice prevented the public from voicing their concerns regarding the rate hike.

In response to your formal complaint, Mr. Shagley advised that the Town Council held a special meeting on June 22, 2012. An ordinance ("Rate Ordinance") increasing rates for the Town's Waterworks ("Waterworks") was introduced at the meeting. Notice of the June 22, 2012 meeting was posted 48 hours before the meeting at the Town Hall (the principal office of the Council pursuant to I.C. 5-14-1.5) and at the U.S. Post Office Branch located in Seelyville Indiana. The meeting was held at the Town Hall. Notice for

the June 22, 2012 meeting was handled in accordance with the requirements of notice under the ODL.

The Council held a special meeting on July 10, 2102. The Rate Ordinance was considered on second reading at this meeting. Notice for the July 10, 2012 meeting was posted more than 48 hours prior to the meeting at the Town Hall and Seelyville Post Office Branch. The meeting was held at Town Hall and notice was given in accordance with I.C. § 5-14-1.5-5. Notice for this meeting was also published in the *Tribune Star* at least 10 days before the meeting and was mailed to all users of the Waterworks. The additional notice of this meeting was handled in accordance with I.C. § 8-1.5-3-8.1. The Rate Ordinance Hearing Notice Statute required the Town to hold a public hearing on the Rate Ordinance and provide public notice of that public hearing. The public hearing was held in conjunction with the July 10, 2012 meeting.

During the July 10, 2012 meeting there was discussion as to whether notice was also required to be published in the newspaper for the June 22, 2012 meeting pursuant to either the ODL or Rate Ordinance Hearing Notice Statute. During the July 10, 2012 meeting, Mr. Shagley explained that the ODL does not require notice to be publicized in the local newspaper and the Town had provided notice in the newspaper in order to satisfy the Rate Ordinance Hearing Statute. Mr. Shagley further advised that the notice that had been provided for the June 22, 2012 and July 10, 2012 meeting had complied with both statutes. Under the Rate Ordinance Hearing Statute, notice was not required to be published in the newspaper for the June 22, 2012 meeting.

As to your complaint regarding the July 13, 2012 executive session notice, under the ODL, notice for the executive session was not required to be posted in the local newspaper. The ODL simply required the notice be posted at the principal office of the governing body holding the meeting, which was done by the Town for the July 13, 2012 executive session.

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 nights and weekend, 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.*

You allege that the Town failed to provide proper notice for the July 13, 2012 executive session due to the notice was not published in the local newspaper. As the ODL does not require a governing body to post notice of an executive session in the local newspaper, it is my opinion that the Town did not violate the ODL. Although not alleged, the notice provided with the Town’s response to your formal complaint failed to provide the statutory code and the language of the statutory code for the executive session. A proper notice would have provided:

NOTICE

The Town Council of the Town of Seelyville will meet in executive session at 9 a.m. on July 13, 2012 at the Town Hall pursuant to I.C. § 5-14-1.5-6.1(b)(2) for a discussion of strategy with respect to the initiation of litigation or litigation that is either pending or has been threatened specifically in writing.

Posted this 11th day of July, 2012.

In the future, I would encourage the Town to provide both the language and the specific statutory citation in a notice for executive session.

As to the notice provided by the Town for meetings held on June 22, 2012 and July 10, 2012; public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices, nothing requires the governing body to publish the notice. *See* I.C. § 5-14-1.5-5(b)(2). As such, the Town would not have violated the ODL by failing to publish notice of the June 22, 2012 and July 10, 2012 meetings in the local newspaper.

However, I.C. § 8-1.5-3-8.1(c) provides the following regarding notice for hearings concerning the adoption of rates and charges:

(c) After the introduction of the ordinance establishing the rates and charges under section 8 of this chapter, but before the ordinance is finally adopted, the municipal legislative body shall hold a public hearing at

which users of the works, owners of property served or to be served by the works, and other interested persons may be heard concerning the proposed rates and charges. Notice of the hearing, setting forth the proposed schedule of rates and charges, shall be:

(1) published in accordance with IC 5-3-1 (IC 5-3-1-1 through IC 5-3-1-9);

(2) mailed to owners of vacant or unimproved property if the ordinance includes a fee for water or wastewater service to vacant or unimproved property; and

(3) mailed to users of the works for service to property located outside the municipality's corporate boundaries. The notice may be mailed in any form so long as the notice of hearing is conspicuous. The hearing may be adjourned from time to time. Notice mailed under subdivision (3) must include a statement that, following adoption of the ordinance, the users described in subdivision (3) may be entitled to petition the commission under section 8.3 of this chapter to review and adjust the rates and charges imposed on the users if a petition under section 8.2 of this chapter or under IC 36-9-23-26.1 with respect to the same rate ordinance has not been filed.

As to publication in a local newspaper, the statute would require that notice for the July 10, 2012 meeting held by the Town to be published in the local newspaper in accordance with I.C. 5-3-1. The statute would not have required notice to be published for the June 22, 2012 meeting, where the ordinance was first introduced. As to your allegations that the lack of notice for the June 22, 2012 meeting prevented the public from voicing their concerns regarding the rate hike; I.C. § 8-1.5-3-8.1 provides that the meeting held by the Town on July 10, 2012 was the appropriate setting for the public to be heard regarding concerns about the rate hike and notice for the meeting was posted in accordance with the Open Door Law and Rate Ordinance Hearing Notice Statute. As such, it is my opinion that the Town did not violate I.C. § 8-1.5-3-8.1(c) by failing to publish notice of the June 22, 2012 meeting in the local newspaper.

CONCLUSION

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

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: Richard J. Shagley II