



STATE OF INDIANA

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Rickey L. Brumbarger
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Re: Formal Complaint 12-FC-43; Alleged Violations of the Open Door Law by the Dugger Town Council

Dear Sirs and Madams:

This advisory opinion is in response to your formal complaints alleging the Dugger Town Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Due to the similarity in nature of the complaints that have been filed against the Council, I have combined all the complaints and will issue a single advisory opinion. Terry Modesitt, Attorney, responded on behalf of the Council. His response is enclosed for your reference.

BACKGROUND

In your formal complaints¹, you allege the following regarding the conduct of the Council:

- At the January 9, 2012 meeting, the Council attempted to fire the Town Marshall, David Heaton. Council President Dwight Nielson stated the Council had met in a private meeting prior to officially taking office as members of the Council and voted on the issue whether to retain Marshall Heaton. The Council is made up of three members, President Nielson, Kermit King, and Lane Lovelace. Mr. Brumbarger alleged that President Nielson stated the decision to fire the Marshall had taken place months ago. The Council also voted on the employee insurance coverage, to which members of the Council stated that discussions and a vote had occurred on the issue prior to being sworn in as members of the Council.

¹ Allegations beyond I.C. § 5-14-1.5-1 *et seq.* are outside the purview of this office.

- The Council continues to utilize an agenda, but does not make the agenda available to the public.
- At the February 6, 2012 Council Meeting, President Nielson stated he had the support of his fellow Council members regarding the termination of the Town's Utility Clerk before the issue had ever been discussed at an open meeting of the Council.
- At the February 6, 2012 meeting the Council voted to retroactively elected President Nielson. The first vote took place prior to the Council members taking office.

In response to your formal complaint, Mr. Modesitt advised that it was his understanding that the complaints alleged two violations of the ODL. First, that the Council members violated the ODL by meeting prior to taking office and the Council President Dwight Neilson violated the ODL when he spoke with the Town Clerk regarding an employee of the Town.

As to your initial allegation, I.C. § 36-5-2-3(a) specifically states that a councilmen's term of office begins at noon January 1 after the member's election and continues until the member's successor is elected and qualified. The newly elected members of the Council had no power to take public action prior to January 1, 2012. In addition, no newly elected member of the Council had been sworn in, nor did they have the authority to act individually on or behalf of the Council prior to January 1, 2012. As such, the actions of the newly elected Council members prior to January 1, 2012 would not have violated the ODL.

As to your second allegation, 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. When President Nielson met with the Clerk, a majority of the Council was not present and the requirements of the ODL would not apply.

The Council believes that it has been forthright in acknowledging that it met prior to taking office and that a discussion took place between the Town Council President and the Town Clerk. There was no intent to conceal information or deprive the community from engaging in the Town's matters. The Town is willing to cooperate with any and all investigations and will gladly follow through with any recommendations from the Public Access Counselor's Office.

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).

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the Public Access Counselor must file the complaint not later than thirty 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. The first complaint received by our Office regarding the Council's alleged conduct was on February 14, 2012. As to the issues that have been alleged regarding the January 9, 2012 meeting, more than thirty days have passed since either the alleged action occurred in violation of the law or when the public was made aware of any meeting conducted secretly or without notice. As such, you do not have standing to file a formal complaint regarding the January 9, 2012 meeting. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your complaint in regards to the January 9, 2012 meeting will be addressed as an informal inquiry. *See* I.C. § 5-14-4-10(5). As to all other issues presented, you still retain the ability to file a formal complaint pursuant to I.C. §§ 5-14-5-6 and 5-14-5-7.

January 9, 2012 Council meeting

As alleged, the Council attempted to fire the Town Marshall, David Heaton at the January 9, 2012 meeting. Council President Dwight Nielson stated the Council had met in a private, prior to officially taking office, and voted on the issue whether to retain Marshall Heaton. The Council is made up of three members, President Nielson, Kermit King, and Lane Lovelace. In Mr. Brumbarger's Formal Complaint, he alleged that President Nielson stated the decision to fire the Marshall had taken place months ago. The Council also voted on the employee insurance coverage, and members of the Council further stated that discussions and a vote had occurred on the issue prior to being sworn in as members of the Council.

I.C. § 36-5-2-3(a) provides that the term of office for a member of a legislative body commences at noon January 1 after the member's election. Newly elected members of the Council did not take office and were not empowered to act on behalf of the Council until January 1, 2012. As such, for better or worse, the ODL would not apply to actions taken of the newly elected members prior to January 1, 2012. Therefore, as to any allegations that the newly elected members of the Council conducted meetings pursuant to the ODL prior to January 1, 2012, it is my opinion that the Council did not violate the ODL. However, as to the allegations that the newly elected Council members voted on issues prior to taking office, I.C. § 36-5-2-3(a) provides that the newly elected member would not retain power to act as a member of the Council or on behalf of the Council until January 1, 2012. Thus, it is my opinion that any alleged vote that occurred prior to January 1, 2012 would be considered void.

As to the alleged actions of the Council that occurred after January 1, 2012, 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 on public business. *See* I.C. § 5-14-1.5-2(c).

Official action means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). Public business is defined as any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14-1.5-2(e). The ODL requires that 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 ODL permits public agencies to hold executive sessions in certain specified instances, including receiving information about an employee's alleged misconduct and to discuss, before a determination, the employee's employment status. *Frye v. Vigo County*, 769 N.E.2d 188, 192 (Ind. Ct. App. 2002) *citing* I.C. § 5-14-1.5-6.1(b)(6). An "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." *See* I.C. § 5-14-1.5-2(f). 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 public access counselor is not 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*. As such, if a majority of the Council met after January 1, 2012 to discuss, deliberate, or vote on Marshall Heaton's employment status, and the meeting was not properly noticed and held accordingly to the requirements of the ODL, then it is my opinion that the Council violated the ODL. But, if a majority of the Council did not meet to discuss, deliberate, or vote on Marshall Heaton's employment status, beyond in a properly noticed public meeting or executive session, then it is my opinion that the Council did not violate the ODL.

A governing body of a public agency is not required to use an agenda, but if it chooses to utilize one, the agency must post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. *See* I.C. § 5-14-1.5-4(a). If a public agency utilizes an agenda, the ODL does not prohibit it from changing or adding to the agenda during the meeting. *See Opinion of the Public Access Counselor 09-FC-40*. Thus, the Council would not violate the ODL by not using an agenda for its meetings. However, should the Council utilize an agenda; a copy of the agenda must be posted at the entrance to the location of the meeting prior to the start the meeting.

Regarding the Council's ability to terminate or suspend Marshall Heaton, I.C. § 36-5-7-3 provides the following:

The Marshal serves at the pleasure of the town legislative body. However, before terminating or suspending a marshal who has been employed by the town for more than six (6) months after completing the minimum basic training requirements adopted by the law enforcement training board

under I.C. 5-2-1-9, the legislative body must conduct the disciplinary removal and appeal procedure prescribed by I.C. 36-8 for city fire and police departments. I.C. § 36-5-7-3.

Any vote to terminate the Marshall by the Council would be required to be performed at an open public meeting; as such conduct would be considered final action pursuant to the ODL. *See* I.C. § 5-14-1.5-2(g).

February 6, 2012 Council meeting

It is alleged that at the February 6, 2012, Council Meeting, President Nielson stated he had the support of his fellow Council members regarding the termination of the Town's Utility Clerk before the issue had ever been discussed at an open meeting of the Council. Further, the Council voted to retroactively elect President Nielson at the February 6, 2012 meeting, as the first vote had taken place prior to the Council members taking office.

As stated prior, 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 on public business. *See* I.C. § 5-14-1.5-2(c). The ODL requires that 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 public access counselor is not 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.*

As to the termination of the Utility Clerk, if a majority of the Council met after January 1, 2012 to discuss, deliberate, or vote on the Utility Clerk's employment status, and the meeting was not properly noticed and held accordingly to the requirements of the ODL, then it is my opinion that the Council violated the ODL. But, if a majority of the Council did not meet to discuss, deliberate, or vote on Utility Clerk's employment status, beyond those discussions in a properly noticed public meeting or executive session, then it is my opinion that the Council did not violate the ODL. I would also note that it is not apparent whether the Council was empowered to terminate the Utility Clerk. If the Council did not retain the power to terminate the Utility Clerk, then it would not have violated the ODL by discussing the issue, as the Utility Clerk's employment status would not have been considered "public business" of the Council.

As to the subsequent vote of the Council to elect President Nielson that was held on February 6, 2012, the Council indicated the vote was necessary as the initial vote took place prior to the Council members taking office. As outlined prior, the newly elected members of the Council did not have the authority to act on behalf of the Council until January 1, 2012. *See* I.C. § 36-5-2-3(a). As such, it is my opinion that any action or decision of the newly elected members prior to January 1, 2012 would be considered void.

Lastly, I would note that as to all issues presented, a Court, not the Public Access Counselor, may declare a final action of a governing body of a public agency void. *See* I.C. § 5-14-1.5-7(a). If a complainant continues to believe that a public agency has acted in violation of the ODL following the issuance of an advisory opinion from this office, that complainant may file an action in any court of competent jurisdiction to obtain a declaratory judgment; enjoin continued, threatened, or future violations; or declare void any policy, decision, or final action. *Id*; *See Opinions of the Public Access Counselor 10-FC-327 and 11-FC-11*. In determining whether to declare any policy, decision, or final action void, a court shall consider certain factors, including the extent to which the violation affected the substance of the policy, decision, or final action; denied or impaired access to any meetings that the public had a right to observe and record; and prevented or impaired public knowledge or understanding of the public's business. *See* I.C. §5-14-1.5-7(d). Not all violations of the ODL would result in a court finding that the action should be voided. *Hinojosa v. Bd. of Pub. Works & Safety*, 789 N.E.2d 533 (Ind. Ct. App. 2003); *See also Opinion of the Public Access Counselor 09-FC-193*.

CONCLUSION

Based on the foregoing, it is my opinion that as to the alleged discussions held by the Council after January 1, 2012 concerning the Utility Clerk, if a majority of the Council met to discuss, deliberate, or vote on the Utility Clerk's employment status, and the meeting was not properly noticed and held accordingly to the requirements of the ODL, then it is my opinion that the Council violated the ODL. But, if a majority of the Council did not meet to discuss, deliberate, or vote on Utility Clerk's employment status, beyond those discussions in a properly noticed public meeting or executive session, then it is my opinion that the Council did not violate the ODL. However, if the Council was not empowered to terminate the Utility Clerk, it would not have violated the ODL as the Utility Clerk's employment status would not have been "public business" of the Council. Further, it is my opinion that any action or vote taken by the Council prior to January 1, 2012 would have been void as the newly elected members of the Council had as of January 1, 2012 not taken office pursuant to I.C. § 36-5-2-3(a).

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized and cursive.

Joseph B. Hoage
Public Access Counselor

cc: Terry Modesitt