



STATE OF INDIANA

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July 5, 2016

Mr. Keith E. Phenis
C/o J. Clayton Miller
2000 East Main Street
Richmond, Indiana 47374

Re: Formal Complaint 16-FC-130; Alleged Violation of the Open Door Law by the Town of Fountain City Town Council

Dear Mr. Phenis:

This advisory opinion is in response to your formal complaint alleging the Town of Fountain City Town Council ("Council") violated the Open Door Law ("ODL"), Indiana Code § 5-14-1.5-1 et. seq. The Council has responded to your complaint via Mr. Stephen Hunyadi, Esq. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on June 10, 2016.

BACKGROUND

Your complaint dated June 10, 2016 alleges the Town of Fountain City Town Council violated the Open Door Law by taking final action at an executive session.

There has been an ongoing dispute regarding a public way. In 2015, citizens of Fountain City petitioned the Council to vacate a public way. The vacation was initially approved, but then reversed at a subsequent meeting. Citizens then petitioned for mandamus demanding the vacation.

You stated sometime in April 2016, the Council met in executive session and decided to vacate the public way. The Council later approved the vacation at a public meeting in May. At the May meeting, you contend a council member stated the matter had been discussed at length in the executive session and the meeting was to formally adopt the final decision reached.

On June 27, 2016 the Council responded. The Council admits an executive session took place to discuss the litigation, but states the council only adopted strategies for the litigation and took no final action on Council business. Council asserts no final action was taken at the executive session, but rather the final action was taken at the open public meeting, as required by law.

ANALYSIS

It is the intent of the Open Door Law (“ODL”) 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. *See Indiana Code § 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 Indiana Code § 5-14-1.5-3(a)*.

A “meeting” is defined as a gathering of a majority of the governing body for the purpose of taking official action on business. *See Indiana Code § 5-14-1.5-2(c)*. “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. *See Indiana Code § 5-14-1.5-2(d)*. Generally, these actions must be open to public scrutiny.

The exceptions to this policy are called executive sessions. Executive sessions are subject-matter-contingent scenarios which have heightened sensitivity above and beyond regular public business. The Indiana General Assembly has recognized the need for privacy when it comes to these very narrow situations and has carved out executive sessions as instances when it is appropriate for a governing body to meet behind closed doors. Notably, one of these exceptions allows for an executive session to be held for the discussion of strategy with respect to litigation which is either pending or has been threatened specifically in writing. *See Indiana Code 5-14-1.5-6.1(b)(2)(B)*.

The Council held an executive session on April 19, 2016 to discuss settlement options and alternatives with the town attorney. Subsequently, the Council held a public meeting on May 3, 2016 during which they discussed the primary purpose of the April 19, 2016 executive session, the implications the Council’s approval would have, as well as the status of the pending litigation. Following this summation, a motion was made and approved to vacate the public way.

The Council held an executive session to discuss pending litigation and the potential strategies available to it, which constitutes official action under the ODL. You allege a final decision was improperly made during this session, violating the ODL. This allegation stems from the statement of one Council member that the matter was discussed at length during the session and the Council, “now needed to take a vote on what they decided at the executive session.”

The Council has responded this statement is both inaccurate and misleading, there were no unauthorized private meetings, and no public announcements were made of any final decision prior to the vote held during the May 3, 2016 meeting. While the Council members may have come to an informal consensus during the executive session (or even made a decision), there is no evidence any final action was taken. The General Assembly specifically contemplated the discussion of strategy be allowed in an executive session and it is logical the Council would reach a consensus during this discussion with how best to respond to the issue.

There is a marked difference in the Open Door Law between official action and final action. As you correctly argue, taking final action in an executive session is prohibited by the ODL. *See Indiana Code 5-14-1.5-6.1(c)*. “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See Indiana Code 5-14-1.5-2(g)*.

While final action is required to be taken in a public meeting, taking official action (which includes receiving information, deliberating, **and making decisions**, see Indiana Code § 5-14-1.5(d)) is not prohibited in an executive session. If a governing body was not permitted to undertake any official action in an executive session, there would be little point in holding these sessions. The fact the Council may have made a decision in its executive session does not indicate there was **final action**. A final action (vote) must be memorialized at a public meeting, so the public is aware of which representative officials are in favor of or opposed to the issue at hand. Thus, as long as the Council’s final vote was taken and the decision subsequently ratified in a public meeting, no violation has occurred. From the information provided, it does not appear as if any attempt was made by the Council to intentionally subvert the Open Door Law provisions. *Emphasis added.*

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Fountain City Town Council did not violate the Open Door Law because official action during the executive session was permissible and final action was properly taken in a public meeting.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt
Public Access Counselor

Cc: Mr. Stephen L. Hunyadi, Esq.