



STATE OF INDIANA

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July 5, 2016

Mr. William S. de Funiak

Re: Formal Complaint 16-FC-146; Alleged Violation of the Open Door Law by the Town of Long Beach Town Council (Priority)

Dear Mr. de Funiak:

This advisory opinion is in response to your formal complaint alleging the Town of Long Beach 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 counsel, Ms. Julie Paulson, Esq. Her 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 23, 2016.

BACKGROUND

Your complaint dated June 23, 2016 alleges the Town of Long Beach Town Council violated the Open Door Law by barring you, the Clerk-Treasurer, from an executive session.

On February 23, 2016, you obtained an informal opinion from this office in which I opined Clerk-Treasurers should be allowed to attend executive sessions. *See Informal Opinion of the Public Access Counselor 16-INF-02*. On April 8, 2016, you made an informal inquiry as to whether a Deputy Clerk may attend an executive session when the Clerk-Treasurer is unavailable. I responded in the affirmative, finding Deputy Clerk-Treasurers may fill in for a clerk-treasurer whom is unable to fulfill his or her duties by attending executive sessions. *See Informal Opinion of the Public Access Counselor 16-INF-10*.

On May 19, 2016, you allege the Town Council attempted to bar you from its executive session, but was unsuccessful in doing so. The following day, your attorney sent correspondence to the Town Attorney encouraging the review of *Informal Opinion of the Public Access Counselor 16-INF-10* in the hopes the Town Council would cease its attempts to bar you from future executive sessions.

On May 25, 2016, while you were out of town and your appointed Deputy Clerk was barred from an executive session. In response, the Deputy Clerk filed a Supplemental Offense Report with the Long Beach Police Department to document the denial of entry.

The Town Council contends you are barred from making a complaint regarding the May 19, 2016 denial of entry because Indiana Code § 5-14-5-7 requires that a formal complaint must be filed no later than thirty (30) days after the denial. They also contend the complaint should be dismissed because you have not alleged any denials within the thirty (30) day period and only a person who is denied a right is allowed to file a formal complaint. See Indiana Code § 5-14-5-6. Furthermore, the Town Council's response states it has discretion to admit or deny persons entry to attend an executive session and there is no right or requirement a Deputy Clerk be admitted to executive sessions.

ANALYSIS

It is the intent of the Open Door Law ("ODL") 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 Indiana Code § 5-14-1.5-1*. Section 6.1 provides an exception, allowing public agencies to conduct executive sessions which are closed to the public in order to discuss strategies with respect to certain specified topics.

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.

Because justification for holding these kinds of meetings is so narrow and limited under section 6.1 of the Open Door Law, executive sessions are outliers. They should not be held regularly nor should they be a standing meeting on a governing body's schedule. A board should only hold a handful of them a year, if at all. This Office scrutinizes closed-door meetings heavily for good reason – they are the only time the public is excluded from the official action of governing body business.

The Council first asserts this formal complaint should be dismissed because there is an issue of timeliness and a formal complaint was not filed by the Deputy Clerk herself. This Office has been actively engaged in a series of ongoing conversations stemming from the Town of Long Beach Town Council, fielding a number of conference calls and issuing multiple informal opinions, and waives this requirement in the hopes of finally settling the matter of admittance to executive sessions.

I have previously addressed the issue in 16-INF-02, in which I concluded the Clerk-Treasurer should not be excluded from executive sessions. That particular Opinion is incorporated by reference. Anecdotally, this Opinion has been well received around the state by Clerk-Treasurers and Councils alike, as well as their respective state-wide associations.

The Clerk-Treasurer is an elected official with duties to the town which cannot be delegated to other members of the Council. Specifically, the Clerk-Treasurer **shall** "[s]erve as clerk of the legislative body by attending its meetings and recording its proceedings." *See Indiana Code § 36-5-6-6(a)(9)*. The Clerk cannot simply abrogate this statutory duty. Implicit in this statute is that the legislative body of a Town allow the Clerk access to executive sessions. Otherwise a Council would be forcing a Clerk to run afoul of the law. Moreover, under Indiana Code § 36-5-2-8(b), the Clerk-Treasurer "is an ex-officio member [of the legislative body] for the purpose of casting the deciding vote to break a tie." The legislature

clearly intended for a Town legislative body and a Clerk-Treasurer to be inextricably linked. Therefore, it is my opinion a Clerk-Treasurer is a necessary element of a Town Council's executive session. The Clerk is not necessarily a participatory member as an ex-officio member until a tie vote, however he or she may observe and take necessary minutes in an executive session.

My experience with the instant situation is that the conflict is somewhat political in nature. Should the Council wish to discuss political matters and exclude the participation of the Clerk-Treasurer, it may enter into a caucus pursuant to Indiana Code § 5-14-1.5-2(c)(4). Caucuses are excluded from the definition of meetings in general. The Council should be aware substantive public business may not be discussed in a caucus, but political policy and issues may be addressed.

One argument on the part of the Council is well-taken, however. The Council asserts its executive session was subject to the attorney-client privilege and therefore the exclusion of the Deputy Clerk and the Clerk-Treasurer would be proper under the extremely limited scope of Indiana Code § 5-14-1.5-6.1 ("For discussion of strategy with respect to...initiation of litigation or litigation that is either pending or has been threatened specifically in writing").

Here, the Council and the Clerk-Treasurer are each represented by their own counsel as the Clerk is statutorily allowed to hire its own respective attorney separate from to Town attorney (See Indiana Code § 36-5-6-8). It stands to reason a Council can enjoy the benefits of litigation strategy sessions with legal representation mutually exclusive from each other's presence.

Reading the Open Door Law and other Indiana Code provisions harmoniously, when there is threatened or pending litigation between the parties, it is the opinion of this Office a Town Council may enjoy the attorney-client privilege to discuss strategy in executive session without the Clerk present.

This, however, does NOT authorize general legal discussions with an attorney behind closed doors. See *Simon v. Auburn Board of Zoning Appeals*, 519 N.E.2d 205, Ind. App 1988. Only litigation strategy may be addressed with an attorney behind closed doors. All other legal advice should be received in an open meeting or with a non-majority gathering of a governing body. I cannot, however, conceivably think of another circumstance under 6.1 which would warrant exclusion of the Clerk-Treasurer.

As for issues regarding the validity of the Deputy Clerk's appointment by the Clerk-Treasurer and the definition of vacancy, that is an issue of local government which does not implicitly impact public access. It should be noted, however, the statute allowing the Clerk-Treasurer to appoint deputies does not implicitly require the deputy reside within the town, as the Council asserts. See *Indiana Code § 36-5-6-7*.

It is my hope this opinion clarifies the Clerk-Treasurer's ability to attend the Council's executive sessions and the very limited circumstances in which he or she may be excluded. The Council may not otherwise cloak its executive sessions in secrecy and preclude the Clerk-Treasurer from fulfilling his or her statutory duty. The statutory language is clear in the provision of powers and duties that the Clerk-Treasurer serves as clerk for the legislative body by attending meetings and recording proceedings, including executive sessions.

That being said, it is the responsibility of a Clerk-Treasurer to be a good steward of this privilege and understand the purpose behind executive sessions when they are held. Under Indiana Code § 5-14-3-6.5, what is confidential for one public agency or official is confidential for another. This includes records specifically prepared for discussion or developed during discussion in an executive session. See Indiana Code § 5-14-3-4(b)(12).

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

Cc: Ms. Julie Paulson, Esq.