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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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ALAN MUNCY,  
*Complainant,*

v.

JEFFERSONVILLE CITY COUNCIL,  
*Respondent.*

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Formal Complaint No.  
19-FC-98

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Jeffersonville City Council violated the Open Door Law.<sup>1</sup> Attorney Larry O. Wilder filed a response to the complaint on behalf of the council. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 1, 2019.

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<sup>1</sup> Ind. Code §§ 5-14-1.5-1 to -8

## **BACKGROUND**

Alan Muncy (“Complainant”) contends the Jeffersonville City Council convened two executive sessions in September that violated the Open Door Law.

On September 3, 2019, the Council denied the Muncy’s second application for the approval of the tax credit, prompting him to inquire the specific reasons for denial. Muncy contends two different council members informed him that they had been directed by their lawyer, Larry O. Wilder, not to communicate with him about the issue.

Specifically, Muncy contends council member Dustin White told him that Wilder gave these instructions during a private meeting by all of the council members. Muncy asserts that this gathering was in violation of the ODL because proper notice was not posted prior to the meeting.

Then on September 16, 2019, during a public council meeting, Muncy claims he witnessed eight of the nine Council members along with the legal counsel present for the meeting, Zachary Stewart, have a side conversation prior to the start of the meeting. Muncy notes that no one present in the audience could hear the conversation. He argues that this conversation constitutes an executive meeting, for which the public was not properly notified.

Muncy filed a formal complaint with this office on October 1, 2019.

On October 22, 2019, the Jeffersonville City Council filed a response with this office disputing Muncy’s assertions as untrue. The Council also submitted affidavits from three of its

members and attorney Zachary F. Stewart disputing Muncy's allegations.

First, regarding the alleged executive session on September 3, 2019, the Council asserts that it did not hold any kind of private meeting with all of the council members. The Council's attorney argues such a meeting would have been impossible because he was in Italy at the time.

The Council acknowledges that its attorney contacted each member individually by phone to answer questions they had about Muncy's request for reconsideration. While on the phone he also advised each member that they were not obligated to explain why they chose to cast their vote a certain way, and that because Mr. Muncy had filed a Notice of Tort Claim they should be "cognizant of what they said, if they decided to speak [with Mr. Muncy]."

Second, the Council's argues that Muncy's claim about that an illegal, secret meeting on the evening of September 16, 2019, with attorney Zachary Stewart is false.

Instead, the Council asserts that before the meeting—the agenda of which included Muncy's request for reconsideration— a councilor asked attorney Stewart procedural questions about amending the meeting agenda and whether the council could table Muncy's request for reconsideration. The Council maintains that after Stewart answered the question, the meeting was called to order.

In sum, the Council argues that it complied with the state public access laws and, Muncy filed a complaint because he "is disappointed that the city council refuses to succumb to his pressure and efforts to change their votes on an issue that is of financial importance to him."

## ANALYSIS

### 1. The Open Door Law

It is the intent of the Open Door Law (“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* Ind. Code § 5-14-1.5-1. Except as provided in section 6.1, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. Ind. Code § 5-14-1.5-3(a).

There is no dispute that the City of Jeffersonville is a public agency for purposes of the ODL; and thus, subject to the law’s requirements. *See* Ind. Code § 5-14-1.5-2. Additionally, the Jeffersonville City Council (“Council”) is a governing body of the city for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). So, unless an exception applies, all meetings of the Council must be open at all times to allow members of the public to observe and record.

### 2. Executive Sessions

Muncy contends the Jeffersonville City Council convened two unlawful executive sessions in September. The Council maintains the allegations are untrue.

Under the ODL, an executive session is a meeting where the governing body of a public agency may—in statutorily limited circumstances—exclude the public from a meeting, but it may admit those necessary to carry out its purpose. *See* Ind. Code § 5-14-1.5-2(f); *see also* Ind. Code §§ 5-14-1.5-6.1(b)(1), to ~~(14)~~(providing the specific instances where an executive session is permissible).

Generally, under the ODL, public notice of the date, time, and place of any meetings, executive sessions, or of any re-scheduled or reconvened meeting must be posted at the agency's principle office at least 48 hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* Ind. Code § 5-14-1.5-5.

### **2.1 Meeting on September 3, 2019**

Muncy contends that two Jeffersonville city councilors told him they had been advised not speak to him about the the underlying case.

Critical to Muncy's complaint is his claim that councilor Dustin White told him that the Council's attorney gave specific instructions during a private meeting attended by all of the council members not to discuss the case with Muncy.

Notably, Muncy does not say when this private gathering occurred, only that it did, notwithstanding Wilder's European sojourn.

In any event, the Council maintains that Muncy's claim about what council member White told him is false. The Council argues that White signed an affidavit confirming Muncy's claim to be untrue.

Although the Council attached affidavits from three council members disputing Muncy's claim, it did not include the affidavit from White.

In any case, it is impossible for this office to reach a conclusion on the allegations one way or the other due to the conflicting factual narratives.

To be sure, if a private gathering of the entire council occurred—as alleged by Muncy—without public notice to receive information from its lawyer, then the Council violated the Open Door Law.

On the other hand, if the Council’s lawyer contacted each council member individually and separately to advise them not to speak about a particular legal matter, it is not in violation of the law.

As an aside, based on the Council’s response, it is important for this office to acknowledge that a governing body is capable of convening a meeting or executive session without the physical presence of governing body’s attorney.

So, the Council’s assertion that it would have been impossible for it to conduct an improper executive session while the Council’s attorney was out of the country is not accurate. For instance, an attorney could easily call in to a meeting where a majority of the governing body is present in order to issue the suggestion.

Simply put, under the ODL—with limited exceptions—if a majority of a governing body gathers to take official action on public business, then the gathering constitutes a meeting under the law. No attorney needed.

## **2.2 Meeting on September 16, 2019**

Muncy also asserts that the Council conducted an unlawful executive session on September 16, 2019. The Council denies this as untrue. This controversy is less of a factual dispute than a legal one.

Attorney Zachary Stewart, filling in for Wilder at the September 16 meeting, submitted an affidavit in response acknowledging a brief informal conversation with the council before the meeting about two procedural issues. A majority of the council was present.

Governing bodies cannot meet privately – including out of earshot in a public meeting – to confer with attorneys on substantive public business. In *Hinojosa v. Board of Public Works & Safety for City of Hammond, Ind.*, the Indiana Court of Appeals affirmed the trial court’s ruling that a governing body violated the Open Door Law by conferring with legal counsel off-record during the course of a public meeting. More specifically, the court in *Hinojosa* concluded that the board violated the ODL by failing to comply with Indiana Code section 5-14-1.5-6.1, which is the executive session statute.

Normally a sidebar conversation with an attorney would violate the Open Door Law. In this case, however, the issues were strictly procedural involving the roles and responsibilities of board members and did not regard matters of substantive public business. This is not considered a meeting under Indiana Code section 5-14-1.5-2(c)(6). Had the advice pertained to any particular matter and not on procedure generally, the conversation would need to have taken place during the public meeting itself.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that there is insufficient evidence on facts not in dispute to make a conclusive statement on this matter.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor