



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
HEATHER NEAL

Indiana Government Center South  
402 West Washington Street, Room W460  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
www.IN.gov/pac

August 20, 2009

Michael Hutt  
2123 East 10<sup>th</sup>  
Jeffersonville, Indiana 47130

*Re: Formal Complaint 09-FC-168; Alleged Violation of the Open Door Law  
by the Jeffersonville City Council*

Dear Mr. Hutt:

This advisory opinion is in response to your formal complaint alleging the Jeffersonville City Council ("Council") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5). A copy of the Council's response to the complaint is enclosed for your reference. It is my opinion the Council violated the ODL by failing to provide adequate notice of the July 20, 2009 executive session. Further, the Council has violated the ODL if it has failed to keep or make available memoranda of executive sessions. Finally, it is my opinion the Council did not violate the ODL by conducting the July 20 executive session for the purpose of discussing strategy with respect to the initiation of litigation.

## BACKGROUND

You filed the present complaint on July 24, 2009. You allege the Council violated the Open Door Law in the following ways:

1. Failed to provide executive session notice which meets the requirements in I.C. § 5-14-1.5-6.1
2. Failed to keep memoranda of executive sessions held between December 15, 2008 and July 20, 2009
3. Conducted an executive session for a discussion not authorized by I.C. § 5-14-1.5-6.1

You followed the July 24 complaint with a letter my office received on August 10. You provided copies of a number of news articles you found pertinent to the issues raised in the complaint.

The Council responded to the complaint by letter dated August 10 from Council President Connie Sellers. Regarding your first complaint, the Council agrees that the executive session notice for the July 20 executive session was deficient. The Council

indicates that the Clerk-Treasurer's office prepared the notice and the Council did not review the notice before it was provided. The Council indicates a new template has been prepared for use in the future.

The Council does not directly address your second complaint, regarding memoranda, but does provide a copy of memoranda of the July 20 meeting.

Regarding your third complaint, the Council contends the July 20 executive session was conducted for a purpose authorized by the ODL. Specifically, the Council contends that the meeting was held for a strategy discussion with respect to possible future litigation regarding annexation. The Council provides a number of affidavits from individual members swearing the discussion at the meeting was related to issues regarding the potential for initiating litigation.

### 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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, 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. I.C. § 5-14-1.5-3(a).

An "executive session" is a meeting from which members of the public are excluded, but a governing body may invite anyone necessary to carry out the body's business. *See* I.C. § 5-14-1.5-2(f).

The notice for an executive session must include the date, time and place of the meeting. I.C. § 5-14-1.5-5(a). In addition, the notice "must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b)." I.C. § 5-14-1.5-6.1(d).

Here, you allege and the Council agrees that the notice for the July 20 executive session was deficient. The notice failed to provide the subject matter by specific reference to the enumerated instance for which the meeting was held. It is my opinion the Council violated the ODL by providing a deficient meeting notice. The Council has now put in place measures to prevent further violations by creating a template for executive session meeting notices which includes a checklist of instances for which executive sessions may be held. I would encourage the Council to review the executive session notice template again, as there appear to be a number of typographical errors in the list of executive session instances. Generally, though, the format of the new template is a good format to use.

Your second allegation is that the Council has not or will not provide you with copies of meeting memoranda from executive sessions conducted between December 2008 and July 2009. The Council did not respond to this complaint. The Council has a

duty, set out in I.C. § 5-14-1.5-4, to keep certain memoranda of each meeting and to make such available within a reasonable period of time after the meeting. It is my opinion the Council has violated the ODL if it cannot or will not make those memoranda available to you. The Council did provide a copy of meeting memoranda for the July 20 executive session. I would note that the document does not contain an indication of which members were present or absent, as required by I.C. § 5-14-1.5-4(b)(2). I would urge the Council to review I.C. § 5-14-1.5-4 to be sure all required memoranda are kept for each meeting.

Finally, you contend the Council was not authorized to conduct the July 20 executive session for a discussion of “annexation.” After reading your complaint and supporting documentation, it appears to me that you misunderstand the instance for which the Council met in executive session. The Council contends, and provides a number of affidavits supporting, that it met in executive session on July 20 to consider the initiation of litigation related to annexation.

The ODL provides twelve instances for which an executive session may be held. Among those is the following:

For discussion of strategy with respect to any of the following:

- (A) Collective bargaining.
- (B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing.
- (C) The implementation of security systems.
- (D) The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.

I.C. § 5-14-1.5-6.1(b)(2).

Here, the Council met in executive session to discuss the potential of initiating litigation. In my opinion this type of discussion in executive session is authorized by I.C. § 5-14-1.5-6.1(b)(2)(B), which allows a strategy discussion with respect to initiation of litigation. The provision does not require that the litigation already be initiated before the discussion. Certainly when an entity is considering litigation, it is important to look at the consequences, alternatives, costs, benefits, and other factors related to the possibility of initiating litigation. In my opinion, I.C. § 5-14-1.5-6.1(b)(2)(B) allows that discussion to take place in executive session, even if the governing body eventually decides not to pursue the matter through litigation. In my opinion, the Council did not violate the ODL by conducting this executive session.

## CONCLUSION

For the foregoing reasons, it is my opinion the Council violated the ODL by failing to provide adequate notice of the July 20 executive session. Further, the Council has violated the ODL if it has failed to keep or make available memoranda of executive sessions. Finally, it is my opinion the Council did not violate the ODL by conducting the July 20 executive session for the purpose of discussing strategy with respect to the initiation of litigation.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Connie Sellers, Jeffersonville City Council