

May 20, 2004

Mr. Eric H. Burns
Withered, Corrigan & Burns
8 North Third Street
P.O. Box 499
Lafayette, Indiana 47902-0499

*Re: Formal Complaint 04-FC-70; Alleged Violations of the Open Door Law by the
Town of Boswell*

Dear Mr. Burns:

This is in response to your formal complaint alleging that the Town Council for the Town of Boswell (Town) violated the Indiana Open Door Law (Ind. Code §5-14-1.5) (Open Door Law) by meeting privately and without notice during which meetings that governing body discussed the job performance of the former town marshal. A copy of the Town's response to your complaint is enclosed for your reference. The Town's response creates a factual dispute that cannot be resolved for purposes of this advisory opinion. Accordingly, I offer the following opinions to guide the Town's future conduct and to otherwise support any further relief you might seek against the Town in a civil action filed pursuant to Indiana Code 5-14-1.5-7.

BACKGROUND

Your complaint asserts that on April 13, 2004, the Town Council held a disciplinary hearing to discuss charges that were then pending against the former town marshal. You assert that during the hearing, each member of the Town Council "testified under oath that the entire Council had met privately together on various occasions before and after posted meetings and discussed the job performance of [the marshal]." More particularly, you assert that one member of the Town Council testified that during these gatherings that occurred outside posted sessions, each member of the Town Council, "individually, and together, by consensus, decided that [the marshal] was not doing a good job as Marshal." You conclude that these gatherings constituted meetings subject to the Open Door Law, and that the Town Council's failure to post notice of these gatherings violated that statute. In response, the Town denies that the Town Council gathered together outside a posted meeting for the purpose of taking official action on public business. The Town acknowledges that prior to one posted public meeting, one member of the Town Council remarked to the others that a complaint had been lodged against the town marshal, but asserts that the members did not discuss the complaint or the town marshal's

performance at that time, but rather discussed only the members' schedules for the purposes of scheduling an executive session to address the complaint.

ANALYSIS

The intent and purpose of the Open Door Law is 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." IC 5-14-1.5-1. Toward that end, except under very limited circumstances, all meetings of the governing body of a public agency must be open for the purpose of permitting members of the public to observe and record the meetings. IC 5-14-1.5-3(a). 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." IC 5-14-1.5-2(c). "Official action" includes receiving information, deliberating (discussing), making recommendations, establishing policy, making decisions, or taking a vote. IC 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. IC 5-14-1.5-5(a). This notice requirement also applies to executive sessions; that is, meetings that may be held privately and outside public view as authorized by statute. IC 5-14-1.5-5(a); 5-14-1.5-6.1(d). One statutory basis authorizing an executive session includes receiving information concerning an employee's alleged misconduct and discussing without a determination that employee's continuing status. IC 5-14-1.5-6.1(b)(6).

At issue here is whether a majority of the Town Council gathered together privately and outside a properly noticed meeting for the purpose of taking official action on public business; that is, to discuss the town marshal's job performance and alleged misconduct. The facts are in dispute, and no supporting evidence is presented to merit a conclusive finding in this advisory opinion. Accordingly, I decline to reach a conclusion with regard to whether public access laws were violated under the facts alleged, but rather offer the following opinions and guidance to support any further relief you may seek in any civil action you file against the Town.¹

You allege that each member of the Town Council acknowledged under oath at an April 13, 2004, hearing, that they "discussed the job performance of [the marshal]" and "decided that [the marshal] was not doing a good job as Marshal," and that these discussions occurred privately and outside a properly noticed meeting. If this allegation is supported by the transcripts of that hearing or by other evidence not now presented, it is my opinion that the substantive discussion of the town marshal's job performance constituted official action and occurred in a meeting of the Town Council in violation of the notice provisions of the Indiana Open Door Law. It would not matter, as the Town appears to allege, that the gathering where that discussion

¹ You may bring a civil action against the Town in a court of competent jurisdiction alleging a violation of the Open Door Law. IC 5-14-1.5-7. If you prevail in any such action after having first obtained an advisory opinion or informal inquiry response from this office, the court shall award you your attorney fees and the reasonable costs of litigation. IC 5-14-1.5-7(f). A response from the public access counselor for this purpose does not mean that the public access counselor must state affirmatively whether the public access laws have been violated. *Gary/Chicago Airport Board of Authority v. Maclin*, 772 N.E.2d 463, 471 (Ind. Ct. App. 2002).

occurred was not “for the purpose” of having the alleged discussion; it is enough that a majority of the governing body gathered together and took official action on public business. To suggest that the innocent intent of a governing body when it gathers together as a majority absolves it of any violation for whatever discussions and events occur after it gathers would defeat the purpose and intent of the statute. The substantive discussion and conclusions allegedly reached in that discussion as alleged in your complaint would clearly fall into the definition of “official action” under the Open Door Law. While that discussion could certainly be held in an executive session, the statute nonetheless requires that the executive session be properly noticed.

That said, the Town denies that it had the discussion as described in your complaint, and asserts instead that one member of the governing body merely notified the others that a complaint that was brought against the marshal, and that the only discussion that followed was limited to scheduling an executive session to address the substance of the complaint. If the discussion were so limited as alleged by the Town, I would not find a violation of the Open Door Law. In my opinion, any such discussion would be in the nature of an administrative function that, while itself required to be carried out in public, need not be separately noticed as a meeting under the Open Door Law.

I write further on an issue that was raised while this complaint was pending. After you filed the formal complaint in this matter, you contacted this office to question whether the Town could hold an executive session to discuss this formal public records complaint under the statutory provision authorizing executive sessions to discuss strategy with respect to pending or threatened litigation under Indiana Code 5-14-1.5-6.1(b)(2)(B). In my opinion, a public records complaint filed with this executive branch agency under Indiana Code 5-14-5-6 is not “litigation” for purposes of the executive session provisions. Any executive session noticed and held solely for the purposes of discussing this complaint would violate the provisions of the Open Door Law.

CONCLUSION

As set forth above, it is my opinion that your allegations, if proven true, would support a finding that the Town violated the Open Door Law. The papers submitted to this office create a factual dispute that cannot be resolved in the context of this advisory opinion. Accordingly, I offer the foregoing comments in support of any further relief you may seek in a civil action filed in a court of competent jurisdiction.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Hunter J. Reece