

May 20, 2004

Mr. Will J. Carter  
15 Starlight Drive  
Anderson, Indiana 46012

*Re: Formal Complaint 04-FC-72; Alleged Violation of the Open Door Law by the City of Anderson*

Dear Mr. Carter:

This is in response to your formal complaint alleging that the City Council for the City of Anderson (Council) violated the Indiana Open Door Law (Ind. Code §5-14-1.5) (Open Door Law) when a majority of that governing body gathered together on April 15, 2004, without notice, and took official action on public business. The Council filed a response to your complaint, and that response is enclosed for your review. In addition, Mr. Ollie Dixon, presiding officer of the Council, separately submitted documents in response to the complaint, and those too are enclosed with this opinion. While I find that the Council did not intend to meet as a governing body when it gathered together on the date at issue, it is my opinion that the gathering was a "meeting" as that term is defined by our legislature under the Open Door Law, and required notice pursuant to that statute.

#### BACKGROUND

On April 15, 2004, five members comprising a majority of the City Council gathered together at a business establishment operated by Mr. Dixon for a meeting organized by Mr. Dixon. The meeting was advertised as a "Town meeting hosted by Councilman Ollie H. Dixon," and was advertised through an item published on that same day in the Anderson Herald-Bulletin.<sup>1</sup> Notwithstanding publication of that item, it is undisputed that "notice" of the meeting as that term is used in the Open Door Law was not posted 48 hours in advance of the gathering at either the principal office of the Council or at the building where the event was to be held, and it does not appear that the meeting was attended and recorded by the recording secretary for the Council. During the meeting, the members of the Council heard from residents and participated in a discussion on a variety of matters affecting the local community and about which the Council had jurisdiction. Specifically, the members received information from and provided information to one another and residents about City department budgets, a proposed City ordinance, and the number of African-Americans working in City Government. Other topics

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<sup>1</sup> There is no indication of who placed that advertisement, or whether there was any cost incurred by the City of Anderson for publication of that advertisement.

raised by those in attendance included the condition of the streets, the condition of a walking path in a local park, utility rates, and the escalating price of gasoline. No vote of the Council was taken on any matter discussed. This complaint alleging that the gathering violated the notice provisions of the Open Door Law followed.

## 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). “Public business” means “any function upon which the public agency is empowered or authorized to take official action.” IC 5-14-1.5-2(e). “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. 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). The notice must be posted at the principal office of the public agency at issue, or if no principal office exists, at the location where the meeting is to be held. IC 5-14-1.5-5(b). Notice must also be provided to media, but there is no requirement that the media or the governing body “publish” the notice, and publication does not satisfy the posting requirements of the statute. *See* IC 5-14-1.5-5(b).

At issue here is whether a majority of the Council gathered together outside a properly noticed<sup>2</sup> meeting for the purpose of taking official action on public business. The gathering is characterized as a “Town Hall” type meeting for constituents to provide feedback to their elected representative on matters of community concern. The Council asserts that neither Mr. Dixon nor any other member of the majority present for that gathering intended that the gathering be a formal meeting of the City Council subject to the Open Door Law. There is no evidence to the contrary, and you do not allege otherwise. But, neither does their intent end the inquiry. What matters is whether they gathered together as a majority and while gathered took official action on public business. To say that a governing body’s intent in gathering, however innocent, absolves it of any violation for whatever discussions and events occur after it gathers would defeat the purpose of the statute and the clear intent of the General Assembly that “the official action of public agencies be conducted openly.” *See generally* IC 5-14-1.5-1.

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<sup>2</sup> The issue of “notice” is related to whether notice was given in the manner required under the Open Door Law (posting and delivery to the media 48 hours prior to the meeting). There is no suggestion that the meeting was intended to be closed or otherwise secret. Indeed, the meeting was advertised in the local newspaper and by all accounts great effort was made to obtain the attendance and participation of any member of the public and the media.

That said, it is not enough that a majority of the governing body was gathered together. The simple gathering of a majority is not a “meeting.” Indeed, the Open Door Law expressly recognizes exceptions to the meeting definition in several circumstances where the General Assembly anticipated that a majority could be gathered together. These include social or chance gatherings (*e.g.*, dinner, community events, and so on), on site project inspections, traveling to and attending meetings of organizations devoted to the betterment of government (*e.g.*, seminars hosted by the Indiana Association of Cities and Towns, and so on), and political caucuses. IC 5-14-1.5-2(c)(1), (c)(2), (c)(3), (c)(4). Neither in my opinion would the simple gathering of a majority of a governing body in any other context be a “meeting” as that term is defined by the Open Door Law without that body also taking “official action” *on that body’s* “public business.” IC 5-14-1.5-2(c). To find otherwise ignores the plain language of the statute and the practical realities of government, particularly in local and smaller communities where community leaders are fewer, tend to know one another and run in the same circles, and routinely attend functions and meetings of a variety of entities and other governing bodies. I think too that any such interpretation would infringe on the civil and other constitutional rights of our elected and public officials to assemble and participate in representative government as citizens.

The Council asks that the issue be reviewed in the context of what occurred at the gathering, and it is from that perspective that I find the unfortunate basis to conclude there was a violation of the Open Door Law. I say it is “unfortunate” because, as noted above, I do not believe based on the evidence presented that it was the intent of the Council or Mr. Dixon (who hosted the meeting) to violate the law or to hold anything that resembled a “meeting” of the Council. Still, it is undisputed that the “public business” of the Council was discussed with and among the members of the Council who were gathered together. While it may or may not be that the Anderson City Council can have an impact on the escalating price of gasoline, there can be no serious question (and none is raised) as to that body’s jurisdiction over the enactment of a proposed City ordinance, the construction of a new police station, the City budget and City departmental budgets, the condition of the City streets, and the diversity of the City’s workforce. These certainly comprise the “public business” of the Council as functions over which the Council is empowered or authorized to take some form of official action. *See* IC 5-14-1.5-2(e). Just as certainly, it is clear that the majority of the Council took “official action” on that public business. The Council emphatically notes that no votes were taken or requested on any item discussed. However, in broadly defining “official action,” the General Assembly anticipated and included conduct that falls far short of taking a vote. A governing body takes “official action” within the meaning of the Open Door Law if it gathers together as a majority and merely “receives information” on a matter that is the public business of that governing body. IC 5-14-1.5-2(d)(1). The Council acknowledges that information was exchanged, but notes that it was brief and informal. Among the items of information shared included budget information provided by an official of the Department of Public Works regarding that department’s budget. That information was provided in direct response to a question from a councilman. I cannot agree that information of this type presented in that context, however briefly presented, falls outside the definition of “official action.” Certainly, the same question and answer, had they occurred in a regular meeting of the City Council, would constitute official action of the Council. Moreover, it seems clear that one or more of the majority of council members present did more than simply receive information; they actively participated in a discussion of the issues. As

noted above, one council member posed a direct question to a City official regarding the official's departmental budget. Another reflected on his willingness at a prior council meeting to vote on a proposed ordinance. Another asked for an accounting of the number of African-Americans employed by the City.

What occurred at this gathering was much more than the mere attendance of a majority of the Council at the same place; it included an active discussion of precisely the same issues that were appropriate for a regular meeting of the Council in the council chamber. Accordingly, I must conclude that the April 15, 2004, gathering was a meeting of the Council – whether they meant for it to be or not – as “meeting” is defined under the Open Door Law. IC 5-14-1.5-2(c); *see Advisory Opinion 00-FC-44; Alleged Violation of the Indiana Open Door Law by the Hamilton County Board of Commissioners*, (January 9, 2001), (<http://www.state.in.us/pac/advisory/2000/2000fc44.html>). Because that gathering was a “meeting” under the law, it required compliance with the notice and other provisions of the statute concerning the conduct of a meeting. Because it is undisputed that notice was not posted as required by the statute, I must find the Council in violation of the notice provisions of the Open Door Law.<sup>3</sup>

To be clear, I do not find that the mere gathering of a majority of a governing body falls within the definition of a “meeting” and requires compliance with all of the provisions of the Open Door Law. Neither should this opinion be interpreted to suggest that the sort of meeting *intended* by Mr. Dixon would violate any law. Indeed, “Town Hall” meetings with constituents are widely used and highly regarded in a representative government. However, if a majority of the members of a governing body attend or plan to attend a “Town Hall” or any other kind of meeting where the public business of that body will be discussed, it should post notice of that gathering as its own meeting and comply with any other applicable provisions of the Open Door Law.<sup>4</sup>

I write further to provide additional guidance to the City in light of events subsequent to the filing of the instant complaint. After this complaint was filed, several constituents in the City of Anderson contacted this office to report that another “Town Hall” was scheduled at Mr. Dixon's business, and that the City this time posted notice of the “Town Hall” as a meeting of the Council. This was apparently done in the event that a majority of the Council would be in attendance at that subsequent meeting. No formal complaints were filed, and absent other facts challenging the content of that notice, I would not find the notice in violation of the Open Door

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<sup>3</sup> No complaint is made that you nor any member of the public was precluded from attending the meeting and observing and recording the proceedings. *See* IC 5-14-1.5-3(a) (Except as otherwise provided in the statute, meetings must be “open at all times for the purpose of permitting members of the public to observe and record them.”). Accordingly, it may well be the case that a court would characterize the violation as a “technical” violation, and find that the meeting was otherwise in substantial compliance with the law. *See e.g., Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind. Ct. App. 1998).

<sup>4</sup> In addition to the guidance previously offered on a similar issue in Advisory Opinion 00-FC-44 referenced above, a review of the informal inquiries made to this office since its creation by the General Assembly indicates that it has consistently recommended that a governing body post notice of a meeting for *any function* where it gathers or anticipates that it will gather as a majority and receive information or take any other form of official action on its public business.

Law. *See* Note 4. That said, I caution the City that the location of its meetings may violate other provisions of the Open Door law or other laws applicable to the Council. For example, under the Open Door Law, a public meeting may not be held at a location that is not accessible to an individual with a disability. IC 5-14-1.5-8(d). And, “accessible” for this purpose means that the design, construction or alteration of the facility must conform to the Uniform Federal Accessibility Standards or with the Americans with Disabilities Act. IC 5-14-1.5-8(b). I also note that some governing bodies are subject to other state statutes, local ordinances, or internal policies and procedures restricting the location of the meetings of the governing body. I offer no opinions on any such restrictions applicable to the Anderson City Council, but defer that issue to the Council’s attorneys.

### CONCLUSION

For the reasons set forth above, I find that the Council violated the notice provisions of the Open Door Law when it gathered together as a majority and took official action on the public business of the Council.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Mr. Timothy S. Lanane