

February 2, 2006

Henry Adams
329 Maid Marion Drive North
Scherverville, IN 46375

*Re: Consolidated Formal Complaints 06-FC-1; 06-FC-12; Alleged Violation of the
Access to Public Records Act and Open Door Law by the St. John Township
(Lake County) Board*

Dear Mr. Adams:

This is in response to your formal complaint alleging that the St. John Township Board (“Board”) violated the Open Door Law and Access to Public Records Act by holding an executive session without proper notice and denying you documents from the executive session.

BACKGROUND

You filed two complaints regarding the same matter. Your first complaint, assigned #06-FC-1, was filed on January 3, 2006. In that complaint, you alleged that the Board was planning a January 3, 2006 executive session for “personnel” matters, and you demanded that the Board cancel the executive session or make it open to the public. You enclosed the notice for the January 3 executive session, as well as for a December 20 executive session that also recited “personnel” as the agenda item. You also stated “I am also requesting that all documents from the December 20, 2005 executive session be declared public record.”

In your second complaint, filed January 13, 2006, assigned #06-FC-12, you alleged that the December 20, 2005 and January 3, 2006 executive session notices were invalid. You also alleged that you were denied copies of minutes and inspection of tapes for the executive sessions of December 20 and January 3.

I sent a copy of each complaint to the Board. I received responses by letter from the Board’s attorney, Eugene Feingold. I have enclosed a copy of the letters for your reference. Mr. Feingold states that it is his belief that the Board did not hold an executive session scheduled for

December 20, because the St. John Township Trustee refused to attend. Mr. Feingold provided me with documentation showing that through two e-mail communications on December 14, 2005, the Trustee informed the Board Chairman, Mary Tanis, that the notice for executive session of December 20 was improper, after confirming this with the Office of the Public Access Counselor. Mr. Feingold also concedes that the notice of the December 20 executive session was not compliant with the Open Door Law, because it did not cite the enumerated instance for which an executive session may be held.

Mr. Feingold also stated that the January 3 executive session was convened for the purpose of making inquiry on some matter of the Trustee, but the Trustee did not participate, again declaring the meeting to be illegal. Therefore, “there was no effective meeting conducted.” As a consequence, there was no reason to take any minutes, and nothing to be made available as a public record. Mr. Feingold offers explanation as to why the Board did not follow the dictates of the Open Door Law with respect to notices for executive sessions. Mr. Feingold cites the lack of separate counsel for the Board and the lack of willingness of the Trustee to inform the Board of the requirements of the Open Door Law for the Board’s improper notices.

ANALYSIS

Except as provided in section 6.1 of the Open Door Law, all meetings of 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. Ind. Code 5-14-1.5-3(a). Notice of the date, time, and place of a meeting or an executive session must be given at least 48 hours in advance of the meeting, not including Saturdays, Sundays, and legal holidays. IC 5-14-1.5-5(a). In addition to the date, time and place, notice of an executive session must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under IC 5-14-1.5-6.1(b). IC 5-14-1.5-6.1(d).

The notices of the executive sessions for December 20, 2005 and the January 3, 2006 recited the date, time, and place of the meetings, but stated that the agenda was “personnel.” There is no enumerated instance in section 6.1(b) of the Open Door Law for “personnel” matters. The enumerated instances are more specific; moreover, a proper notice must recite the text and citation of the instance for which the executive session is being held. As the Board admits, the executive session notices were not compliant with the plain dictates of the Open Door Law. If the Board met outside the public pursuant to these notices, the Board violated the Open Door Law. A “meeting” is a gathering of a majority of the governing body for the purpose of taking official action on public business. IC 5-14-1.5-2(c). Therefore, if the Board received information or made decisions, or took other official action during its January 3 executive session, it met in violation of the Open Door Law. *See* IC 5-14-1.5-2(d). This is true irrespective of whether the Trustee attended the meeting or whether the gathering accomplished the original purpose of the executive session.

Any person may inspect and copy the public records of any public agency during regular business hours of the agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). IC 5-14-3-3(a). The Open Door Law requires that memoranda of a meeting or an executive session be kept during the meetings, and the memoranda are to be available within a

reasonable period of time after the meeting. IC 5-14-1.5-4(b) and (c). If a public agency receives a request for a record, it is required to respond within 24 hours or seven days of receiving the request, depending on the way in which the request was received by the agency. IC 5-14-3-9(c). If the public agency does not maintain a record that is responsive to a request, the public agency should so indicate in its response. Nevertheless, a public agency is not required to produce a record that it does not maintain.

You complain that you have not received memoranda or tapes from the executive sessions of December 20 or January 3. Mr. Feingold indicated in his complaint response that because the executive sessions were not held, no public record would have been created regarding those sessions, including tapes or minutes. If the Board gathered on January 3, as I stated above, it should have kept memoranda, and those memoranda should be made available to you for inspection and copying. If the Board did not meet on either date, there was no duty to keep memoranda, and no requirement to create a record in response to your request. However, the Board should have told you that no responsive records existed.

A final word regarding the Board's familiarity with the Open Door Law. Because the Board is a governing body subject to the Open Door Law, it is the responsibility of the Board and each of its members to know the access laws. My website, including Handbook on Public Access Laws and published advisory opinions, are a resource to public agencies and the public. *See* www.in.gov/pac. My office also provides training at the request of public agencies. *See* IC 5-14-4.

CONCLUSION

The St. John Township Board violated the Open Door Law if it met in executive session pursuant to notices that failed to conform to the requirements of the Open Door Law. If the Board held a meeting on January 3, it should have maintained memoranda and made the memoranda available for inspection and copying.

Sincerely,

Karen Davis
Public Access Counselor

cc: Eugene Feingold