



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
ANDREW J. KOSSACK

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

January 26, 2011

Mr. William F. Sexton  
1239 Fox Hollow Dr.  
Porter, IN 46304

Ms. Rondi L. Wightman  
870 Quail Ridge Dr.  
Porter, IN 46304

*Re: Consolidated Formal Complaints 10-FC-327 and 11-FC-11;  
Alleged Violations of the Open Door Law by Town of Porter Town  
Council*

Dear Mr. Sexton and Ms. Wightman:

This advisory opinion is in response to your formal complaints alleging the Town of Porter Town Council (the "Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Due to the similarity of the allegations in your complaints, I have consolidated the complaints and respond to both herein. The Council's attorney, Patrick Lyp, responded on behalf of the Council. His response is enclosed for your reference.

## BACKGROUND

The complaints allege violations of the ODL with respect to a December 15, 2010, executive session (the "Session"). The Session was a joint meeting between the Council and the Town of Porter Park Board ("Park Board"). Mr. Sexton states that Mr. Lyp informed him that the purpose of the meeting was to discuss "personnel performance," and would be limited to that topic. Mr. Sexton claims that the Session "not only discussed performance of park employees, but also discussed a policy and procedure change to the Park Board structure." He argues that such a discussion was improper because the Council would have to change an ordinance to effect such a reorganization, and such a topic was suitable only for an open meeting of the Council. He claims that the Park Board informed him that only 20% of the Session discussed employee performance and that the remaining 80% of the Session centered on policy changes.

Park Board member Wightman attended the Session and also argues that it was improper under the ODL. She claims that the Session was called “to discuss the job performance of the Park Superintendent, Jim Miller and [sic] to transfer all the Park employees (Park Administrator, part-time and seasonal employees) to the jurisdiction of the Porter Town Council.” She further alleges that the Council “repeatedly stated during [the Session] that the transfer of all the Porter Parks employees was in fact ‘a done deal’ and that the Town Council’s expectation was that the Park Board would make a motion and publicly vote on these employee changes at our Park Board Meeting [sic] on Wednesday, December 15, 2010.” Further, she states that after the Park Board requested an extension to consider the vote and consult with its own legal counsel, the Council agreed to the extension of time but “threatened not to cover any outside legal council [sic] for the Park Board and also threatened to disband the Park Board if we should vote against the proposal by the Town Council.” Ms. Wightman also estimates that 20% of the discussion at the Session concerned job performance; the rest of the meeting was, according to her, about “changes in procedure and policy.”

Mr. Sexton and Ms. Wightman also argue that the Session was improper because Mr. Miller is an employee of the Park Board rather than the Council, and that the Park Board has “sole jurisdiction” over park employees.

In response to the complaints, Mr. Lyp argues that everything discussed during the Session was related to the review of Mr. Miller’s job performance and the proposed action plan relating to him. He states that the initial part of the meeting discussed specifically Mr. Miller’s job performance. After that, the Council outlined to the Park Board its proposed “action plan” to resolve and correct problems associated with that performance. The plan involved Mr. Miller reporting directly to the Council’s Park Board liaison and expanding Mr. Miller’s duties to require him to assist with Town work. The arrangement would require approval of the Park Board due to the fact that Mr. Miller was the Park Board’s employee. However, Mr. Lyp notes that Mr. Miller is nevertheless an employee of the Town: he is paid by the Town’s clerk-treasurer and reports to the Council at its bi-weekly meeting. Mr. Lyp acknowledges that the Council had decided at that point that the action plan with respect to Mr. Miller was appropriate given perceived performance deficiencies, but he states that the Session ended with the intention of voting on the proposed plan at the Council’s December 27th public meeting.

## ANALYSIS

The General Assembly enacted the ODL with the intent 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* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, 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).

Executive sessions are an exception to the general rule that a meeting of the governing body must be open to the public. An executive session is defined as a meeting “from which the public is excluded, except the governing body may admit those person necessary to carry out its purpose.” I.C. § 5-14-1.5-2(f). “Executive sessions are governed by Indiana Code 5-14-1.5-6.1, and may only be conducted under very limited circumstances.” *Opinion of the Public Access Counselor 03-FC-64*. The purposes for which executive sessions may be held are limited to the twelve situations listed at Indiana Code section 5-14-1.5-6.1(b). The governing body of a public agency bears the burden of showing that its gathering is an executive session within one of several strict statutory exceptions. *Opinion of the Public Access Counselor 00-FC-12*.

In this instance, the executive session was held under the exception permitting discussion of “a job performance evaluation of individual employees.” I.C. § 5-14-1.5-6.1(b)(9). Complainants assert that the Council went beyond the scope of this exception for employee evaluations and took impermissible action by discussing an “action plan” to deal with the employee’s performance issues.

The Indiana Court of Appeals analyzed a similar issue in *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001). In that case, the complainant, Baker, argued that the Town of Middlebury went beyond the scope of the exception for employee evaluations and took impermissible final action by compiling a list of employees to be rehired and excluding Baker from that list. The court, however, held:

[T]he Open Door Law does not prohibit Middlebury from receiving information, making recommendations, establishing policy, and making decisions in executive session. See I.C. § 5-14-1.5(2)(d) (emphasis supplied); I.C. § 5-14-1.5-6.1(c). In this instance, Middlebury made a decision not to include Baker on the list of rehires to be presented at the open meeting. This decision not to rehire Baker was subsequently implemented at the public session by vote approving the list of rehires, of which Baker was not included, and by approving a new interim marshal. “Final action,” by definition, is “[a] vote by the governing body on any motion, proposal, . . . or order.” I.C. § 5-14-1.5-2(g) (emphasis supplied). Because words in statutes are given their plain and ordinary meaning . . . the Council’s “final action” on the issue of which employees would be rehired consisted of its vote at the public meeting, not its compilation of the rehire list in executive session reflecting its decision on what final action should be taken.

*Id.* In that case, it is important to note that the discussion of the employees’ evaluations was necessary to the discussion of compiling a list of rehires. Compiling the list was the direct result of the discussion of the employees’ evaluations. It appears that the Court of Appeals reasoned that the compiling of the list was permissible in executive session due to its connectedness with the discussion of the evaluations.

Similarly here, the Council discussed Mr. Miller’s performance evaluation and proposed “action plan” in connection with his performance. The Council did not vote during executive session; rather, the Council planned a vote at a public meeting to be held later regarding the action plan. The discussion of the action plan was directly related to

Mr. Miller's performance, just as the Town of Middlebury's compiling a list of potential rehires was related to its discussion of the employees' past performance in *Baker*. Under such circumstances, it is my opinion that the Council did not violate the ODL.

I note that I would agree that a discussion of personnel policies or reorganizations that did not relate to Mr. Miller would have been inappropriate and exceeded the scope of the executive session allowance. Because I see no evidence here that such extraneous discussion occurred, however, it does not appear that the Council violated the ODL.

If a complainant continues to believe that a public agency has acted or is acting in violation the ODL following the issuance of an advisory opinion from this office, that complainant may file an action in any court of competent jurisdiction to obtain a declaratory judgment; enjoin continued, threatened, or future violations; or declare void any policy, decision, or final action. I.C. § 5-14-1.5-7(a). If this matter proceeds to litigation, the Council will bear the burden of proof to demonstrate that its discussion was indeed within the context of employee performance evaluations. Courts liberally construe the ODL in favor of the ODL's intent that the official action of public agencies be conducted and taken openly. I.C. § 5-14-1.5-1.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Council did not violate the ODL.

Best regards,



Andrew J. Kossack  
Public Access Counselor

cc: Patrick Lyp