



# STATE OF INDIANA

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May 22, 2103

Ms. Rhonda A. Greene  
10130 W. Suder Lane  
Campbellsburg, Indiana 47108

*Re: Formal Complaint 13-FC-134; Alleged Violation of the Open Door Law by  
the Washington County Council*

Dear Ms. Greene:

This advisory opinion is in response to your formal complaint alleging the Washington County Council ("Council") violated the ODL. Mark D. Clark, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you provide that the Council held an executive session on April 1, 2013. The executive session was held prior to the Council's regular public meeting. While waiting in the hallway for the Council's public meeting, you heard "Rhonda" coming from the room in which the Council was holding its executive session. You then heard "even if you hold the meeting at 11:00 at night, you can't keep Rhonda and her camera out of the meeting." At that point, you knocked on the door and informed those in attendance that you were present. You were informed by the Council's attorney that the executive session was almost complete. At the public meeting, the Council did not discuss you or your actions at any point. When you brought up the executive session, the Council's President stated that the Council had decided not to post meeting minutes on the internet in fear of liability. You specifically asked the Council why you were discussed in the executive session, to which Mr. Clark advised that you were used in reference to discussing the ODL. You provide that you are not an employee of the county, nor a party to any currently filed lawsuit. It is your belief that it was improper for the Council to discuss you or your actions at the April 1, 2013 executive session.

In response to your formal complaint, Mr. Clark advised that the Council conducted a properly noticed executive session on April 1, 2013 in order to discuss strategy with respect to initiation of litigation or litigation that was either pending or specifically threatened in writing, to conduct a job performance evaluation of an individual employee of Washington County, and to discuss records classified as

confidential by State or Federal law. The topics of discussion were allowable pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B), I.C. § 5-14-1.5-6.1(b)(9), and I.C. § 5-14-1.5-6.1(b)(7). The discussion conducted pursuant to (b)(2)(B) concerned litigation that had been filed by Ms. Lana Sullivan against several entities, including Washington County. The charge of discrimination has been filed against Washington County and to Mr. Clark's understanding, the Indiana EEOC has authorized Ms. Sullivan to file suit against Washington County.

Mr. Clark provided that for several months you have videotaped the Council's public meetings, which included meetings which were relevant Ms. Sullivan's litigation. In previous conversations, you have indicated to members of the Council and the Washington County Commissioners that you would make the recordings available for review, if requested. During the Council's discussion at the executive session, the topic arose regarding using your recordings as evidence in the relevant litigation. There was also discussion that such recordings could be edited by individuals and that no Washington County Authority maintained such recordings. During this discussion, Mr. Clark used you as an example of an individual who has the right to video and audio record the Council's meetings. The statement "even if a meeting was conducted at 11 p.m., the Council could not prohibit you from recording the meeting" was made by Mr. Clark. Mr. Clark made the statement to demonstrate that the Council could not regulate or interfere with the recording of any public portion of a government meeting and that such recordings could be offered as evidence in the litigation that had been filed. The statement was made in conjunction with the Council's discussion of the Sullivan lawsuit. Mr. Clark further noted that he addressed this issue in response to your inquiries at the April 1, 2013 public meeting.

#### 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. *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. *See* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). A governing holding an executive session may admit those persons necessary to carry out its purpose. *See* I.C. § 5-14-1.5-2(f). The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). "Final action" is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g).

Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, “To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.* There has been no allegation that the notice provided by the Council for the April 1, 2013 executive session was improper.

As to the discussions held by the those in attendance at the April 1, 2013 executive session, the executive session was held, in part, pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B), which provides:

- “(b) Executive sessions may be hold only in the following instances:
  - (2) For discussion of strategy with respect to any of the following:
    - (B) Initiation of litigation or litigation that is either pending or has been threatened in writing.

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

The discussion conducted pursuant to (b)(2)(B) concerned litigation that had been filed by Ms. Sullivan against the county. During the Council’s discussions, the topic arose regarding using your recordings as evidence in the Sullivan litigation. There was also discussion that such recordings could be edited and that no Washington County Authority maintained recordings of the Council’s public meetings. During this discussion, Mr. Clark used you as an example of an individual who has the right to video and audio record the Council’s meetings. Mr. Clark stated that even if the Council conducted a meeting at 11 p.m., the Council could not prohibit you from recording the meeting. Mr. Clark made the statement to demonstrate that the Council could not regulate or interfere with the recording of any public portion of a government meeting, despite the concerns of alteration, the recordings could be used as evidence in litigation, and the statement was made in conjunction with the Council’s discussion of the use of your recordings in the Sullivan lawsuit. In the context provided, it is my opinion that the Council’s discussions held pursuant to (b)(2)(B) were proper, as the recordings were discussed in relation to litigation that had been filed by Ms. Sullivan and more specifically, how the recordings could be used as evidence. Thus, it is my opinion that the Council did not violate the section 6.1 of the ODL as it relates to its April 1, 2013 executive session.

## CONCLUSION

Based on the foregoing, it is my opinion that the Council did not violate the ODL as to the discussions held pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) at its April 1, 2013 executive session.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: Mark D. Clark