

February 3, 2000

Mr. Robert R. Baker  
c/o Mr. Richard W. Rogers  
Post Office Box 1142  
Middlebury, Indiana 46540

Re: Advisory Opinion 00-FC-4; ; *Executive Sessions and the Middlebury Town Council.*

Dear Mr. Baker:

This is in response to your formal complaint<sup>1</sup>, which was received on January 28, 2000. You have alleged that the Middlebury Town Council ("Council") has violated the Indiana Open Door Law, Indiana Code chapter 5-14-1.5. Specifically, you claim that the Council took final action in executive session and failed to provide proper notice of that executive session in violation of Indiana Code section 5-14-1.5-6.1. Mr. Craig M. Buche, attorney for the Council, responded to your complaint in a letter dated February 1, 2000. A copy of his response is enclosed for your reference.

It is my opinion that the Council did violate the Open Door Law when it took official action in their January 4, 2000 executive session that extended beyond the discussion of your job performance evaluation. Also, it is my opinion that the notice provided by the Council was appropriate under the Open Door Law only to the extent that it concerned the discussion of your job performance evaluation. This notice was not sufficient to cover the official actions taken in executive session that should have taken place in a meeting open to the public.

## BACKGROUND

According to your complaint, on January 4, 2000, the Council met in executive session ("executive session") and during that executive session took "final action" by deciding to terminate or not rehire you as Town Marshall. It is your contention that the Council reached a decision concerning your tenure during, and possibly prior, to the executive session. As evidence, you state that the Council prepared a checklist of equipment to be returned to the Town and presented this document to you at the executive session. Further, the minutes of the public meeting, which followed the executive session, reveal that the Council had prepared a list of town employees without your name on it, despite the fact that no discussion, deliberation or decision-making concerning the list of employees occurred during the public meeting.

In addition, you have alleged that the Council violated the Open Door Law with respect to the notice of the executive session. The executive session certification cites the enumerated instance under

Indiana Code section 5-14-1.5-6.1(b)(8), to discuss the job performance evaluation of an employee, as the basis for the meeting. You contend that the real purpose of the executive session fell under the exception outlined at Indiana Code section 5-14-1.5-6.1(b)(5), which is to receive information about alleged misconduct and to discuss, before a determination, your status as an employee. As further evidence of this point, you contend that your most recent performance evaluation, from the summer of last year, contained all "excellent" or "good-plus" ratings.

In response to your complaint, the Council stated that the only type of "official action" that may not take place at an executive session is "final action," which is defined as a "vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order." Ind. Code §5-14-1.5-2(g). The Council contends that they are not prohibited from taking other forms of official action, namely receiving information, deliberating, making recommendations, establishing policy and making decisions at any executive session provided for in the Open Door Law. Ind. Code §§5-14-1.5-2(d) and 5-14-1.5-6.1(b). According to the Council, the vote of a governing body must take place at a public meeting, but the governing body can and must be able to, in executive session, consider information, deliberate, build a consensus and make decisions as to what final action should be taken. The Council contends that it was not a violation of the Open Door Law for them to make the decision not to rehire you and that their only obligation was to take a vote in the public meeting that followed the executive session. As to the creation of the equipment list, the Council responded that it is within the prerogative of the Council president as executive of the Town to direct the return of equipment of any employee at any time. The Council could have even taken the same action as a group in an administrative function meeting under Indiana Code section 5-14-1.5-5(f)(2)<sup>2</sup>.

With respect to your complaint about the notice provided for the executive session, the Council claims that the sole purpose of the executive session was to evaluate your performance. The Council admits that the executive session was also an effort to notify you that you would not be on the list of town employees because of problems in the town police department and to avoid surprising you or causing you embarrassment or humiliation at the public meeting that followed. In order to use the exception that you cite as authority, the Council would have had to discuss alleged misconduct and discuss, before a determination, your status as an employee. In response to your contention that the Council should have listed this exception in the notice, the Council claims that it would not have been appropriate to cite this exception because they were not there to discuss any alleged misconduct and discuss your status as an employee, but rather to evaluate your job performance. Finally, the Council believes that your interpretation of the Open Door Law would be unduly restrictive on governing bodies, who should be permitted to take all official action, except for final action, in executive sessions in order to accomplish their purposes.

## ANALYSIS

The intent and purpose of the Indiana 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." Ind. Code § 5-14-1.5- 1. The provisions of the Law are to be "liberally construed with the view of carrying out its policy." Id. The Council is a clearly both a public agency and

a governing body under the Open Door Law. Ind. Code §5-14-1.5-2. Your specific concerns about the conduct of the January 4, 2000 executive session by the Council are addressed below.

### *Conduct of Executive Sessions*

There are several terms that are defined in the Open Door Law, which are important to its application. An executive session is "a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." Ind. Code §5-14-1.5-2(f). A "meeting" means a gathering of a majority of the members of a particular governing body for the "purpose of taking official action upon public business." Ind. Code §5-14-1.5-2(c). Executive sessions are meetings, therefore, but are exceptions to the general rule that meetings of a governing body must be open for members of the public to observe and record them. Ind. Code §5-14-1.5-3(a). Official action includes receiving information, deliberating, making recommendations, establishing policy, making decisions and taking final action. Ind. Code §5-14-1.5-2(d). Final action, which essentially means the taking of a vote by a governing body, must occur in a public meeting. Ind. Code §§5-14-1.5-2(g) and 5-14-1.5-6.1(c).

The purposes for which executive sessions may be held are limited to the eleven situations listed at Indiana Code section 5-14-1.5-6.1(b). Some of these exceptions permit a governing body to hold an executive session:

- (1) Where authorized by federal or state statute.
- (2) For *discussion* of strategy with respect to any of the following:
  - (A) Collective bargaining.
  - (B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing.
  - (C) The implementation of security systems.
  - (D) The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

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- (4) To *receive information* about and interview prospective employees.
- (5) With respect to any individual over whom the governing body has jurisdiction:
  - (A) to *receive information* concerning the individual's alleged misconduct; and
  - (B) to *discuss, before a determination*, the individual's status as an employee, a student, or an independent contractor who is a physician.

\* \* \*

- (8) To *discuss* a job performance evaluation of individual employees. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.

Indiana Code §5-14-1.5-6.1(b) (Emphasis added.) These exceptions seem to specify the permitted action as well as the subject matters for executive sessions.

The issue raised in your complaint is what types of "official action" may be taken at an executive session under Indiana Code section 5-14-1.5-6.1(b). As noted above, many of the exceptions, including the one cited by the Council for its executive session, clearly permit "discussion" or to "receive information" or to "discuss, before a determination" particular matters. The Council's position is that within any of the exceptions listed under Indiana Code section 5-14-1.5-6.1(b), they are permitted the flexibility to take any official action, so long as they do not take final action.

The Indiana Court of Appeals has provided guidance that is instructive in determining whether the executive session exceptions may be construed to provide authority to take all official action, except for final action.

In 1977, the legislature passed the Indiana Open Door Law which expanded the public meeting provision of the Hughes Anti-Secrecy Act, I.C. 5-14-1-4 (this provision repealed 1977) (Burns Code Ed., 1974). The intent behind the Indiana Open Door Law is clearly stated: "In enacting this chapter [5-14-1.5-1--5-14-1.5-7], the general assembly finds and declares that this state and its political subdivisions exist only to aid in the conduct of the business of the citizens of this state. It is the intent of this chapter that the deliberations and actions of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the citizens may be fully informed. The purposes of this chapter are hereby declared to be remedial, and its provisions are to be liberally construed with the view of carrying out its policy." I.C. 5-14-1.5-1. Thus, we are instructed to construe the statutory provisions of the Open Door Law consistently with its declared policy that the business of public agencies should be openly exposed to public scrutiny. In construing this statutory provision, it is our duty to give effect to the intention of the legislature. Where, as here, the words are clear and unambiguous, the words will be given their plain, ordinary and unbridled meaning. It can be presumed the legislature intended its language to be applied in a logical manner consistent with the underlying policies and goals of the statute in question. Further, it is important to recognize what the statute does not say as well as what it does say. When certain items or words are specified or enumerated in the statute, then, by implication, other items or words not so specified are excluded. Finally, exceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective "Open Door" or "Sunshine" laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions.

*Common Council of the City of Peru v. Peru Daily Tribune, Inc.*, 440 N.E.2d 726, 729 (Ind. App. 1982) (Citations omitted.) Using the analysis from the *Common Council* case, the position that a governing body may perform all official action at executive sessions is not valid. In fact, the General Assembly has specifically permitted certain actions to be taken at executive sessions-they would not have used the words "to discuss" or "to receive information" if they had intended all official action to be permissible in an executive session.

It is my opinion, therefore, that to the extent that the Council took official action in their January 4, 2000 executive session to discuss your job performance evaluation, their actions were permissible

under the Open Door Law. Any additional official action taken by the Council during that executive session, including but not limited to making a decision as to your tenure, should have taken place in a meeting open to the public and, therefore, did violate the Open Door Law.

### *Notice of Executive Sessions*

Indiana Code § 5-14-1.5-5(a) provides that:

Public notice of the date, time, and place of any meetings, *executive sessions*, or of any rescheduled or reconvened meeting, shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting.

(Emphasis added). Public notice of the date, time and place of executive sessions, therefore, must be provided at least forty-eight (48) hours in advance of an executive session. In addition, such notices must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under Indiana Code section 5-14-1.5-6.1(b). Ind. Code §5-14-1.5-6.1(d).

You claim that the Council did not properly notify the public under the Open Door Law of the executive session. You believe the real purpose of the executive session was to receive information about your alleged misconduct and discuss, before a determination, your status as an employee, which is permitted under Indiana Code section 5-14-1.5-6.1(b)(5). The Council has responded that they did properly notify the public because their purpose was to discuss your job performance evaluation and that the notification that referenced Indiana Code section 5-14-1.5-6.1(b)(8) was appropriate.

As noted in the previous section, the exceptions that permit governing bodies to conduct executive sessions under the Open Door Law are to be construed narrowly in favor of the general policy that the actions of governing bodies of public agencies are to be held openly. *Common Council of Peru v. Peru Daily Tribune, Inc.*, Id. The Council did provide notice of the executive session as a discussion of your job performance evaluation, despite the problems identified in the previous section of this opinion. There is no evidence to indicate that their intention was to discuss any alleged misconduct, rather they wanted an opportunity to discuss your job performance outside of a public meeting. The fact that the Council took official action beyond that permitted under Indiana Code section 5-14-1.5-6.1(b)(8) is problematic-there is no exception that would have permitted the Council to discuss your termination or make a decision or determination in executive session. While the Council may consider this interpretation to be unduly restrictive, the General Assembly clearly stated that the provisions of the Open Door Law are to be construed liberally in order to effectuate the intent of the Law,

that official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the public may be fully informed.

Indiana Code §5-14-3-1.

It is my opinion, therefore, that the notice provided by the Council, to the extent that it was

intended to alert the public to an executive session to discuss your job performance evaluation, did not violate the Open Door Law. It is also my opinion, however, that the official action of the Council during the executive session which extended beyond discussion of your job performance, should have been taken in a public meeting. The notice of the executive session, therefore, was not sufficient to notify the public of the actions that should have taken place in a meeting open to the public.

## CONCLUSION

It is my opinion that the Town Council of Middlebury did violate the Open Door Law when it took official action in their January 4, 2000 executive session that extended beyond the discussion of your job performance evaluation. Also, it is my opinion that the notice provided by the Council was appropriate under the Open Door Law only to the extent that it concerned the discussion of your job performance evaluation. The notice was not sufficient to cover the official actions in that executive session that should have taken place in a meeting open to the public.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: : Mr. Craig M. Buche, Attorney  
Middlebury Town Council  
w/o enclosure

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1 This complaint was filed on your behalf by your attorney, Mr. Richard W. Rogers.

2 Indiana Code section 5-14-1.5-5(f)(2) provides that town executives may meet, without posting notice, to discuss the internal workings of the unit. While it is arguable that the action taken may have been permissible at an administrative function meeting, the action took place at an executive session, which is not open to the public. This opinion, therefore, focuses on the use of an executive session to take such action.