



STATE OF INDIANA

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July 17, 2008

Carole "Kelly" Havens
12032 Timberline Trail North
Granger, Indiana 46530

*Re: Formal Complaint 08-FC-167; Alleged Violation of the Open Door Law
by the South Bend Common Council*

Dear Ms. Havens:

This advisory opinion is in response to your formal complaint alleging South Bend Common Council ("Council") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) by conducting a meeting without proper notice. I have enclosed a copy of the Council's response to the complaint for your reference. It is my opinion the Council did not violate the ODL.

BACKGROUND

You allege that on June 23, 2008 the Council conducted a required public hearing to address a resolution to add approximately three hundred acres to the Airport Economic Development Area. You allege that the public first knew of the hearing upon learning from a reporter early on June 23 that the meeting was scheduled for later that evening. You allege that when you requested a copy of the hearing notice, the Council (through the City attorney's office) did not produce a copy of the notice required by I.C. § 5-3-1-2(b). You do not, however, make a complaint based on the Access to Public Records Act.

You make allegations regarding the substance of the hearing, whether the matter should have been addressed by an ordinance rather than a resolution, and whether the matter was hurried so it would be completed by July 1. The crux of your complaint seems to be that the Council conducted the meeting pursuant to the wrong statute for the subject matter considered. As these are issues outside the public access laws, they are outside the purview of this office. As such, they will not be addressed in this opinion. This opinion will address the issue Open Door Law issue you present, whether the Council provided appropriate notice of the June 23 meeting.

You requested priority status for the complaint. Priority status is granted pursuant to 62 IAC 1-1-3(1) when the complainant intends to file an action in court to declare void any policy, decision or final action of a governing body or to seek an injunction that would

invalidate any policy, decision, or final action based upon a violation of the Open Door Law. Because you alleged a reason for priority status provided in 62 IAC 1-1-3, I am required to issue an advisory opinion within seven days of receipt of the complaint. Two additional complaints were submitted regarding this issue, by Thomas Zmyslo and George Lane. Because the subject matter was identical, the complaints were consolidated and are addressed by this opinion.

The Council responded to the complaint by letter dated July 15 from Assistant City Attorney Thomas Bodnar. The Council contends that you were in attendance at the June 23 meeting and that you have raised no issue about physical access to the hearing. Further, you did not raise an issue regarding appropriateness of the agenda versus the discussion or action taken on a particular item. The Council also contends you raise no issue that the public notice was deficient. The Council submits that the issue you raise is whether the actions of the Economic Development Commission complied with the economic development statutes, a subject matter outside the purview of this office.

The Council contends that by attending the June 23 meeting you waived any right to complain of any irregularity of notice. The Council cites several supporting opinions from previous public access counselors. The Council further contends that Thomas Zmyslo was in attendance at the June 23 meeting.

The Council contends the question to be addressed by this office is whether proper notice was given of the meeting. The Council provides copies of notice provided to the news media as well as posted at the office of the Council and on the City website prior to noon on June 19. The Council included an affidavit from John Voorde, South Bend City Clerk, affirming all notices were posted and sent to the media.

ANALYSIS

It is the intent of the Open Door Law 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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, 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). The Council constitutes a governing body for the purposes of the ODL. I.C. § 5-14-1.5-2.

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 hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. I.C. § 5-14-1.5-5(a). Nothing in the ODL requires the notice to include an indication of the subject matter to be discussed at the meeting (except when the meeting is an executive session).

A governing body is not required to utilize an agenda, but a governing body which does utilize an agenda must post a copy of the agenda at the entrance to the meeting location prior to the meeting. I.C. § 5-14-1.5-4(a). Nothing in the ODL indicates how much time before the meeting the agenda must be posted. As such, it is my opinion the agenda must be posted at any time before the meeting begins.

Here, you contend that the Council did not provide proper notice for its June 23 meeting. You allege that when the Council met to address a resolution regarding this issue, it should have met instead for a hearing to pass an ordinance on the issue. You contend the Council may have violated I.C. 36-7-14 or I.C. 36-7-26 when it addressed this issue as a resolution rather than an ordinance. Whether the Council addressed the issue in an appropriate manner is a matter outside the public access laws and as such outside the purview of this office. The public access counselor does not have the power to issue opinions concerning matters outside the public access laws. *See* I.C. 5-14-5.

The issue you raise which can be addressed by this office is whether appropriate notice was provided for the meeting held on June 23. Since the meeting was held to address this matter as a resolution, among other items, publication of a hearing notice pursuant to I.C. 5-3-1 was not required. Instead, the Council was required to follow the notice requirements of the ODL, which required the Council to provide forty-eight hours (excluding weekends and holidays) notice of the date, time and location of the meeting. I.C. § 5-14-1.5-5. The Council was required to deliver the notice to any news media who by January 1, 2008 had requested meeting notices as well as to post notice at the office of the Council. I.C. § 5-14-1.5-5. Based on the evidence provided by the Council, it is my opinion the Council satisfied the notice requirements of the ODL for the June 23 meeting.

As the City contends and as your complaint indicates, you were in attendance at the June 23 meeting. Several opinions by past public access counselors support the notion that a person who was not denied access to a meeting lacks standing to file a complaint with the public access counselor's office on the basis that the notice was insufficient. Most recently, I have addressed this issue in *Opinion of the Public Access Counselor 07-FC-226*. It is my opinion you were not denied access to the meeting since you were in attendance at the June 23 meeting. Furthermore, the Council has provided evidence that it posted appropriate notice of the meeting.

CONCLUSION

For the foregoing reasons, it is my opinion the Council has not violated the ODL.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Thomas Bodnar, Assistant City Attorney
Timothy Rouse, South Bend Common Council
George Lane
Thomas Zmyslo