



# STATE OF INDIANA

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August 12, 2008

Ed Burgin  
125 North Walnut Street  
Atlanta, Indiana 46031

*Re: Formal Complaint 08-FC-183; Alleged Violation of the Open Door Law  
by the Atlanta Town Council*

Dear Mr. Burgin:

This advisory opinion is in response to your formal complaint alleging Atlanta Town Council (“Council”) violated the Open Door Law (“ODL”) (Ind. Code 5-14-1.5) by providing insufficient notice for an executive session. A copy of the Council’s response to the complaint is enclosed for your reference. It is my opinion that the Council substantially complied with the ODL.

## BACKGROUND

You filed a complaint on July 28, 2008, alleging the Council violated the ODL by posting an improper notice for a June 27 executive session. You include copies of two notices provided by the Council. First is what I understand to be the notice posted at the office of the Council. It contains the date, time and location of the meeting, among other items. In addition, it contains a list of all the allowed instances for an executive session but does not contain an indication for which of those instances the June 27 meeting would be held. The other notice you provide is in the form of an electronic mail message sent by the Clerk-Treasurer to a member of the news media. This notice contains the date, time and location of the meeting as well as an indication the meeting would be held for “employee evaluation.”

You also make an allegation related the memoranda and minutes of the meeting. If I understand correctly, you contend that the memoranda should reflect that the notice was in error and as such nothing should have been discussed in executive session.

The Council responded to the complaint by letter dated August 12 from Clerk-Treasurer Robyn Emmert. The Council contends notice posted in the window of the Town Hall included the reference to “employee evaluation.” The Council further contends that generally the newspaper will print an executive session notice with the correct statutory reference but that this time the newspaper received the notice but failed

to print the information. The Council includes a copy of the minutes of the executive session which reflect the date, time and subject matter with specific reference to the Indiana Code citation allowing the executive session. The Council further contends no official action was taken at the executive session. Finally, the Council indicates that future notices will contain the specific Indiana Code citation allowing the executive session.

## 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).

Executive sessions, which 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). Notice of an executive session 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).

Here, you provide two different notices. While I understand your complaint to allege the notice containing a list of all executive session instances was the public notice provided, the Council contends the public notice placed in the window of the Town Hall included the “employee evaluation” indication that was also sent to the newspaper.

First, I commend the Council for preparing a template notice containing a list of all executive session instances. I believe this is the best type of notice for an executive session, as it forces an agency to read the instances and be sure the subject matter discussed is expressly authorized by statute. In fact, I have placed a similar notice on the public access counselor website as an example of a good executive session meeting notice. The problem with the copy of the notice you have sent, though, is that there is no indication which of those instances applied to the June 27 executive session. I generally recommend an agency circle the appropriate instance or in some way designate the instance(s) used for the executive session. It is not sufficient to simply list the all instances. If this were the notice provided for the June 27 meeting, the notice was insufficient because it did not set out the specific instance for which the meeting was held.

Here, though, the Council contends the notice placed in the window was similar to the notice provided to the news media in that it contained an indication the meeting would be held for “employee evaluation.” While the ODL requires 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)), the law does not indicate that the enumerated instance must be listed by Indiana Code citation. In my opinion, an

indication of the Indiana Code citation in addition to the narrative description (e.g. “To discuss a job performance evaluation of an employee”) is the best way to list the specific instance(s). It is my opinion, though, that a narrative indication that leaves no questions which instance applies is also acceptable.

The Indiana Court of Appeals has addressed substantial compliance with the ODL in *Turner v. Town of Speedway*, 528 N.E.2d 858 (Ind. Ct. App. 1988). The court said the following:

. . . substantial compliance with the Open Door Law may in some circumstances be sufficient. Other jurisdictions have reached the same result. [Citation omitted] In a 1987 amendment to IC 5-14-1.5-7, our legislature confirmed Judge Neal's use of "substantial compliance" as the proper standard to review violations under the Open Door Law. Several factors are considered, including the extent to which the violation denied or impaired access to a meeting, and prevented or impaired public knowledge or understanding of the business conducted in the meeting. IC 5-14-1.5-7(d) (Supp. 1987).  
*Id.* at 862.

Here, the meeting notice indicated the meeting was held for “employee evaluation.” While the notice did not contain the Indiana Code citation or the entire narrative provided in section 6.1(b), it is my opinion this omission did not prevent or impair public knowledge or understanding of the business conducted in the meeting since the term “employee evaluation” rather clearly suggests I.C. § 5-14-1.5-6.1(b)(9) is the enumerated instance authorizing the executive session. As such, it is my opinion the Council substantially complied with the ODL. Further, because it is my opinion the Council substantially complied with the ODL, it is my opinion no amendment to the minutes and memoranda is necessary.

Finally, while no issue is presented here related to official action taken during the executive session, I am compelled to address the definition of official action. The Council contends that “no official action was taken during this meeting.” It is a common mistake for public agencies to believe that if the governing body did not vote, no official action was taken. To the contrary, the ODL provides that “official action” means to receive information, deliberate, make recommendations, establish policy, make decisions or take final action (i.e. vote). See I.C. § 5-14-1.5-2(d). Here, the Council held a discussion, which certainly involved deliberating and likely involved receiving information, both of which constitute official action. This is not a violation of the ODL, but it is important to note that the Council did, as it is authorized to do, take official action at the June 27 meeting.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Council substantially complied with the ODL but in the future should use the executive session template and clearly indicate which instance(s) apply to the meeting.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Robyn Emmert, Town of Atlanta Clerk-Treasurer