



STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

September 27, 2019

Jeffery M. Heinzmann
Attorney at Law
12175 Visionary Way
Fishers, IN 46038

VIA EMAIL ONLY: jeff@heinzmannlaw.com

Re: Informal Opinion; 19-INF-13; Clerk excluded from Exec. Sessions

Dear Mr. Heinzmann:

This informal opinion is in response to your inquiry about the propriety of a second-class city excluding the elected Clerk from city council's executive sessions. In accordance with Indiana Code section 5-14-4-10(5), I issue the following informal opinion to your inquiry.

BACKGROUND

You seek a determination on behalf of your client, Jennifer Kehl, the elected Clerk of the City of Fishers about whether the city council may exclude her from the council's executive sessions.

Your client informed you that the city council has excluded her from the council's executive sessions since November 2017.

DISCUSSION

1. The Open Door Law (ODL)

It is the intent of the Open Door Law ("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 Ind. Code § 5-14-1.5- 1. Except as provided in section 6.1, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. Ind. Code § 5-14- 1.5-3(a).

2. The City Clerk

Indiana Code section 36-4-10-4(1) to (9) lists the statutory duties of a city clerk. Notably, the first duty in that list requires the clerk to "[s]erve as clerk of the city legislative body under IC 36-4-6-9 and maintain custody of its records." Ind. Code § 36-4-10-4(1).

Indiana Code section 36-4-6-9 provides the following:

The city clerk is the clerk of the legislative body. The city clerk shall do the following:

- (1) Preserve the legislative body's records in the clerk's office.
- (2) Keep an accurate record of the legislative body's proceedings.
- (3) Record the ayes and nays on each vote on an ordinance or resolution.
- (4) Record the ayes and nays on other votes when requested to do so by two (2) or more members.
- (5) Present ordinances, orders, or resolutions to the city executive under section 15 of this chapter.
- (6) Record ordinances under section 17 of this chapter.
- (7) This subdivision applies only to a second class city that maintains an Internet web site. The city clerk shall post on the city's Internet web site the roll call votes of the legislative body not later than three (3) business days after the following:
 - (A) The date the roll call vote is taken if the city's software is able to generate a roll call vote.
 - (B) If the city's software is not able to generate a roll call vote, the date the legislative body is first able to approve the minutes of the meeting at which the roll call vote was taken.

The city clerk shall maintain the roll call vote information on the Internet web site for a period of four (4) years.

Plainly enough, the clerk of a second-class city has express statutory duties as the clerk of the city's legislative body, which includes keeping an accurate record of the legislative body's proceedings. The question becomes whether this statutory provision mandates a Clerk to actually attend or be present in order to keep an accurate record.

3. Can the City Council Bar the Clerk from Executive Sessions?

The Open Door Law requires a governing body to keep memoranda of all meetings including executive sessions. Under Indiana law, the clerk of a second class city has a statutory duty to keep an accurate record of the city council's proceedings.

The ODL does not, however, govern whether a governing body has authority to exclude another separately elected official who has a statutory duty to record the proceedings of the governing body from attending those meetings, but other relevant statutes might.

In *Informal Opinion of the Public Access Counselor 16-INF-02*, I opined that a Town Clerk-Treasurer could not be excluded from an executive session as the Clerk-Treasurer of a Town is an ex-officio member of a town board pursuant to statute and has a tie-breaking vote in the event of deadlock. It follows that an ex-officio member be part of all meeting proceedings to have the requisite knowledge base to break a tie. Moreover, Indiana code section 36-5-6-6(a)(1) mandates that a town clerk-treasurer serve as the clerk of the legislative body by attending its meetings and recording its proceedings¹.

¹ For example, the case cited by the Fishers City Clerk, *State v. Neff*, 117 N.E. 3d 1263 (Ind. 2019) dealt exclusively with a *Town* Clerk-Treasurer.

The statute for a town Clerk-Treasurer and a City Clerk are mutually exclusive. A City Clerk does not break ties as an ex-officio member and is not expressly mandated to attend meetings. In both cases, however, the position of Clerk or Clerk-Treasurer is inextricably linked to the municipality's legislative body. And although a clerk and a council are distinct elected offices, they are statutorily symbiotic in practice.

Additionally, the tacit premise that both a Clerk and a Clerk-Treasurer are bulwarks for executive session accountability is a legitimate reading of the Indiana Code between the Open Door Law and Home Rule. It does appear, however, to be much more explicit in terms of Town public business than in City legislative practice. Notably, a plain reading of Indiana code section 36-4-6-9 does not mandate that a Clerk actually attend and be present at a Council meeting in order to keep an accurate record, in contrast with Indiana code 36-5-6-6 which does require it for a Town Clerk-Treasurer.

There are exceptions, of course. For example, this Office deferred to a Town in *Informal Opinion of the Public Access Counselor 19-FC-14* as to the question of whether a council member could be excluded from an executive session when the council member was a potential litigation adversary. A similar finding was made in *Opinion of the Public Access Counselor 16-FC-146*. The same would hold if the Clerk's office was a bargaining adversary of any kind or makes a habit of leaking sensitive information in violation of Indiana code section 5-14-3-10(a).

Those outlying situations notwithstanding, a position of Clerk or Clerk-Treasurer is indeed the ballast to counterbalance the public's right to know the goings-on of local government with the ability to hold a closed door meeting regarding sensitive topics. That written, I have not been made aware of any executive session abuses being filed with my Office. I am confident that there are enough government watchdogs in Hamilton County to bring it to our attention if inappropriate business was being conducted behind closed doors. I am left to conclude that the City minds the particulars of the access laws. I am also familiar with the situation in Fishers and can reasonably infer that it may be one of those outlying circumstances.

The requirements of memorializing an executive session are that the minutes must identify the subject matter considered; and the governing body shall certify by a statement that no subject matter was discussed in the executive session other than the subject matter specified in the public notice. As a general rule, accuracy and verification of that statement seemingly requires attendance by a Clerk. Beyond a short list of extraordinary circumstances, a City Clerk should generally be allowed to attend executive sessions. If a scenario presents itself which renders that impossible, however, the presiding officer of a legislative body may make exclusions as necessary.

Please do not hesitate to contact me with any questions.

Best regards,



Luke H. Britt
Indiana Public Access Counselor