

Investigative Report

STATE OF IOWA CITIZENS' AIDE/OMBUDSMAN



INVESTIGATION OF LUTHER CITY COUNCIL VIOLATION OF OPEN MEETINGS LAW

TO: Shawn Schnormeier
Mayor, City of Luther
&

Luther City Council:
Vicki Severson
Frank Duroy
Jerry Barrett
Tim Mitchell
Frank Leopold

FROM: William P. Angrick II
Citizens' Aide/Ombudsman

RE: Case File 0603454

Issued: November 8, 2006

Published: December 13, 2006

Ombudsman's Role and Process

The Office of Citizens' Aide Ombudsman (Ombudsman) is an independent and impartial agency within the legislative branch of Iowa state government. Its powers and duties are stated in Iowa Code chapter 2C.

The Ombudsman investigates complaints about Iowa state and local government agencies. The investigation can determine whether agency action is contrary to law, rule, or policy, or is unreasonable, unfair, inconsistent, oppressive, in error or otherwise objectionable. After completing an investigation, the Ombudsman may issue a report to the agency stating the findings, conclusions, and any recommendations for improving agency laws, policies or practices. Before publishing the report, the Ombudsman provides the agency the opportunity to reply, and appends the unedited reply to the report.

Allegations

The Ombudsman received a complaint on August 29, 2006 alleging violations of the Iowa Open Meetings Law by the Luther City Council (Council) in its meeting on August 2, 2006. Based upon my review of the complaint, I identified the following allegations for investigation:

- The Council violated Iowa Code section 21.5 by failing to announce the reason for the closed session held August 2, 2006.
- The Council violated Iowa Code section 21.4 by failing to announce the closed session on the August 2, 2006 meeting agenda.
- The Council violated Iowa Code section 21.5 by holding a closed session for an impermissible reason.
- The Council violated Iowa Code section 21.5(2) by discussing unrelated issues in the closed session.

Investigation

The investigation was assigned to Assistant Ombudsman, Linda Brundies. The Ombudsman interviewed the City Clerk and Mayor, examined records provided by the City Clerk, including a transcript of the Council's August 2, 2006 closed session. The Ombudsman also reviewed relevant Iowa law, including statutes, the Attorney General's opinions and "Sunshine Advisory" bulletins.

Findings, Analysis, and Conclusions

1. ***Failure to announce the reason for the closed session held August 2, 2006.***

The violation took place at the August 2, 2006 Council meeting. The applicable section of the minutes read as follows:

Councilperson Severson: I move that we go into executive session.

Councilperson Duroy: 2nd

Mayor: All in favor?

Councilperson Duroy: aye

Councilperson Barret: aye

Councilperson Severson: aye

Councilperson Leopold: Why are we going into executive session? What is this about?

Councilperson Severson: I'll tell you when we get into executive session.

Councilperson Leopold: Well I'm not going to vote on it when I don't know what I'm voting on.

Councilperson Severson: In the executive session I will state what it is about. I moved that we go into executive session and it's been second and voted on.

Mayor: We didn't have this on the agenda.

At the beginning of the closed session, Councilperson Severson announced the purpose of the closed session was to discuss people talking at the meetings. The minutes of the August 2, 2006 meeting reflect the reason the Council went into closed session only because your City Clerk transcribed the tape and inserted the transcription in the minutes.

Iowa Open Meetings Law (Iowa Code Chapter 21) requires the following of the Council when going into closed session.

21.5 Closed session.

.....2. The vote of each member on the question of holding the closed session and the reason for holding the closed session by reference to a specific exemption under this section shall be announced publicly at the open session and entered in the minutes. A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session.

A Sunshine Advisory issued by the Iowa Attorney General's office in July of 2002 (Appendix A) provides commentary on the above section. This particular Sunshine Advisory discusses, "Closed Governmental Meetings: Know the Nuts and Bolts for Closed Sessions" and states, in part, the following:

Here are the steps government bodies must take for a meeting to be closed:

- Check the statute. Open meetings only can be closed for 10 specific reasons set out in the law, such as discussion of pending litigation or certain personnel issues. If none of the law's reasons apply, the session may not be closed.
- Announce the reason. The governmental body must publicly announce the reason for closing the meeting and record the reason in the minutes.

I conclude the City Council failed to follow the proper procedure outlined in Iowa Code section 21.5 to have a closed session.

2. *The closed session was not on the meeting agenda.*

Iowa Open Meetings Law requires the following regarding public notice of meetings:

21.4 PUBLIC NOTICE.

1. A governmental body, except township trustees, shall give notice of the time, date, and place of each meeting, and its tentative agenda, in a manner reasonably calculated to apprise the public of that information. Reasonable notice shall include advising the news media who have filed a request for notice with the governmental body and posting the notice on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the body holding the meeting, or if no such office exists, at the building in which the meeting is to be held.

2. Notice conforming with all of the requirements of subsection 1 of this section shall be given at least twenty-four hours prior to the commencement of any meeting of a governmental body unless for good cause such notice is impossible or impractical, in which case as much notice as is reasonably possible shall be given. Each meeting shall be held at a place reasonably accessible to the public, and at a time reasonably convenient to the public, unless for good cause such a place or time is impossible or impractical. Special access to the meeting may be granted to persons with disabilities.

When it is necessary to hold a meeting on less than twenty-four hours' notice, or at a place that is not reasonably accessible to the public, or at a time that is not reasonably convenient to the public, the nature of the good cause justifying that departure from the

normal requirements shall be stated in the minutes.

This legal requirement applies to matters to be discussed in closed sessions. The closed session was not on the agenda and it should have been. See July 2004 Iowa Attorney General Sunshine Advisory (Appendix B). I conclude the Council did not place the closed session on the agenda as required by Iowa Code section 21.4.

3. *The closed session was held for an impermissible reason.*

Iowa Code section 21.5 specifically states the permissible reasons for holding a closed session.

21.5 CLOSED SESSION.

1. A governmental body may hold a closed session only by affirmative public vote of either two-thirds of the members of the body or all of the members present at the meeting. A governmental body may hold a closed session only to the extent a closed session is necessary for any of the following reasons:

- a. To review or discuss records which are required or authorized by state or federal law to be kept confidential or to be kept confidential as a condition for that governmental body's possession or continued receipt of federal funds.
- b. To discuss application for letters patent.
- c. To discuss strategy with counsel in matters that are presently in litigation or where litigation is imminent where its disclosure would be likely to prejudice or disadvantage the position of the governmental body in that litigation.
- d. To discuss the contents of a licensing examination or whether to initiate licensee disciplinary investigations or proceedings if the governmental body is a licensing or examining board.
- e. To discuss whether to conduct a hearing or to conduct hearings to suspend or expel a student, unless an open session is requested by the student or a parent or guardian of the student if the student is a minor.
- f. To discuss the decision to be rendered in a contested case conducted according to the provisions of chapter 17A.
- g. To avoid disclosure of specific law enforcement matters, such as current or proposed investigations, inspection or auditing techniques or schedules, which if disclosed would enable law violators to avoid detection.
- h. To avoid disclosure of specific law enforcement matters, such as allowable tolerances or criteria for the selection, prosecution or settlement of cases, which if disclosed would facilitate disregard of requirements imposed by law.
- i. To evaluate the professional competency of an individual whose appointment, hiring, performance or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session.

j. To discuss the purchase of particular real estate only where premature disclosure could be reasonably expected to increase the price the governmental body would have to pay for that property. The minutes and the tape recording of a session closed under this paragraph shall be available for public examination when the transaction discussed is completed.

k. To discuss information contained in records in the custody of a public airport, municipal corporation, municipal utility, jointly owned municipal utility, or rural water district organized under chapter 357A, that are confidential records pursuant to section 22.7, subsection 46. This paragraph is repealed effective June 30, 2007.

The Council's closed session on August 2, 2006 did not meet any of the above exceptions. I conclude the Council did not have a proper reason, as provided under Iowa Code section 21.5, to have a closed session. Discussion of the manner in which people talk at meetings is not a permissible reason to hold a closed session.

4. *Unrelated issues were discussed in the closed session.*

The transcript of the closed session reveals the Council discussed issues unrelated to the stated reason for holding the closed session. The applicable portion of the transcript reads as follows:

Councilperson Severson: I do have another item of concern here, Ah the demolition of the school, the people feeding the firefighters, why aren't we just paying for that?

Councilperson Leopold: I asked the same question.

Councilperson Severson: I'm concerned about that because I think it's wonderful that people want to help. I love that, but I have a project that's even better that they could help with and that would be getting an auto defibrillator. That we could have at the town hall. I've got a call in to Lou Grecko about it. That would be something that would benefit us and not Ken Howe.

Councilperson Leopold: Well from what I understand they kept track of who donated what and so if we go with my suggestion is, that we still bill Ken Howe for this. That the people that did donate get it back. Financially we aren't doing that well but I don't think it's going to hurt if they are willing to help us out. Get through it and then give them a chance to take that money back to the option to do something else with it, like the auto defibrillator.

Councilperson Severson: We all know how far away from rescue (disrupted)

Mayor: After the meeting I was approached about the bill for the food and I wasn't sure if the council made a decision as far as everything Mark had presented. They had an idea to obtain donations. I said; well I assume the city would take responsibility for paying since I'm unsure right now, if you want to get donations, if we do something different we can always give the money back, that's always a possibility.

Councilperson Leopold: But it's an encouraging thing..(disrupted)

Councilperson Severson: It's, It's good that they want to help, I think that's wonderful, but, but, I think we as a council it, it should be kinda our duty to help guide people into something that will benefit us. I know getting rid of the school yea, indirectly it helps everyone but doing something that really effects the health and welfare of our community that's what, you hope they would understand. I am certainly not putting anybody down, I'm not saying that's dumb, no, it's just that when you start getting involved in some volunteer things, sometimes you need a little guidance to direct you in that area. In a more advantageous manner. You know, yeh, yeh, something positive just for our community. You know that's the important thing. It's got to be Luther first and Ken Howe second, so (inaudible) I felt we really had to get together on this um, I have to say this is probably the best together I've felt all of us for a long time, so I'm glad we did this.

Iowa Code section 21.5 (2) states, "... A governmental body shall not discuss any business during a closed session which does not directly relate to the specific reason announced as justification for the closed session."

The Council discussed feeding the fire fighters and taking donations for an auto defibrillator. I find the Council discussed topics other than the restrictions on people talking at council meetings. I conclude these discussions were in violation of Iowa Code section 21.5(2).

Recommendations

I make the following recommendations to improve the Council's conduct of meetings:

1. The Council did not enter into closed session properly. I recommend the Council ensures it states the reason for entering a closed session before entering the closed session. The Council should also ensure the minutes accurately record these procedures.

2. The Council discussed unrelated issues during a closed session. I recommend the Council ensures it only discusses issues during closed session stated in the reasons for going into closed session. After discussing the stated issue, no additional issues should be discussed and the Council should properly end the closed session.
3. The Open Meetings Law only allows discussion of certain topics during closed sessions. Consideration of when and for how long citizens may speak at meetings is not a permissible reason for a closed session. I recommend the Council ensures closed sessions are held only for reasons allowed by law.
4. The Council acted contrary to law when it failed to provide notice of the closed session on the agenda. I recommend the Council ensures the agenda contain sufficient information to inform the public of proposed actions and matters to be discussed at the meeting.
5. It is the Council's responsibility to be knowledgeable about the Iowa Open Meetings Law and Iowa Open Records Law, Chapters 21 and 22 of the Iowa Code, respectively. Relying solely on the legal council's advice will not shield the government body from liability if the body fails to follow these laws. I recommend the Council ensures members obtain that knowledge.

I am providing you with the following resources to assist the Council with on-going education and training on the Council's responsibilities regarding Public Records and Open Meetings laws:

- Ten copies of the "Iowa Open Meetings, Open Records Handbook" published by the Iowa Freedom of Information Council.
- The Iowa Attorney General's office publishes monthly bulletins called Sunshine Advisories, which I have cited throughout this letter, to advise citizens and government officials about their rights and responsibilities regarding Iowa Open Meeting's Law and Public Records Law. These bulletins are available at:
http://www.state.ia.us/government/ag/Sunshine_adv/sunshine.html
- If the City is a member of the Iowa League of Cities, utilize the training resources and publications available from this organization.

REPLY

**William P. Angrick II
Citizens' Aide/Ombudsman
Capitol Complex
Des Moines, Iowa 50319**

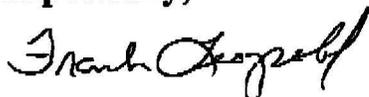
RE: Case File 0603454

Mr. Angrick,

I would like to respond to your investigation of the Luther City Council violation of the Open Meetings Law. I do understand my responsibility in the above action. I realize that I should have simply listened to the reason for the closed meeting and researched in my Municipal Policy Leaders Handbook before I responded. I can not make any excuses for my actions and I understand that I should have moved to close the session before I discussed any further business.

I will read the handbook on Open Meetings that was included in your mailing. I have also recently learned that the League of Cities is a good source of information. I am sorry that you have had to become involved. I will do everything in my power to keep Luther Council meetings running correctly.

Respectfully,



Frank Leopold, Luther City Council

Ombudsman's Comment

The Ombudsman sent Luther Mayor, Shawn Schnormeier, Council Members Vicky Severson, Frank Leopold, Frank DuRoy, Jerry Barrett and Tim Mitchell each a "Notice of Intent to Reply" form together with the Report on November 8, 2006. The Ombudsman offered them the opportunity to reply within 30 days from the date they received the Report. Mr. Leopold returned the Notice of Intent to Reply form and his reply on November 18, 2006. Frank DuRoy returned the "Notice of Intent to Reply" form indicating he chose not to reply. No reply was received from any of the other Council Members or Mayor Schnormeier.

Sunshine Advisory Bulletin

A Bulletin on Iowa Open Meetings and Public Records Laws
By Attorney General Tom Miller -- July 2002

Closed Governmental Meetings: Know the Nuts and Bolts for Closed Sessions

Closed sessions are serious business: the public is asked to leave so that a council, board, commission or other governmental body can hold discussions behind closed doors. Iowa's Open Meetings Law, Iowa Code Ch. 21, spells out very specific rules. Here are steps government bodies must take for a meeting to be closed:

- **Check the statute.** Open meetings only can be closed for 10 specific reasons set out in the law, such as discussion of pending litigation or certain personnel issues. If none of the law's reasons apply, the session may not be closed.
- **Announce the reason.** The governmental body must publicly announce the reason for closing the meeting and record the reason in the minutes.
- **Take a vote.** Closing requires an affirmative vote of two-thirds of the members, or all members present. For example, a five-member body needs either 4 votes to close (two-thirds of all the members) or 3 votes (if only three are present and three is a quorum.)
- **Keep records.** The governmental body must keep detailed minutes and must tape-record the closed session. Detailed minutes must record who is present, all discussion, and any action taken. The minutes and tape are sealed and only can be opened under a court order.
- **Stay focused.** A closed session is authorized only to the extent necessary for the reason cited. There must not be discussion of other matters.
- **Return to open session for final action.** Final action only can be taken in open session. For any final decision, a motion and vote must be done in open session.

Be vigilant about "what goes on behind closed doors."

Citizens who have inquiries or complaints about public records or open meetings may call the Iowa Citizens' Aide/Ombudsman Office - toll-free at 888-IA-OMBUD (888-426-6283.)

"Sunshine Advisory" bulletins are designed to give information on Iowa's public records and open meetings laws - our "Sunshine Laws." Local officials should obtain legal advice from their counsel, such as the city or county attorney

Iowa Attorney General's Office: Hoover Building, Des Moines, Iowa 50319.

On the Web: www.IowaAttorneyGeneral.org. Sunshine Advisories are a general resource for government officials and citizens.

Sunshine Advisory Bulletin

A Bulletin on Iowa Open Meetings and Public Records Laws
By Attorney General Tom Miller -- July 2004

Closed-Session Agendas:

Is an agenda required for a closed session?

Meeting agendas posted in advance are the public's invitation to watch government in action. The public would have no way to decide whether to attend a meeting in the absence of an advance, descriptive agenda that lists the topics to be discussed in open session. But how does the agenda requirement apply to closed sessions, when the public cannot attend? Does the advance agenda really need to describe the topics to be discussed in closed session? If the public cannot attend a closed session, what is the point of the agenda?

Iowa law does not exempt a governmental body from agenda requirements for closed sessions. Posting agendas for closed sessions gives the public an opportunity to:

- **Check on why the session is closed.** Only a few topics can justify a closed session. Iowa Code sec. 21.5(1)(a-k). The public has an interest in examining the agenda to be sure that the reason for closing the session is among the reasons authorized by law.
- **Watch for the vote to close a session.** Governmental bodies cannot go into closed session without an affirmative vote of two-thirds of the members of the body, or an affirmative vote of all members present at the meeting. Iowa Code sec. 21.5(1). The public is entitled to hold accountable those members who vote to close a session and assess whether they have complied with the law.
- **Watch for final action in open session.** Even when a closed session is authorized by law, any final action must be taken in open session in full view of the public. Iowa Code sec. 21.5(3). The public needs to know what topic is under consideration in closed session in order to decide whether to remain at the meeting site and await a possible vote of the governmental body as the "final action" on that topic.

In sum, closed session topics must be disclosed on the agenda in advance to give the public an opportunity to assess the reason for a closed session, hold accountable the members who vote to close a session, and decide whether to await a vote as final action.

Citizens who have inquiries or complaints about public records or open meetings may call the Iowa Citizens' Aide/Ombudsman Office -- toll-free at 888-IA-OMBUD (888-426-6283.)

"Sunshine Advisory" bulletins provide information on Iowa's public records and open meetings laws -- our "Sunshine Laws." The bulletins are a resource for public officials and citizens. Local officials should obtain legal advice from their counsel, such as the city or county attorney.

Iowa Attorney General's Office: Hoover Building, Des Moines, Iowa 50319.

On the Web: www.IowaAttorneyGeneral.org.