



STATE OF INDIANA

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January 8, 2014

Mr. Vincent G. Hernandez
238 S. Columbia St.
Union City, IN 47390

Chad A. Suitts
527 N. Plum St.
Union City, IN 47390

Re: Formal Complaint 13-FC-347; Alleged Violation of the Open Door Law by the City of Union City

Dear Mr. Hernandez and Mr. Suitts,

This advisory opinion is in response to your formal complaint alleging the City of Union City ("City") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.* The Board responded to your complaint via Mayor Bryan Conklin and City Council President Tim Huess. Their response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on December 17, 2013.

BACKGROUND

Your complaint alleges the City of Union City violated the Open Door Law by conducting a vote without providing proper notice and holding a vote outside of a public meeting.

You speculate in your formal complaint the City Council President held individual telephone conversations with members of the City Council to ratify a decision to purchase a new dump truck. You allegedly confirmed this in a phone conversation with the City Council President and other members of the Council. All of these conversations took place on December 11, 2013. On December 12, 2013, the truck was purchased. No meeting or public vote was conducted.

In its response, the City argues the individual conversations did not amount to a gathering of a majority of the Council and consequently was not a meeting. Furthermore, they contend no vote was taken despite the subsequent purchase of equipment.

ANALYSIS

It is the intent of the Open Door Law (ODL) 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. Accordingly, except as provided in section 6.1 of the ODL, 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. See Ind. Code § 5-14-1.5-3(a).

"Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. Ind. Code 5-14-1.5-2(c). "Public business" means "any function upon which the public agency is empowered or authorized to take official action." Ind. Code 5-14-1.5-2(e). "Official action" is very broadly defined by our state legislature to include everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. Ind. Code § 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. Ind. Code § 5-14-1.5-5(a).

The City argues the Mayor unilaterally decommissioned a former dump truck with a snow plow in September 2013. It is unclear if he had the individual authority to do so as part of his duties; however, that does not seem to be in dispute. Likewise, it is unclear from the information provided what governing body in Union City has the unilateral authority to purchase a dump truck. From the documentation submitted to this Office, it can be reasonably inferred the City Council has that particular responsibility.

The decision to purchase a dump truck is clearly an official action as described in Ind. Code § 5-14-1.5-2(d). The question is whether the individual conversations amounted to a meeting as contemplated by the ODL. I have addressed this topic recently in *Advisory Opinion 13-FC-324* concerning communication over email by the State Board of Education. I would refer the parties to that Opinion for analysis of what constitutes a meeting under the law, but I did not find aggregate conversations between individuals amounted to a majority thereby triggering the Open Door Law on that basis alone.¹

In the Board of Education Opinion, the secondary issue was whether the communications amounted to a vote. It troubled me greatly the Board members in that instance communicated over email to constructively ratify a letter sent to the General Assembly. However, in the end I found the email traffic was not intended to be a vote, because the email chain merely solicited consent to affix their signatures to the letter.

¹ Note Ind. Code 5-14-1.5-3.1 would not apply in this instance because a serial meeting would require direct communication between three (3) or more members at least once. Which does not appear to have happened in this situation.

On this particular matter, *Advisory Opinion 13-FC-324* and the present case differ factually. The City Council President telephoned Council members individually soliciting approval for the purchase of the truck. There is no other way to characterize the communication other than a vote or a final action on public business. An open meeting is a condition precedent to a vote or final action under the ODL. Otherwise, public agencies could do all of their business behind closed doors by nominating one individual to have one-on-one discussions with the rest of the Board and never taking issues public in a quorum.

Even though the City Council President called the members at different times and individually, a majority of the Council sanctioned the decision to purchase the truck. This amounted to a vote, an endorsement and an authorization of the purchase. These kinds of actions are an affront to the very purpose of the Open Door Law. Public business is to be conducted openly. There are provisions in the law and exceptions for emergency situations, but I do not believe the City properly exercised its duty of open access and transparency in this case.

Much is made in the City's response about the emergency nature of the situation. A new truck had not been purchased by December 11, 2013 when one became available. I can surmise that impending weather prioritized the purchase of the truck. The Mayor and City Council President characterize the situation as an emergency even though three months had passed since the old truck broke down. The delay in procuring a truck is not an emergency, but it is within reason to speculate weather conditions would put the City on emergency status if no snow removal vehicle was available. The Open Door Law speaks to such a situation in Ind. Code § 5-14-1.5-5(d):

If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice under this section shall not apply.

This merely speaks the 48-hour notice requirement, however, and an open meeting would still be required. The Council could have convened in a public place to vote on the purchase and go forward if the lack of a truck would have threatened disruption of government activities. The threat of heavy snow without snow removal equipment could be considered an emergency under the circumstances.

The City, unfortunately, decided to go ahead with purchase without following the requirements of the Open Door Law. I am basing this Opinion on the speculation the truck could not have been purchased without the authorization of the City Council members. If the City Council President had the discretion to independently use public funds for the purchase, it seems curious he would phone council members before the purchase merely to "advise" them of the situation and not to obtain their consent.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor that the City of Union City violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Bryan Conklin; Tim Huess