



# STATE OF INDIANA

**MICHAEL R. PENCE, 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](http://www.IN.gov/pac)

February 22, 2016

Mr. Eric Disbro  
460 Western Drive  
Danville, Indiana 46122

Mr. William Wright  
1316 Greenstone Drive  
Danville, Indiana 46122

*Re: Formal Complaint 16-FC-11; Alleged Violation of the Open Door Law by the Town of Danville Police Commission and the Town of Danville Town Council (Consolidated)*

Dear Mr. Disbro and Mr. Wright:

This advisory opinion is in response to your formal complaints alleging the Danville Police Commission ("Commission") and the Town of Danville Town Council ("Council") (collectively known as "Town") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 et. seq. The Town has responded via Ms. Nikki G. Shoultz, Esq. Her 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 January 19 and February 18, 2016.

## **BACKGROUND**

Your complaint dated January 15, 2016, alleges the Town of Danville Town Council and the Town of Danville Police Commission violated the Open Door Law by conducting public meetings without proper notice.

The situation as I understand it from the materials provided is as follows: On October 21, 2015, a coalition of three (3) Town officials delivered a personnel letter to Mr. Wright. The letter, dated October 20, 2015 has not been provided to this Office, but apparently was a performance appraisal. The three (3) Town officials were members of the five-member Danville Police Commission. One of the officials also held a position as a town councilperson. There is no indication who prepared the letter or if a majority of Commission members discussed the contents of the letter before delivery.

On January 19, 2016, a properly noticed public meeting was held to take final action on Mr. Wright's demotion. A properly noticed executive session was held beforehand to discuss his job performance.

You first contend the Commission conducted an improper unadvertised meeting on October 20, 2015. While this is beyond the thirty (30) day limitation for filing a complaint pursuant to Ind. Code § 5-14-5-7, in support of your complaint, you note that you became aware of the alleged improper Commission meeting on January 12, 2016.

On February 3, 2016 the Town responded. The Town first asserts your complaint is untimely. The Town does acknowledge that three (3) Commission members delivered a letter outlining personnel concerns to the Chief of Police. The Town contends the delivery of a letter does not constitute a meeting, because it was not for the purpose of taking official action under Ind. Code 5-14-1.5-2(d). Alternatively, the Town asserts that due to the fact one member was acting as a Town Council representative and not a Commission member; it would be considered that a majority of the Commission was not present. The Town also contends the delivery of a letter was a mere administrative function and not official action as intended by the Open Door Law.

### **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).

#### ***Timeliness***

Mr. Wright's complaint is untimely pursuant to Ind. Code § 5-14-5-7 which states that all formal complaints filed with the Office of the Public Access Counselor must be submitted within thirty (30) days of when the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. Mr. Wright was involved in the alleged secret meeting and was aware on that date. Mr. Disbro claims he became aware of the meeting on January 12, 2016. As his complaint was filed on January 19, 2016, his complaint will stand as timely. There is no indication he knew or should have known about the meeting before January 12, 2016, as the letter itself has been declared confidential by the Town.

#### ***Majority Gathering***

A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. See Ind. Code § 5-14-1.5-2(c). The Town argues that of the three (3) Commission members present at the delivery of the letter on October 21, 2015, one of those members was not acting in her capacity as a member of the Board of Commissioners, but rather as a member of the Town Council.

A public official having dual roles on different boards or commissions is not atypical nor is it prohibited. However, that individual cannot pick and choose which 'hat' they are wearing when attending 'meetings' for the purposes of avoiding Open Door Law considerations. See *Opinion of the Public Access Counselor 14-FC-68*. While the one Commission member may have claimed to take off her "Commissioner hat" to wear her "Council hat" she was

unequivocally present in her capacity as both. The subject matter of the letter was germane to both of her official capacities and thus the argument fails that she was present as a Council member only.

### ***Official Action vs. Administrative Function***

“Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* Ind. Code § 5-14-1.5-2(d). “Public business” means any functions upon which the public agency is empowered or authorized to take official action. *See* Ind. Code 5-14-3-2(e).

The Town asserts the mere delivery of a letter is not enough to constitute official action as contemplated by the Open Door Law. I have substantial concerns about the capabilities of the Danville Police Commission if it takes three (3) members to effectuate the delivery of a letter. I say this as I have doubts that the only action taken was merely delivery of the letter. I find it more likely the delivery included an explanation of the appraisal and amounted to a traditional performance review. While I agree that sheer delivery of a letter is probably not official action, discussion or explanation of the letter clearly meets the definition of official action.

Generally, public notice of the date, time, and place of any meeting of a governing body, shall be given at least forty-eight (48) hours before the meeting. *See* Ind. Code § 5-14-1.5-5. The forty-eight hour notice requirement does not apply to the following instance in subsection (f)(2):

the executive of a county or the legislative body of a town if the meetings are held solely to receive information or recommendations in order to carry out administrative functions or confer with staff members on matters relating to the internal management of the unit.

The Town asserts the delivery was an administrative function. This exception to notice, however, only applies to the executive of a county (County Boards of Commissioners) or the legislative body of a town (town council). The Police Commission is neither. This exception exists as county commissioners and many town councils are three-member panels. In any case, the administrative function meeting exception to notice does not apply to police commissions.

### ***Executive Sessions***

The Town also argues the gathering on October 21, 2015 was effectively an executive session from which the public may be excluded under Ind. Code § 5-14-4.5-6.1. It is true the evaluation of job performance of personnel is a matter which may be discussed behind closed doors and the governing body may include only those necessary to conduct that meeting. However, the crux of the issue at hand is notice. Even if the meeting was labeled an executive session (which it could have been), this does not absolve the Commission from giving 48-hours notice of the executive session. *See* Ind. Code § 5-14-1.5-6.1(d).

### ***Voiding Action***

Although you have asked this Office to void any action taken at the October 21, 2015 gathering, please be advised the Public Access Counselor does not have the enforcement capability to do so. Only a trial court can overturn a vote or final action as a remedy to a lawsuit. *See* Ind. Code § 5-14-1.5-7. It is unlikely a trial court would overturn the issuance of a performance appraisal even if it did find a violation of the Open Door Law in this case. The Town Council held a properly noticed executive

session and public meeting to carry out the demotion of Mr. Wright thus effectively correcting any wrongdoing on October 21, 2015. In order for Mr. Wright to have contested the issuance of the letter, court action would have needed to have been taken place within thirty (30) days of October 21, 2015.

***Conclusion and Recommendation***

From my investigation, it is clear the October 21, 2015 action constituted a meeting. A majority of a governing body met to carry out (and likely discuss) a task. This all could have been avoided by sending a one or two members (or a designee) to Mr. Wright's office to deliver the letter. A properly noticed executive session to discuss the matter with Mr. Wright behind closed doors could have also been a proper course of action. While this is certainly not the most egregious of offenses to come across my desk, I would like to take the opportunity to remind the Commission and the Council to be mindful of the perception it gives the public when shortcuts are taken to avoid public scrutiny. Legal loopholes notwithstanding, the Open Door Law exists to foster trust and accountability with the public as well as public employees.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a large, sweeping flourish underneath.

Luke H. Britt  
Public Access Counselor

Cc: Ms. Brittany Shaw, Esq.; Ms. Nikki G. Shoultz, Esq.