
OPINION OF THE PUBLIC ACCESS COUNSELOR

DAVID R. KURTZ,
Complainant,

v.

DEKALB CTY. CENT. UNITED SCH. DIST. BD. OF
TRUSTEES,
Respondent.

Formal Complaint No.
17-FC-256

Luke H. Britt
Public Access Counselor

BRITT, Opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the DeKalb County Central United School District Board of Trustees (“Board”) violated the Open Door Law¹ (“ODL”). Legal Counsel W. Erik Weber responded on behalf of the Board. In accordance with Indiana Code § 5-14-5-10,

¹ Ind. Code §§ 5-14-1.5-1 to -8

I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 30, 2017.

1.

BACKGROUND

Dave Kurtz (“Complainant”), executive editor for KPC Media Group, filed a formal complaint alleging the Board violated the Open Door Law (“ODL”) by holding an executive session to interview prospective appointees to fill a vacancy on the school board.

On September 19, 2017, the Board announced the resignation of one of its members. The Board solicited applications to fill the vacancy. Based on the information provided, the Board received nine applications and interviewed all nine individuals.

On October 5, 2017, the Board held an executive session on the issue, referencing in the public notice Indiana Code section 5-14-1.5-6.1(b)(10) as the exemption authorizing the session. The Board asserts that during the executive session it eliminated all but three of the applications and placed the three finalists on the agenda of the next session of the Board on October 17, 2017.

On October 17, 2017, the Board voted to appoint Mark Eck from the final field of three candidates to fill the vacancy on the Board. Notably, Board member Heather Krebs commented to the news media that the Board interviewed all nine candidates for the vacancy, and then narrowed the candidate pool to three individuals on October 5, 2017. The Board’s response does not explicitly refer to the interview

process, only stating it has broad discretion to fill the seat. Although it is unclear when exactly the nine interviews took place, the Board does not deny or otherwise dispute the statement by one of its members that the Board conducted interviews with each applicant for the vacancy.

Kurtz maintains that pursuant to Indiana Code ~~5-14-1.5-6.1(b)(10)~~, interviews of potential appointees to the Board must be conducted in a public meeting. Because that did not happen in this case, Kurtz alleges an ODL violation.

Conversely, the Board contends that it followed the statute as written and took action consistent with the command of the ODL. The Board argues that the ODL only requires interviews of the three finalist be conducted—if at all—at a public meeting. Since the Board had no further questions for the three finalists, it claims it did not conduct a final interview at the public meeting on October 17, 2017. Restated, the Board seems to take the position that interviews of applicants for a vacancy on the Board may be held in an executive session prior to the field being narrowed to three candidates.

2.

ANALYSIS

This complaint raises the issue of whether a school board—consistent with the Open Door Law—may conduct interviews of prospective appointees to the board at a meeting that excludes the public.

2.1 The Open Door Law

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. Accordingly, 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. *See* Ind. Code § 5-14-1.5-3(a).

DeKalb County Central United School District is a public agency for purposes of the ODL. Ind. Code § 5-14-1.5-2. The school corporation’s board of trustees is a governing body for purposes of the ODL. Ind. Code § 5-14-1.5-2(b). Thus, unless an exception applies, all meetings of the Board must be open at all times to allow members of the public to observe and record.

What is more, Indiana Code section 20-26-4-3(d) expressly declares that the governing body of a school corporation must comply with the ODL and all meetings must be open to the public to the extent required by the ODL. So, there can be no dispute that the ODL applies to the Board in this

case, the question is whether an exception applies that authorizes nonpublic interviews of prospective school board members.

2.1.1 Executive Sessions

Section 6.1 of the ODL authorizes the governing body of a public agency to exclude the public from certain meetings. This allows the governing body to discuss limited, and narrowly-defined subject matters. These meetings are called executive sessions. Critically, executive sessions are permitted *only* in certain statutorily-defined circumstances. *See* Ind. Code § 5-14-1.5-6.1(b)(1) to (12).

Here, the Board invoked the exception under Indiana Code section 5-14-1.5-6.1(b)(10), which authorizes a governing body—when considering the appointment of a public official—to hold an executive session to take the following actions:

- (A) Develop a list of prospective appointees.
- (B) Consider applications.
- (C) Make one (1) initial exclusion of prospective appointees from further consideration.

Ind. Code § 5-14-1.5-6.1(b)(10). Additionally, that same subsection provides:

Notwithstanding IC 5-14-3-4(b)(12), a governing body may release and shall make available for inspection and copying in accordance with IC 5-14-3-3 identifying information concerning prospective appointees not initially excluded from further consideration.

An initial exclusion of prospective appointees from further consideration may not reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3) prospective appointees. *Interviews of prospective appointees must be conducted at a meeting that is open to the public.*

Ind. Code § 5-14-1.5-6.1(b)(10) (emphasis added). Under the ODL, “public official means a person: (1) who is a member of governing body of a public agency; or (2) whose tenure and compensation are fixed by law and who executes an oath.” Ind. Code § 5-14-1.5-6.1(a).

In this case, the parties disagree about whether nonpublic interviews of prospective appointees is permissible under subsection (b)(10). Kurtz claims the interviews of prospective board members should have taken place in a public meeting. The Board disagrees.

In construing the ODL, it is the duty of this Office—like the courts—to give effect to the legislature’s intention. Toward that end, the legislature has expressly declared that the provisions of the ODL are to be liberally construed. Ind. Code § 5-14-1.5-1. As a result, “all doubts must be resolved in favor of requiring a public meeting and *all exceptions* to the rule requiring open meetings *must be narrowly construed.*” *Baker v. Town of Middlebury*, 753 N.E.2d 67, 70 (Ind. Ct. App. 2001) (emphasis added).

Here, the plain language of the exception invoked by the Board under subsection (b)(10), sets forth three actions a governing body may take when considering the appointment of public official: (1) Develop a list of prospective appointees; (2) Consider applications; and (3) Make one initial

exclusion of prospective appointees from further consideration. The Board contends that conducting preliminary interviews of the prospective appointees behind closed doors is permissible under this exception. This Office cannot agree.

The first problem is the relevant ODL exception explicitly states:

Interviews of prospective appointees must be conducted at a meeting that is open to the public.

Ind. Code § ~~5-14-1.5-6.1~~(b)(1). Here, the Board does not argue—or even suggest—that it conducted any of the interviews of the prospective appointees at any public meeting.

Second, executive sessions are exceptions to the general rule of open meetings, so the language is to be narrowly construed. On its face, the clear language of the (b)(10) exception lists the three actions a governing body may take when considering the appointment of a public official. Conspicuously absent from the list is the ability to interview prospective appointees or applicants for the vacancy. On the contrary, the clear language requires interviews to be conducted in public. *See* Ind. Code § ~~5-14-1.5-6.1~~(b)(10).

Further illustrating the legislature’s intent that prospective public officials be interviewed in a public meeting are the other provisions in the ODL that *expressly permit* a governing body to conduct interviews in executive session. *See* Ind. Code § ~~5-14-1.5-6.1~~(b)(4); ~~-(5)~~.

It is true that the ODL authorizes a governing body to receive information about and interview prospective *employees* in executive session. Ind. Code § ~~5-14-1.5-6.1~~(b)(5)(emphasis added). Even so, a prospective appointee to the school

board is a prospective *public official*, not a prospective employee. In *Common Council of City of Peru v. Peru Daily Tribune*, the Indiana Court of Appeals held that applicants to a municipal utility board were not prospective employees but rather prospective officers that do not qualify for the ODL exception for executive session interviews with prospective employees. 440 N.E.2d 726, 732 (Ind. Ct. App. 1982). The court affirmed the lower court's judgment enjoining the city council from holding executive sessions to interview prospective municipal officers. 440 N.E.2d at 733. The court explained:

The public would be harmed and a law broken if the executive sessions had not been enjoined. Therefore, an injunction was properly issued to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. The public had the right to have the interviews open to public scrutiny as part of the entire deliberative process

Id. (internal citations omitted). This Office agrees. Employees and public officials are distinguishable. The ODL permits interviews of prospective employees in an executive session, but not prospective public officials.

For its part, the Board cites no support for its view that the interviews of prospective appointees to the school board may be conducted secretly other than stating the Indiana Code is silent on the application process thereby leaving broad discretion to the Board on the procedure.

The Board is correct that the remaining members on the board are charged with filling a vacancy in its membership

in accordance with Indiana Code section 20-26-4-4. The remaining members must—by majority vote—appoint a person from within the boundaries of the school corporation with the residence and other qualifications provided for a regularly elected or appointed board member filling the membership to serve for the term or the balance of the term. *See* Ind. Code § 20-26-4-4.

It is true that the policy of the state is to grant school corporations all the powers needed for the effective operation of each school corporation. Ind. Code § 20-26-3-1. Indeed, the Board as the school corporation’s governing body has some specific powers—set forth by statute—that it exercises to carry out the purposes of the school corporation. *See* Ind. Code § 20-26-5-4. Specifically, one of those powers is “to prepare, make, enforce, amend, or repeal rules, regulations, and procedures...for the operation of the governing body.” Ind. Code § 20-26-5-4(18)(A).

Still, procedural discretion does not give license to violate another applicable portion of Indiana Code. Under Indiana Code section 20-26-3-5 “if there is a...statutory provision requiring a specific manner for exercising a power, a school corporation that exercises the power shall exercise the power in the specified manner as a minimum requirement.”

As set forth above, the remaining members of the Board are required by statute to fill vacancies that occur on the board. Further, it is undisputed that the Open Door Law applies to, and must be obeyed by, the governing body of a school corporation. *See* Ind. Code § 20-26-4-3(d); Ind. Code § 5-14-1.5-2. So, the ODL will govern this process in the absence of statutory provision to the contrary. For example, if a governing body utilizes the executive session mechanism to fill

a board vacancy, as is the case here, it must abide by the parameters set by the ODL.

Certainly not every applicant merits an interview. Some may be dismissed upon receipt of a résumé or application materials. Nothing in Indiana Code confers a right to be interviewed or to be considered as a prospect just because a candidate submits an application or résumé. There can be no question, however, that an interview implies interest in a candidate. That interest transforms a mere applicant into a prospective appointee.

In any case, note well that no interviews of an applicant, candidate, contender, aspirant, or nominee for appointment as a public official—here a school board vacancy—can *ever* be held in an executive session under the ODL. Even if there is a distinction between prospective appointees and applicants—as asserted by the Board—it matters not because an executive session can never be held to interview anyone under any circumstance for an open seat to a governing body.

Moreover, the Board did not have to invoke the executive session exception at all. The Board is not prohibited from conducting all activities related to filling the board vacancy in a public meeting. But if the Board exercises its ability to hold a closed door meeting as it pertains to filling a vacancy on the board, it may only do three things: (1) Develop a list of prospective appointees; (2) Consider applications; and (3) Make one (1) initial exclusion of prospective appointees from further consideration. Ind. Code § 5-14-1.5-6.1(b)(10). Narrowly construed, those three actions do not include interviews.

No provision of the Indiana Code, whether it be in Title 20 or otherwise, confers authority on a governing body to interview a prospective public official—in this case prospective appointees to school board—in secret, even preliminarily.

The Board should be mindful that judicial remedies are available for violations of the Open Door Law. Under the ODL, any person may file an action in any court of competent jurisdiction to: (1) obtain a declaratory judgment; (2) enjoin continuing, threatened, or future violations of the [ODL]; or (3) declare void any policy, decision, or final action taken at any executive session in violation of [the ODL]. *See* Ind. Code § 5-14-1.5-7(a). In determining whether to declare any policy, decision, or final action void, the court must consider, among other things, the factors set forth under Indiana Code § 5-14-1.5-7(d). Indiana courts have held that “substantial compliance with the [Open Door Law] is sufficient, and not every technical violation of the [Open Door Law] will require a voiding of governmental action.” *Hinojosa v. Bd. of Pub. Works & Safety*, 789 N.E.2d 533, 543 (Ind. Ct. App. 2003).

Even so, in 2015, the Indiana Court of Appeals rejected a school board’s argument that deficient public notice—a violation of the ODL—amounted to a mere technical violation after weighing the statutory factors; and thus, voided a school board’s final action. *Warren v. Board of School Trustees*, 49 N.E.3d 559 (Ind. Ct. App 2015).

As an aside, it is also worth mentioning that the Indiana Court of Appeals has recongized that even a threatened violation of the Open Door Law—specifically in the context of a governing body attempting to interviewing prospective

public officials in secret—constitutes a “great public injury.” *Common Council of City of Peru v. Peru Daily Tribune*, 440 N.E.2d 726, 733 (Ind. Ct. App. 1982).

Here, the Board’s contention that final action, that is, the actual vote to appoint the new Board member occurred at a public meeting does not remedy the violation.

The public had the right to have the interviews of the prospective appointees to the Board open to public scrutiny “to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.” 440 N.E.2d at 733 (citations omitted).

CONCLUSION

Based on the foregoing it is the opinion of the Public Access Counselor that the DeKalb County Central United School District violated the Open Door Law by holding preliminary interviews of prospective appointees to a Board seat behind closed doors.

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish at the end.

Luke H. Britt
Public Access Counselor