OPINION OF THE PUBLIC ACCESS COUNSELOR

KELLI J. HARDING,
Complainant,

v.

PERRY COUNTY BOARD OF COMMISSIONERS,
Respondent.

Formal Complaint No.
19-FC-28

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Perry County Board of Commissioners violated the Open Door Law.[1] Attorney Christopher M. Goffinet filed an answer of behalf of the board. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on March 20, 2019.

[1] Ind. Code §§ 5-14-1.5-1 to -8

BACKGROUND

This case is about whether the Open Door Law ("ODL") requires a county board of commissioners to adjourn its meeting or whether it is in continuous session.

Kelli J. Harding ("Complainant") asserts that the Perry County Board of Commissioners does not adjourn its meetings, but rather leaves the meetings open. Harding contends one of the commissioners indicated to her that the board will then meet to discuss issues but not take final action. This is largely because "it has always been done."

As a result Harding filed a formal complaint with this office.

The Board asserts there is no formal requirement to adjourn a meeting. It contends that a mere majority of the Board does not trigger the Open Door Law, but only when taking official action on public business. There are multiple exceptions to the definition of meeting that would exempt a gathering from the ODL.

ANALYSIS

The principal issue in this case is whether the Open Door Law requires a county board of commissioners to adjourn its meetings.

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.

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).

Perry County is a public agency for purposes of the ODL; and thus, subject to the law's requirements. *See* Ind. Code § 5-14-1.5-2. Additionally, the Perry County Board of Commissioners ("Board") is a governing body of the county for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). As a result, 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.

2. Continuous Sessions

Although not explicitly stated, Harding alludes to the Board's practice of continuing meetings indefinitely under what is formerly considered to be continuous sessions.

The Board is correct that there is no formal requirement to "adjourn." Adjourning is a procedural term of art found in guides like *Robert's Rules of Order* but is not mentioned in the Open Door Law. But there is no question that when a meeting concludes, it closes the meeting until new notice is posted for a subsequent session.

This office most recently addressed this issue in *Opinion of the Public Access Counselor*, 16-FC-11 (2016). Indeed, Boards of Commissioners formerly had the benefit of a continuous session, a concept ratified by the Indiana Court of Appeals in *Board of Commissioners of St. Joseph County v. Tinkham*, 491 N.E.2d 578 (Ind. Ct. App. 1986). This meant that a Board of

Commissioners could meet generally with no public notice. Consider the following, however, from 16-FC-11:

> After the *Tinkham* decision (and as a result of, along with several other cases), the General Assembly amended the notice exemptions set out at Indiana Code 5-14-1.5-5(f). *See* P.L. 67-1987.
>
> The amended law struck County Boards of Commissioners from the authorized list of those governing bodies meeting in continuous session. No other Indiana Code section gives County Boards of Commissioners the authorization to meet in continuous session, a fact recognized in Informal Opinion of the Public Access Counselor 98-05.
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> That Opinion goes on to state:
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> > Indiana Code 5-14-1.5-5(f)(1) remains applicable to governing bodies that meet in continuous session and exempts them from providing notice except for meetings that are required by or held under statute, ordinance, rule or regulation. If the General Assembly intends to characterize a governing body as meeting in continuous session, it does so by specific language. For example, the State Board of Tax Commissioners' enabling act clearly states that they meet in continuous session. See Ind. code § 6-1.1-30-4. In contrast, the enabling act for boards of county commissioners provides

> that the commissioners are to set meetings once each month and at other times as necessary. See Ind. Code § 33-2-2-6. The Commissioners, therefore, do not meet in continuous session as contemplated under Indiana Code 5-14-1.5-5(f)(1).

Alternatively, P.L. 67-1987 recognized the need for boards of commissioners to undertake administrative, operational functions without notice, therefore the public law added the administrative function exception to Ind. Code § 5-14-4.5-5(f):

> 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.

"Administrative functions" do not include the awarding of contracts, or any other action creating an obligation or otherwise binding the county. This new provision replaces the continuous session language in subsection (f), however, in every other way, the notice requirements of the Open Door Law absolutely and unequivocally apply to county boards of commissioners. *Tinkham*, as it applies to boards of commissioners, has been rendered moot by subsequent legislation.

Thus, a county board of commissioners may utilize administrative function meetings without notice. Administrative functions are narrowly construed and do not absolve Board from the notice requirements for the majority of public business.

3. Notice Requirements

Under the Open Door Law, the governing body of a public agency must give public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting at least 48 hours—excluding weekends and legal holidays—before the meeting as follows:

> The governing body of a public agency shall give public notice by posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held.

Ind. Code § 5-14-1.5-5(b)(1). Here, the Board's attorney correctly states the instances when notice is *not* required, but Harding is most concerned about when notice *is* required.

Unless otherwise stated by statute, discussion of substantive public business will always trigger the ODL for the purposes of notice. Just because a Board has "always done" something, does not make it right. The Open Door Law is the governing statute and contains very real consequences if not followed, both politically and civilly.

Although Harding has not identified a specific instance of misconduct here, this office strongly urges the Board to be diligent and mindful of the requirements of the law and not

to treat government transparency casually or disregard the Open Door Law's mandates.

Luke H. Britt
Public Access Counselor