OPINION OF THE PUBLIC ACCESS COUNSELOR

LYDIA DUNCAN,
Complainant,

v.

CITY OF BICKNELL,
Respondent.

Formal Complaint No.
19-FC-41

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the City of Bicknell violated the Open Door Law.[1] Attorney Michael Edwards filed an answer to the complaint on behalf of the city. 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 May 23, 2019.

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[1] Ind. Code §§ 5-14-1.5-1 to -8

BACKGROUND

This case centers on two emergency meetings convened by the City of Bicknell's Board of Public Works and Safety involving the actions and alleged actions of the Bicknell Police Chief.

On April 23, 2019, the Board of Public Works and Safety for the City of Bicknell ("Board") convened an emergency executive session at 5:30 p.m. for the purpose of receiving information about an employee's alleged misconduct. That employee was Police Chief Terry Stremming.

About 45 minutes later, the Board held an emergency special meeting where it voted unanimously to put the police chief on paid administrative leave. The Board also voted to reverse Stemming's decision earlier that day to suspend an officer.

Although the Board did not provide 48 hours' notice, it sent the notice to the *Vincennes Sun-Commercial* at 11:37 a.m., and posted notice at city hall prior to the meetings.

Lydia Duncan ("Complainant") filed a formal complaint alleging a violation of the Open Door Law ("ODL"). In essence, Duncan contends that the ODL required the Board to provide the public 48 hours' notice for both of the meetings it convened on April 23 because the circumstances did not constitute an emergency.

The Board denies that it violated the Open Door Law. Specifically, the Board argues that due to an emergency, it was not required to provide 48 hours' notice. The Board says the situation qualified as an emergency because it amounted to an actual disruption of governmental activity.

The Board also questions Duncan's motives with this complaint by noting her involvement with a lawsuit against the city in 2018 and her previous complaints to this office. The Board contends the complaint is frivolous and vexatious.[2]

ANALYSIS

The primary issue in this case is whether the two meetings convened on April 23, 2019 by the Board of Public Works and Safety for the City of Bicknell required 48 hours' notice under the Open Door Law.

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).

There is no dispute that the City of Bicknell 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 city's Board of Public Works and Safety ("Board") is a governing body of the city for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b).

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[2] Speculation regarding the motives for the complaint will not be addressed by this office.

So, 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. Public Notice

Generally, under the ODL, public notice of the date, time, and place of any meetings, executive sessions, or of any re-scheduled or reconvened meeting, must be given at least 48 hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* Ind. Code § 5-14-1.5-5(a).

Notably, public notice for an executive session must also state the subject matter of the meeting by specific reference to the statutory exemptions for which executive sessions may be held. Ind. Code § 5-14-1.5-6.1(d).

There is, however, an exception to the typical 48 hour time requirements for emergencies, which is at issue in this case.

2.1 Notice of Emergency Meetings

The public notice time requirement rules relax in the case of emergencies. For instance, Indiana Code section 5-14-1.5-5(d) says:

> If a governing body calls a meeting 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, but:
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>> (1) news media which have requested notice of meetings under subsection (b)(2)

must be given the same notice as is given
to the members of the governing body; and

(2) the public must be notified by posting a
copy of the notice according to subsection
(b)(1).

Ind. Code § 5-14-1.5-5(d). Here, the crux of the dispute is
Duncan and the City disagree about whether there existed
an emergency that relieved the Board from providing notice
48 hours in advance.

This office must construe the provisions of the ODL liber-
ally and the exceptions narrowly. *See* Ind. Code 5-14-1.5-1.
In other words, for purposes of the ODL exception to the 48
hour advance notice provision, the term "emergency" will be
narrowly construed.

Typically, a personnel issue will not constitute an emergent
situation. Thus, an executive session to discuss a personnel
matter will very rarely, if ever, qualify as an emergency.

The City of Bicknell is a municipality having only four law
enforcement officers at the time the Board put the chief on
administrative leave. The Board's action constituted a 25%
reduction in the police force and caused the police depart-
ment's administrative leader to be unavailable.

It's conceivable that losing the police chief for disciplinary
reasons—even temporarily—could cause a disruption to a
small municipality and require city leaders to scramble to
implement a public safety plan.

A mayor does not unilaterally have the power to discipline a police chief; and thus, needs a Board of Public Safety's approval to act.[3]

That written, surely there should be internal controls and standard operating procedures for a succession plan when the chief goes on vacation, gets sick, or is otherwise unavailable. While it truly may have been an emergency for the City of Bicknell at the time, an argument can be made that a plan for transition of power – at least a temporary one – is foreseeable and advisable.

This is a matter of first impression for this office. Subjectively, the loss of a police chief is not an inherent emergency, but this office will not fault the City for considering it one this time. It is also worth mentioning that the Board took action to reverse the chief's suspension of another officer on the day in question, which likely contributed to the Board's sense of urgency.

Going forward, however, municipalities should be mindful of avoidable emergencies by establishing contingency plans for foreseeable circumstances. While the details of the circumstances may be unforeseen, the consequences can be anticipated and considered beforehand.

Bicknell is small but not tiny in terms of Indiana municipalities and should be sophisticated enough to foresee interruptions to government services that do not rise to emergent disruptions.

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[3] *New Haven v. Le Fever*, 143 Ind. App. 88, 238 N.E.2d 487 (Ind. Ct. App. 1968).

But in no way shape or form does this office believe the City was intentionally attempting to hide anything or deceive the public. Intelligent minds may disagree on what constitutes an emergency and Bicknell sets forth a reasonable good faith argument in this case.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the City of Bicknell did not violate the Open Door Law but should take measures to ensure emergency plans are in place to handle these types of situations.

Luke H. Britt
Public Access Counselor