
OPINION OF THE PUBLIC ACCESS COUNSELOR

DANIEL J. CARUSO,
Complainant,

v.

NEW CARLISLE TOWN COUNCIL,
Respondent.

Formal Complaint No.
20-FC-126

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the New Carlisle Town Council violated the Open Door Law.¹ Attorney Andrea Halpin filed an answer on behalf of the council. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by this office on September 10, 2020.

¹ Ind. Code § 5-14-1.5-1—8.

BACKGROUND

This case involves a dispute about whether the frequency and substance of the New Carlisle Town Council's executive sessions comply with the Open Door Law (ODL).

On September 8, 2020, Daniel J. Caruso (Complainant), on behalf of the Open Space and Agricultural Alliance, filed a formal complaint against the New Carlisle Town Council² (Council) alleging violations of the Open Door Law. Caruso asserts the Council violated the ODL's provisions on executive sessions in three ways: (1) The Council is abusing the frequency of the ODL's executive session exception; (2) The Council is not adhering to authorized subject matter listed in the public notices; and (3) The Council is using the ODL executive sessions to improperly discuss private deals with other elected officials.

On October 5, 2020, the New Carlisle Town Council filed a response disputing Caruso's claims. For length and clarity we will supply additional facts as needed.

² Caruso references the actions of other local governing bodies in his narrative as potential violations of the ODL, which this office will not address here. Caruso named only the New Carlisle Town Council on the complaint; and thus, this office only solicited a response from New Carlisle. We will not address the substance of claims against entities that did not have the opportunity to respond.

ANALYSIS

1. The Open Door Law

The Open Door Law (ODL) requires public agencies to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. Ind. Code § 5-14-1.5-1. As a result, 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).

The Town of New Carlisle is a public agency for purposes of the ODL; and thus, subject to the law's requirements. Ind. Code § 5-14-1.5-2. The New Carlisle Town Council is a governing body of the town 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 New Carlisle Town Council must be open at all times to allow members of the public to observe and record.

1.1 Meeting

Under the ODL, a meeting is “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). “Official action” means to: (1) receive information; (2) deliberate; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action. Ind. Code § 5-14-1.5-2(d).

Moreover, “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).

The primary exception to ODL's open meeting mandate is the executive session.

2. Executive sessions

The crux of this dispute is whether the frequency and the substance of the New Carlisle Town Council's executive sessions comply with the Open Door Law.

Under the ODL, an "executive session" is "a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose." Ind. Code § 5-14-1.5-2(f).

The ODL authorizes a governing body to hold an executive session only in the specific instances listed in the statute *See* Ind. Code § 5-14-1.5-6.1(b)(1)-(15). In other words, if the subject matter of an executive session is not listed in section 6.1(b), then the session violates the ODL.

2.1 Frequency of executive sessions

Caruso argues the New Carlisle Town Council is violating the ODL by holding too many executive sessions.

As set forth above, the ODL limits a governing body's use of executive sessions by authorizing them only in narrow circumstances. The law does not expressly cap their frequency.

Even so, this office consistently advises governing bodies at all levels of government to schedule executive sessions sparingly. And with good reason: the purpose of the ODL is to ensure that public business happens in public.

These meetings should only happen as authorized and only when necessary. An executive session should not be a standing meeting on a governing body's schedule but scheduled judiciously and only as necessary.

This office heavily scrutinizes executive sessions because they are the only time the public is excluded from a governing body's official action on public business.

While there are certainly justifications for having sensitive discussions behind closed doors, a governing body should use executive sessions sparingly and follow the public notice requirements to the exact letter of the law. Holding unauthorized private discussions behind closed doors as a majority of a governing body only serves to erode the public trust and cast doubt on the transparency of the public agency

2.2 Breaching the defined topic of the session

Caruso also asserts that the Council strayed off topic during six executive sessions it held between June 25, 2020, and September 1, 2020. He contends the public notice of these sessions indicated the purpose was for interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects. *See* Ind. Code § 5-14-1.5-6.1(b)(4).

Caruso contends that the Council released a statement at its meeting on July 21, 2020, stating they were holding executive sessions with the St. Joseph County Board of Commissioners to plan resolution regarding the Indiana Enterprise Center. Caruso argues this indicates the Council's executive sessions were not for the reason cited in the public notice and memoranda.

Without eyes and ears behind those closed doors – and without the benefit of any sworn testimony or authenticated evidence – this office can only pontificate to the hypothetical.

What is clear is that the purpose of the law, especially Indiana code section 5-14-1.5-6.1(b)(4), is to discuss potential economic development prospects in the preliminary stage to court those prospects. To the extent this was the purpose of the executive session, it is legal and legitimate. If this was not the case and, for example, an infrastructure prospect was discussed, it may have an illegal meeting.

After researching the Indiana Enterprise Center, it does indeed appear it is an economic development project.

2.3 Discussing private deals with other elected officials

Caruso contends that the Council is improperly using executive sessions to discuss what he refers to as “private deals with other elected officials.” Caruso bases this conclusion, at least in part, on the Council’s vote on September 1, 2020, adopting a resolution in support of the Indiana Enterprise Center that had not been addressed in a public meeting prior to the vote. The Town disagrees.

The Town argues it took the proper steps to vet the resolution publicly and held public comment forums, public discussion and votes.

Nevertheless, the law contemplates, at least in part, some preliminary strategy discussions regarding economic development prospects, even if conducted by a majority of a council, may not be a meeting at all. Consider the exclusion to the definition of meeting found at Indiana code section 5-14-1.5-2(c)(5):

A gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources.

Therefore, even if some discussions were held in an executive session amongst public officials regarding the development details, this does not require a public meeting at all. Toward that end, this office does not find, based on the information provided, that any discussion by the Town was held in an improper manner.

CONCLUSION

Based on the foregoing, it is the opinion of the public access counselor that the New Carlisle Town Council did not violate the Open Door Law but should remain mindful that executive sessions and closed door meetings should be an intermittent practice.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor