
OPINION OF THE PUBLIC ACCESS COUNSELOR

CAROLYN ORR & MARK STRAW,
Complainant,

v.

WARREN COUNTY BD. OF COMMISSIONERS,
Respondent.

Formal Complaint No.
20-FC-29

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Warren County Board of Commissioners violated the Open Door Law.¹ Attorney Mallory K. Redlin filed an answer on behalf of the county. 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 February 25, 2020.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

This case involves a dispute over additions made to a meeting agenda by the Warren County Board of Commissioners.

On February 18, 2020, the Warren County Board of Commissioners (Commissioners) gathered for the board's second meeting of the month. The original agenda for the meeting included an item of old business titled: "Jordan Creek Windfarm Right of Way Agreement, Exhibit F of the Road Use Agreement."

Around an hour into the the meeting the Commissioners voted to amend the meeting agenda for second time to add Exhibits A–H of the road use agreement for the board's consideration. Ultimately, the Commissioners voted 2-to-1 to approve all of the exhibits.

Five days later, Carolyn L. Orr and Mark Straw (Complainants) filed a formal complaint with this office. Essentially, Orr and Straw contend the Commissioners' action to add several exhibits related to the Jordan Creek Windfarm Right of Way Agreement constituted a violation of the Open Door Law because the board did not describe each agenda item during the meeting. Orr and Straw argue that the Commissioners did not indicate what the additional exhibits were, provided no titles, and did not discuss the additional exhibits.

On March 16, 2020, the Commissioners filed an answer denying that the board violated the Open Door Law. The Commissioners argue that the complaint is based on false information and without merit. In essence, the Commissioners argue that they have a right to amend their agenda at

any time during the course of the meeting. Additionally, the Commissioners dispute the suggestion that the board impermissibly referred to the newly added agenda items solely by number. The board included a copy of the meeting minutes as support for the argument that it discussed—in detail—the totality of the road use agreement exhibits.

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).

Warren County 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 board of commissioners 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 commissioners must be open at all times to allow members of the public to observe and record.

1.1 Defining 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 infor-

mation; (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).

1.2 Meeting agenda

Under the Open Door Law, if a governing body uses an agenda, it must post the agenda at the entrance to the meeting location before the meeting. Ind. Code § 5-14-1.5-4(a). Although the ODL does not specify what agenda items are required, it does expressly state that “a rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void.” *Id.*

Here, the crux of the dispute involves additions the Warren County Commissioners made to the agenda during a meeting. The Commissioners argue that the board has a right to amend the agenda at any time during the course of a meeting.

Granted, nothing in the ODL prohibits a governing body from amending an agenda for a public meeting. This office considers meeting agendas to be a worthwhile endeavor, but the purpose is not to strictly bind a governing body to the items listed on the agenda.

At the same time, this office has consistently acknowledged that if an agenda item is reasonably expected to generate increased public interest (e.g., wind farm right of way agreements), a governing body should include the item on the

agenda it posts before the meeting. If that is not practical, then it makes sense to table the issue until a later date.

In this case, the Commissioners' original agenda included one item of old business related to the Jordan Creek Wind Farm Right of Way Agreement: Exhibit F of the Road Use Agreement. An hour into the meeting, the board added 7 more exhibits from the road use agreement to the agenda and voted 2-to-1 to approve the right of way agreement exhibits A-H of the agreement; rather more than just Exhibit F.

This office does not interpret the ODL in a way that prohibits a governing body from amending a meeting agenda. Still, the law requires a governing body that uses an agenda to post it before the meeting. So, substantive additions to the agenda of a meeting that has already been underway for over an hour is a practice best avoided. This is especially true when the addition to the agenda involves items related to a legitimate public interest.

Reasonable people may disagree—and frequently do—about what the ODL specifically requires from a governing body. Still, the public policy that underlies the ODL is less vulnerable to any sort of reasonable dispute: the government must conduct the business of Hoosiers openly so they may be fully informed.

This office is not privy to the exhibits the Warren County Commissioners added to the agenda and approved at the meeting in question; and thus, this office will not conclude that the county violated the ODL in this case.

Even so, the optics are bad.

Going forward, this office recommends the Warren County Commissioners and all governing bodies stop the practice of making substantive additions to the meeting agenda after a meeting is considerably underway. This is especially true when the additions involve items that relate to issues of legitimate public interest.

Indeed, this would be a perfect time for Warren County to retire the overbroad argument that the ODL authorizes the Commissioners to substantively add to a meeting agenda any time during the life of that meeting. That approach is inconsistent with the express purpose of the law.

The ODL provides a governing body flexibility to amend a meeting agenda, but the law's underlying purpose is transparency.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Warren County Board of Commissioners did not violate the Open Door Law.



Luke H. Britt
Public Access Counselor