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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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SCOTT T. SWICK,  
*Complainant,*

v.

DAYTON TOWN COUNCIL,  
*Respondent.*

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Formal Complaint No.  
20-FC-44

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Luke H. Britt  
Public Access Counselor

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This advisory opinion is in response to a formal complaint alleging the Dayton Town Council violated the Open Door Law.<sup>1</sup> Town attorney Reid D. Murtaugh 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 the Office of the Public Access Counselor on March 27, 2020.

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<sup>1</sup> Ind. Code § 5-14-1.5-1-8

## **BACKGROUND**

This case involves a dispute about the existence of a meeting and defective public notice under the Open Door Law.

Scott T. Swick (Complainant) contends that three members of the Dayton Town Council attended a meeting to receive information about plans for a new subdivision and utility easement.

Beforehand, the council members, via email and phone conversations, discussed who should attend the meeting, and were apparently told by the town's attorney that no more than two members should be present for the meeting. However, contrary to the given legal advice three members of the council, Ron Koehler, Stan Kyger, and Ashley Stevenson, convened in the town's municipal building, to speak with developers and other construction personnel. Swick claims that the council never provided public notice of the meeting. As a result, Swick filed a formal complaint on March 27, 2020.

On April 13, 2020, the Town of Dayton filed a response with this office disputing Swick's claims that the council violated the ODL.

First, Dayton argues that the gathering in question did not constitute a meeting as defined by the ODL. Specifically, the town cites the handbook published by this office, which says that "a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to a recommendation, policy, decisions, or final action on the terms of a request or an offer of public financial resources" is not considered a "meeting."

Second, Dayton argues that even though three members of the council attended the preconstruction meeting, they did not attend for the purpose of taking official action on public business.

Finally, the town contends the preconstruction meeting was held only to discuss a subdivision project that had previously been approved by the council; and thus, there was no discussion of any items that would require a council vote. As such, the town argues that the gathering did not constitute a formal meeting, and therefore public notice of meeting was never required.

## **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 Dayton 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 Dayton Town Council (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 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).

### **1.2 Public notice**

Under the ODL, 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).

## **2. Swick’s claims**

Swick argues the Dayton Town Council violated the Open Door Law by not publishing public notice 48 hours before a meeting with a developer. The Council argues there was no

meeting for purposes of the ODL because it was not a meeting by definition. Swick asserts – and the Council does not refute – three of five members were present for the gathering and the Council did not provide public notice.

### **3. Exceptions to the definition of meeting**

The public notice provisions of the ODL do not apply in the absence of a meeting. There are several notable exceptions to the definition of “meeting.” In other words, a meeting—as defined by statute—is necessary to argue defective public notice.

Under the ODL, the definition of “meeting” does not include any of the following:

- (1) Any social or chance gathering not intended to avoid this chapter.
- (2) Any on-site inspection of any:
  - (A) project;
  - (B) program; or
  - (C) facilities of applicants for incentives or assistance from the governing body.
- (3) Traveling to and attending meetings of organizations devoted to betterment of government.
- (4) A caucus.
- (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.*

(6) An orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action.

(7) A gathering for the sole purpose of administering an oath of office to an individual.

(8) Collective bargaining discussions that the governing body of a school corporation engages in directly with bargaining adversaries. This subdivision applies only to a governing body that has not appointed an agent or agents to conduct collective bargaining on behalf of the governing body as described in subsection (b)(3).

Ind. Code § 5-14-1.5-2(c)(emphasis added). These gatherings, according to our legislature, do not constitute meetings for purposes of the ODL.

With subsection (2)(c)(5), the legislature intended to give latitude to municipalities when courting economic development *prospects*. In order to woo private business to a community, the business will often hold private discussions so as not to reveal secrets or compromise strategic bargaining positioning to a competitor. Therefore the exception exists. Notably, a similar executive session subject matter justification also exists under Indiana Code section 5-14-1.5-6.1(b)(4) for interviews and negotiations with commercial prospects. Generally, the non-meeting gathering precedes the executive session. At those preliminary gatherings, public business is not yet on the table. A more detailed analysis can be found in a previous Informal Opinion of this office.

*See Informal Opinion the Public Access Counselor, 19-INF-7 (2019).*

Contrast this with the current situation: in Dayton, the development was already underway and a contract had been signed. There was no “prospective” element to be found, which undoubtedly is a condition of the statute.

Therefore, the gathering did not meet the definition of the non-public-meeting gathering in subsection 2(c)(5). If anything, it was more akin to an inspection of a project, but that does not quite fit either as it was not on-site.

Finally, it is important to note that the definition of official action, as noted above, is significantly broad, even to the extent that the mere receiving of information is included. When public business is involved, this is always the case.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the town attorney's original assessment was correct and the meeting should have been public. In that regard, the Dayton Town Council violated the Open Door Law. That stated, as it is very much a blurry and confusing set of statutes, I do not believe it was an intentional substantive violation of the law, but a rather technical one.

To that extent, it is simply my recommendation that the Dayton Town Council operate according to the foregoing from now on.



Luke H. Britt  
Public Access Counselor