
OPINION OF THE PUBLIC ACCESS COUNSELOR

MIKE MARTURELLO,
Complainant,

v.

FREMONT COMMUNITY SCHOOLS,
Respondent.

Formal Complaint No.
21-FC-124

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Board of Trustees for Fremont Community Schools violated the Open Door Law.¹ Attorney Timothy Shelly filed an answer on 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 August 25, 2021.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

In this case we consider whether the Board of School Trustees of Fremont Community Schools (Board) acted in accordance with the Open Door Law (ODL) by holding an emergency executive session to discuss COVID-19 issues.

On August 19, 2021, the FCS Board convened what it referred to as an “emergency executive session.” Earlier in the day, Mike Marturello (Complainant), editor for *The Herald Republican*, received an email from the school secretary notifying him that the Board would hold the executive session later that day. Marturello contacted FCS Superintendent Dr. William Stitt to inform him that the meeting notice was defective because it had not been issued at least 48 hours in advance of the meeting and did not include a code citation authorizing the executive session.

Dr. Stitt responded to Marturello and indicated that FCS would allow a reporter to attend the meeting. Marturello contends that FCS denied the reporter entry to the meeting and escorted her out of the building. When Marturello confronted Dr. Stitt arguing the meeting was being held illegally, Marturello asserts that he was told that there was nothing under the emergency meetings provision of the Open Door Law that prohibits emergency executive sessions.

On August 25, 2021, Marturello filed a formal complaint with this office, alleging the FCS Board’s August 19 executive session violated the Open Door Law. Marturello argues

the Board provided defective public notice and failed to provide a valid exception authorizing the meeting to be held in private.

The FCS Board argues that it had legitimate reason to hold an emergency executive session, and the subject matter of the meeting warranted the exclusion of the public. The Board contends that it scheduled an emergency executive session in response to the quickly rising number of positive COVID cases among students and staff along with the direct exposures suffered by those individuals. The Board argues the meeting was excepted from the usual 48-hour notice requirement because it was held to formulate and implement an action plan addressing the ongoing public health emergency.

The Board relies, in part, on an opinion from this office as support for its argument. In *Opinion of the Public Access Counselor 20-FC-82*, this office concluded that the Open Door Law allowed the Delaware County Election Board to call an emergency meeting with less than 48 hours' notice to address the testing of voting machines for the 2020 primary election during the pandemic.

The Board asserts it was under the impression that holding the meeting as soon as possible to address the health and safety concerns of students and staff outweighed waiting the ordinary 48 hours' notice requirement and risking further spread of COVID in Fremont Community Schools.

Moreover, the Board argues the emergency meeting was not open to the public because there was a possibility that the Board's discussion would include the sharing of confidential student and medical information.

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).

Fremont Community Schools (FCS) is a public agency for purposes of the ODL; and thus, is subject to the law's requirements. Ind. Code § 5-14-1.5-2. Moreover, the FCS Board of School Trustees (Board) is a governing body 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 school board must be open at all times to allow members of the public to observe and record.

1.1 ODL definitions

Under the ODL, "meeting" means "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). Notably, the ODL defines "final action" as "a vote by

the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order.” Ind. Code § 5-14-1.5-2(g). The ODL also mandates a governing body to take all final action at public meeting. *See* Ind. Code § 5-14-1.5-6.1(c). Additionally, “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).

2. Executive sessions

Despite the ODL’s general rule of open meetings, the public may be excluded from certain meetings known as executive sessions. A governing body may only hold an executive session in the specific instances set forth under section 6.1 of the ODL. *See* Ind. Code § 5-14-1.5-6.1(b).

This office scrutinizes executive session a bit more closely than other types of gatherings simply because it is the exception to the presumption of openness. Accordingly, when an access law is to be liberally construed, its exceptions shall be narrowly constructed. *See Indianapolis Newspapers v. Ind. State Lottery Comm’n*, 739 N.E.2d 144, 154 (Ind. Ct. App. 2000).

3. School safety plans

On October 1, 2020, this office published an informal opinion² in response to an inquiry about whether a school board could call an executive session to discuss back-to-school or reopening plans. In that case, this office held the following:

² *Informal Opinion of the Public Access Counselor*, 20-INF-7 (2020).

The executive session justifications are rooted in practicality in regard to the sensitivity of the subject matter being discussed. School safety and security plans may be held in closed door meetings to preserve the integrity and efficacy of the safety program itself. Active threats and responses should indeed be kept in-house to ensure those who intend to visit harm on schoolchildren or staff are not privy to those plans.

Back-to-school plans during the COVID-19 pandemic may be a separate issue, however, and not exactly what the legislature intended. While serious and not to be dismissed, COVID-19 is a passive threat insofar as public knowledge of public health plans will not give COVID a heads-up to target a child or a building. The virus, thankfully, does not have eyes and ears. The harm comes from the virus itself and not from knowledge of mitigation efforts.

It is difficult to imagine a scenario wherein those plans – or safety considerations generally - would be compromised if discussions were held during a public meeting.

...

Therefore it is the official position of this office that back-to-school pandemic plan discussions should be held in public.

Although the Indiana General Assembly addressed the intersection of public health emergency and public meetings during the 2021 legislative session, it did not add any provision to include back-to-school plans under the executive session subsection of the Open Door Law. It very well could

have but the appetite to do so was nonexistent. Therefore, this opinion follows the previous informal guidance.

Notably, the Indiana School Board Association has indicated its agreement with this office on the matter, solidifying this office's position that executive sessions are not appropriate for back-to-school reopening plans.

4. Emergency executive sessions in general

There is no question that Indiana, and much of the world, has been in a constant state of emergency since early 2020. At the time of the executive session at issue here, Governor Holcomb's emergency declaration was still in place and still is at the time of this writing.

In short, under emergent situations - provided they involve actual or threatened injury to the public or shutdown of government services - can be called without 48-hours-notice. Emergency meetings still must be open to the public and they do require notice of date, time and location, just without the 48-hour requirement.

Notably, the emergency meeting statute found in Indiana code section 5-14-1.5-5(d) makes no mention of a potential emergency executive session. Nor does the executive session section 6.1(b) contemplate emergencies either. Read as a whole, it does not appear as if the General Assembly intended emergency executive sessions to be a potential construct.

In early 2020, when local communities and the world were facing a significant number of unknowns as it related to the

pandemic, emergency meetings were held to address changing conditions. This office, however, was not aware of any emergency meetings taking place in executive session.

By August 2021, COVID-19 was not sneaking up on anyone. It had been a looming presence in everyone's life for months. While infection rates were ebbing and flowing, no reasonable public official should have been caught flat-footed by increased rates.

Given the meeting took place on a Thursday evening, it does not appear that the community would have been in increased imminent danger if the Board had waited until Monday evening to hold the meeting. Even still, each community knows its situation better than this office and if there was a pending emergency threat with some relative measure of immediacy, perhaps the board could have called an emergency public meeting, but not an executive session.

The School Board additionally argues that individual personal health information would potentially be discussed in executive session and therefore it was justified. It is difficult to envision a scenario where individual personal health information would drive the discussion of a COVID-19 mitigation plan. Speaking in generalities as to infections, vaccination rates, etc. would have accomplished the same outcomes. Citing individual cases would just be pretext for an executive session and not a legitimate reason for a closed-door meeting.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Board of Trustees for Fremont Community Schools violated the Open Door Law.

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to be the initials 'LH' followed by a surname.

Luke H. Britt
Public Access Counselor