
OPINION OF THE PUBLIC ACCESS COUNSELOR

KRISTOPHER BILBREY,
Complainant,

v.

HENRY COUNTY PLANNING COMMISSION,
Respondent.

Formal Complaint No.
21-FC-177

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Henry County Planning Commission violated the Open Door Law.¹ Attorney Sean Row filed an answer on behalf of the commission. 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 October 21, 2021.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

In this case we consider whether the Henry County Planning Commission (Commission) acted in accordance with the Open Door Law (ODL) by holding an executive session to discuss hiring a zoning administrator.

The Henry County Planning Commission sought to hire a zoning administrator over several months during 2021. Kristopher Bilbrey (Complainant) contends the Commission held an executive session on October 7, 2021, to vote on a candidate. The preferred candidate was notified shortly thereafter. Bilbrey argues this course of action is a violation of the Open Door Law and filed his complaint two weeks later.

On November 16, 2021, the Commission filed an answer to Bilbrey's complaint. The Commission does not dispute the general timeline of events presented in the complaint. Even so, the Commission argues that it did not take final action under the ODL because it did not finalize the hiring process. The Commission asserts that the applicant withdrew from consideration before the Commission ratified the action to hire him at a subsequent public meeting.

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 in-

formed. 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).

Henry County 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 Henry County Planning Commission (Commission) 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 Commission 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 sessions 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).

It should be noted from the outset that the October 7, 2021 notice for the executive session appears to be defective. "Discussion of Personnel Matters" is not an appropriate justification for an executive session. Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* Ind. Code § 5-14-1.5-6.1(d).

In this case, the proper justification would have likely been to receive information about and interview prospective employees in accordance with Indiana Code section 5-14-1.5-6.1(b)(5).

Insofar as decision making is concerned, it is the opinion of this office that a preferred candidate can be identified – the Open Door Law allows for some preliminary decision-making in executive session. A vote on a final employment offer,

however, should not happen until a subsequent public meeting. Emails submitted by Billbrey written by a planning commission member indicate a vote was planned and actually taken at an executive session. This is a blatant violation of the Open Door Law.

Because the applicant withdrew his name from consideration, the public does not appear to be prejudiced in any way but the act was a violation nonetheless. The Commission should be mindful of this going forward because the Open Door Law prohibits final action in executive session pursuant to Indiana code section 5-14-1.5-6.1(c).

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Henry County Planning Commission did not comply with the Open Door Law regarding the public notice for the executive session. Because a vote was taken and an offer was made to a preferred candidate outside of a public meeting, this also was a deviation from the law.



Luke H. Britt
Public Access Counselor