
OPINION OF THE PUBLIC ACCESS COUNSELOR

SUSIE TALEVSKI,
Complainant,

v.

PORTER COUNTY BD. OF COMMISSIONERS,
Respondent.

Formal Complaint No.
21-FC-202

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Porter County Board of Commissioners violated the Open Door Law.¹ Attorney Scott McClure 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 December 20, 2021.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

In this case we consider whether the Porter County Board of Commissioners acted in accordance with the Open Door Law (ODL) when developing the ordinance proposal for the distribution of federal funds allocated under the American Rescue Plan Act.

Susie Talevski (Complainant) asserts that Porter County Commissioners Laura Blaney and Jeff Good, and two members of the Porter County Council held private meetings to discuss, deliberate, and decide on the distribution of funds allocated to the county by the American Rescue Plan Act (ARP). Talevski further contends that during these private meetings, Commissioner Jim Biggs was excluded and those present used this time to develop a new ordinance, which was then presented for a vote at a “special meeting” of the Board of Commissioners on October 26, 2021.

Talevski argues that the public notice for the meeting was defective because it did not properly identify the subject matter of the meeting. She also contends that the Board failed to allow for public discussions, deliberations, or opportunity for meaningful public comment on how to spend or allocate the ARP funds.

Additionally, Talevski maintains that Commissioner Blaney admitted—during the special meeting—to engaging in private discussions with two Porter County Council members when developing the ARP plan ordinance.

Talevski insists that the actions detailed in her complaint constitute a violation of the Open Door Law by the Commissioners Laura Blaney and Jeff Good. Talevski filed her formal complaint on December 20, 2021.

On January 10, 2022, the Board filed an answer to Talevski's complaint denying any violation of the Open Door Law. The Board argues that on two separate occasions one member of the Board met with two county council members and the county attorney to discuss and review guidance from the Federal Treasury Department on what qualified for ARP expenditures and to discuss expenditures based on the needs of Porter County. Commissioner Good represented the Board at the meeting in the summer of 2021 and Commissioner Blaney joined the gathering on October 21, 2021. The Board argues there was not a majority of Board members present for any private meeting.

The Board denies Talevski's claim that it provided defective public notice for the special meeting on October 26, 2021. The Board maintains that it provided public notice consistent with Indiana Code section 5-14-1.5-5. The Board asserts that the county posted the meeting notice in various spots on the Porter County website calendar on October 22, 2021, at 9:45 a.m., as well as at the commissioners' office.

The Board argues that meeting was not only properly noticed but was also open to the public. Also, during the meeting a public hearing was held to discuss the proposed ARP ordinance plan at which point members of the public had the opportunity to speak in favor and against the proposed ordinance without time or subject limitation.

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).

Porter 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 Porter County Board of Commissioners (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 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).

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). Additionally, a heightened notice requirement applies to county executives. In order to hold a special meeting that is not otherwise regularly scheduled, it must post the specific reason for the meeting. Pursuant to Indiana Code section 36-2-2-8(b):

The notice must include a specific statement of the purpose of the meeting, and the executive may not conduct any unrelated business at the meeting.

It is unclear whether this special requirement was met giving specific subject matter notice of the meeting, but if not, the Board would not be in compliance with this section.²

3. ARP committees and ordinances

The greater issues here appear to be twofold. First, if a delegation from the Porter County Council and from the Board of Commissioners meet to discuss potential spending projects regarding ARP funds, would that meeting need to be public? Second, does the existence of a pre-written ordinance give rise to an inference that a nonpublic meeting took place prior to its passage.

Regarding ARP committees, this office has been vocal with counties, municipalities, and their respective associations that if a committee is established to discuss ARP funds and develop spending projects, those meetings should happen in public. This money is no different than divvying up local tax revenue appropriations; it just comes from a different source. We have confirmed that this is the expectation from the federal government as well depending on state access statute provisions.

² A historic index of meeting notices could not be found online.

Under the ODL, “governing body” can mean “two or more individuals who are...”

The board, commission, council, or other body of a public agency which takes official action upon public business.

Ind. Code § 5-14-1.5-2(b)(2). In other words, the question is whether an ARP Committee is a governing body for purposes of the ODL based on the statute’s “other body of a public agency” language.

This office is careful to interpret the access laws through the lens of practicality. It is simply not realistic to qualify every staff meeting, impromptu gathering, or group as subject to the Open Door Law.

We know Porter County is a public agency under the ODL. *See* Ind. Code § 5-14-1.5-2(a). We also know that a gathering at some point in the summer of 2021 to discuss ARP expenditures consisted of two or more people taking official action on public business.³ What is less clear is whether that gathering qualifies as two or more people who are a body of a public agency, that is, an extension of Porter County itself.

There does not seem to be an indication that this gathering was anything but a one-off meeting to discuss the ARP money. In and of itself that does not appear to be problematic or a gathering subject to the Open Door Law.

Fast-forwarding to October 21, 2021, the same group met but merely substituted one of the county commissioners for another. By the time of the special meeting on October 26,

³ In attendance was one commissioner, two county councilors, and the county attorney.

2021, a proposed ordinance was in place with a list of expenditures.

Taken together, one could reasonably infer that this group tacitly became the driving force behind the ARP expenditures. The question is whether these discussions should have happened in a public meeting.

Developing a list of projects upon which to appropriate over \$16,000,000 is no small thing for even a mid-sized county. It is something that takes planning and forethought. And even if public input is not explicitly required, it is never a bad idea. By the time of the October 26 meeting, the entire package appeared to have been a foregone conclusion. This suggests that final action took place outside of a public meeting.

The Board seemingly suggests that the list of expenditures and the ordinance just kind of developed organically from the county attorney between the 21st and 26th. But there must have been an inflection point whereby the county attorney was authorized to develop that specific expenditure list and what to put in the ordinance. This appears to be the complainant's contention, and rightfully so.

By all accounts, it seems to be a credible assertion that communication to develop the list and the ordinance was coordinated in some way between the two commissioners who ultimately voted for its ratification. Whether that be directly or by a proxy matters little to this office. This type of end-around to the Open Door Law does not find favor here.

Even if the letter of the law was not broken, it appears the spirit was eroded. This fosters little confidence in the public. The ARP funding discussions should have been taken in

public if those discussions involved authorized decision-makers. Alternatively, final action directing the county attorney to develop a list of expenditures and an ordinance should have taken place publicly in accordance with the ODL.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Porter County Board of Commissioners, in part, have likely violated the Open Door Law. The group making determinations on the ARP funding also should have held meetings publicly as it appeared to be an official decision-making body of the county.



Luke H. Britt
Public Access Counselor