
OPINION OF THE PUBLIC ACCESS COUNSELOR

MARLA J. AILOR,¹
Complainant,

v.

HAMILTON COUNTY BOARD OF HEALTH,
Respondent.

Formal Complaint No.
21-FC-98

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Hamilton County Board of Health violated the Open Door Law.² Attorney John Terry and board chair Charlotte Boden filed a response on behalf of the board. In

¹ Dr. Allon N. Friedman filed a formal complaint against the Hamilton County Board of Health on July 15, 2021. Dr. Friedman's complaint substantially similar to Ailor's complaint. These actions are consolidated.

² Ind. Code § 5-14-1.5-1-8.

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 July 13, 2021.

BACKGROUND

On July 8, 2021, the Hamilton County Board of Health (Board) held an executive session followed by a regular public meeting. The regular meetings are held quarterly and annual notice indicates the meetings will be held on the second Thursday of the month in which the meeting will be held and will begin at 8:00 a.m.

It is unclear at what time the executive session began, however, the regular public meeting did not begin until approximately 8:40 a.m.

Marla Ailor (Complainant) contends the public notice for the Board's executive session was improper; the board did not post the regular meeting agenda outside the meeting space; it did not begin on time; and the room size was insufficient to accommodate the attendees. Additionally, both Ailor and co-complainant Friedman take exception to the manner in which public comment was conducted by the Board.

On August 2, 2021, the Board filed an answer to the complaints with this office. It argues that the agenda was properly posted inside the meeting location and that the executive session subject matter was appropriate, however, it did not address the start time of the meeting.

As for the executive session, it argues that the provision found in Indiana code section 5-14-1.5-6.1(b)(2) was invoked

as it was necessary to discuss strategy in regard to the implementation of security systems due to perceived unrest in board meetings generally.

Insofar as the meeting capacity issues are concerned, it argues that the attendance had never exceeded ten members of the public and did not have an expectation that interest in the meeting would trigger capacity concerns.

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).

Hamilton 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 Hamilton County Board of Health 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).

This case presents multiple issues, which this opinion will address in turn.

2. Public notice

The Open Door Law requires a governing body to provide public notice of the date, time, and place of any meetings, executive sessions, or any rescheduled or reconvened meeting, at least 48 hours—excluding Saturdays, Sundays, and legal holidays—before the meeting. *See* Ind. Code § 5-14-1.5-5(a). Public notice for an executive session must also state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under the ODL. Ind. Code § 5-14-1.5-6.1(d).

The ODL also governs the way a governing body must provide public notice. Ind. Code § 5-14-1.5-5(b).

Annualized notice of set meeting times is appropriate so long as there is no deviation from the annualized notice.

Here, the start time was posted as 8:00 a.m. for those meetings. The public should have an expectation that a meeting begin on time or as close to it as possible.

A meeting should not so unreasonably depart from its stated meeting time so as to deprive the public of its right to attend and observe. *See* Ind. Code § 5-14-1.5-5(h). Moreover, the courts have recognized the law requires:

... public notice of the “date, time, and place of any meetings,” and “whichever comes later” [referring to the conclusion of an executive session] is not a concrete “time” from the public's perspective. ... The fact that several members of the public nonetheless attended does not alter our conclusion.

Warren v. Board of School Trustees of Springs Valley Community School Corp., 49 N.E.3d 559, (Ind. Ct. App. 2015).

This office has stated that a departure of 15 minutes from the posted notice is enough to violate the statute.³

3. Meeting agenda

Ailor and Friedman both assert that the Board failed to post agenda for the meeting in question. The Board contends that it placed the agenda for the meeting on a table just steps inside the room where it held the meeting.

Under the Open Door Law, if a governing body uses an agenda, it must post a copy of the agenda at the entrance to the location of the meeting before the meeting. Ind. Code § 5-14-1.5-4(a).

³ *Opinion of the Public Access Counselor*, 02-FC-21 (2002).

Here, there is no dispute that the Board uses an agenda. As a result, the ODL requires the Board to post a copy of it at the entrance to the location of the meeting before the meeting. Although the Board provided copies of the agenda on table inside the meeting space, the Board does not dispute the claim that it did not post the agenda at the entrance before the meeting as required. Failing to post an agenda amounts to technical noncompliance with the agenda provision of the law. Consequently, this office does not consider this to be a substantive violation of the Open Door Law.

Even so, the Board's best bet going forward is to post a copy of the agenda outside the meeting room or the main entrance before the meeting. This is even more so if capacity caps prohibit entry into the room.

4. Executive sessions

Public notice for an executive session require additional information above and beyond just date, time, and location. Specifically, executive session notices must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held.

The ODL, in relevant part, authorizes executive sessions for discussion of strategy with respect to the implementation of security systems. *See* Ind. Code § 5-14-1.5-6.1(b).

Here, it appears the Board was meeting simply to discuss potential unrest and agitation amongst board meetings in general. If the purpose of the discussion was merely to address strategies to set meeting protocols and audience control within a meeting, that is not an appropriate use of an executive session.

The term “security systems” is not a broad catch-all for any possible public contention or meeting disruption. Rather, given the context of the executive session statute, it is specific to matters such as physical building security, camera placement, metal detector protocols, software breaches, etc. It is not a generalized term intended to include quelling public disagreements with mask mandates.

5. Seating capacity

From the Board’s response, it appears as if attendance at regular Board meetings is sparse. While it is true that the public’s interest in public health has increased, there does not seem to have been any reasonable expectation to foresee an increased crowd to the extent room capacity would have been reached.

Going forward, the Board should anticipate a larger number of attendees and consider moving to a larger room where more members of the public can safely observe.

6. Public Comment

Both complainants expressed consternation over the way the public input forum was handled by the Board.

This office has been relatively vocal about these considerations but it bears repeating here: The public does not have a right or expectation to speak or participate during a regular public meeting under the Open Door Law.

Public *hearings* notwithstanding, public comment forums are a courtesy extended by governing bodies allowing the public to participate in a board’s execution of public business. This office highly values and encourages that practice, but

it is not required by law. Beyond that statement, this office defers to local governing bodies for regulating rules and regulations around public comment forums. To the extent the complaints take exception to those rules, they will not be addressed further herein.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Hamilton County Board of Health violated the Open Door Law by departing substantially from its stated start time.

A handwritten signature in black ink, appearing to be 'LH Britt', enclosed in a thin black rectangular border.

Luke H. Britt
Public Access Counselor