



STATE OF INDIANA

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July 9, 2015

Mr. Ed Cahill
The Press-Dispatch
P.O. Box 68
Petersburg, IN 47567

Re: Informal Inquiry 15-INF-18; Final action in executive sessions

Mr. Cahill:

On July 7, 2014, you requested an informal opinion on a Public Access question regarding a potential violation of Open Door Law ("ODL") in regard to the Petersburg City Council's ("Council") sealed bid for the Good Samaritan Building. As such, in response to your concerns regarding this matter, I issue the following informal opinion in relation to your inquiry. My opinion is based on the applicable provisions of the Open Door Law: Ind. Code § 5-14-1.5-6.1(d), et seq.

BACKGROUND

You seek determination as to whether the actions of the Council in relation to the potential purchase of the Good Samaritan Building were contrary to the Open Door Law. This request specifically seeks to address the issue of whether the Council should have voted in an open, public meeting to submit a sealed bid for the former Samaritan Center building and whether their actions in not doing so are allowed by statute within the scope of an executive session.

ANALYSIS

It is the intent of the Open Door Law (ODL) the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. See Ind. Code § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. See Ind. Code § 5-14-1.5-3(a).



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Ind. Code § 5-14-1.5-6.1(b)(2)(d) allows a governing body to hold an executive session for discussion of strategy regarding “the purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by other parties”.

A final action must be taken at a meeting open to the public. Ind. Code § 5-14-1.5-6.1(c). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. Ind. Code § 5-14-1.5-2(g). While some decisions may be made in executive session, any *binding* decision could be considered to be a ‘vote’ for the purposes of the Open Door Law based upon the totality of the circumstances. An inference can be made that the decision to submit a bid is a final action. This is especially true when an executive session decision is not ratified publicly. See *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. App. 2001). This is also buttressed by the fact that the Council’s attorney stated the Council actually ‘voted’ in private in an email dated May 8, 2015.

I’ve reviewed the email exchange between you and the Council’s attorney and while he is correct that a bid does not amount to a binding contract, it can be considered an offer to enter into an agreement. See *Protective Coatings, Inc. v A.E. Staley Mfg. Co* 695 N.E.2d 1030 (1998) (a bid, if detailed enough, can amount to an offer creating the power of acceptance). Viewed holistically, the resolution to submit a bid in the manner the Council did amount to a final action and not a mere ‘decision’.

I also empathize with the Council’s position that disclosing details of the bid could potentially compromise the City’s competitive position. Voting on whether to submit a bid in an open meeting, however, does not mean the contents of the bid have to be disclosed. The intent of the executive session exception is clearly to allow public agency to maintain a competitive foothold when decided.

Best practice for situations like this is for the governing body to hold an executive session to discuss the strategy for the purchase of real property – which includes what to include in a bid and whether to submit it – and then to approve the decision in an open meeting without disclosing the details of the bid itself or reveal the strategy. But the fact that a bid is submitted does not place the City at a competitive disadvantage.

Governing bodies must be mindful the purpose of executive sessions is to receive information and to discuss sensitive matters in very narrow circumstances – not to make



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binding determination based upon the information presented. An action to submit a bid is a matter of public interest and a decision to do so should be publicly approved after it is discussed in an executive session.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read "LH Britt", written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Brian Mahoney, Esq.