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November 15, 2021

Keely Butrum
Hancock County Council
111 American Legion Place
Greenfield, IN 46140

VIA EMAIL: keelybutrum@yahoo.com

RE: Informal opinion 21-INF-9; Executive Session Notice and Attendees

Dear Ms. Butrum:

This informal opinion examines whether the Hancock County Board of Commissioners violated the Open Door Law when two members of the Board planned to attend an executive session held by the Planning Commission. More specifically, you are seeking a clear explanation of the notice requirements for executive sessions as well as who all would be allowed to attend said meeting.

According to the meeting minutes, a copy of which you included with your inquiry, the Hancock County Planning Commission held an executive session on August 10, 2021, at 6:30 p.m. The stated purpose was to discuss sensitive matters pertaining to a local economic development.

Also discussed was the County Highway Department's timetable for repair work to be done on some local county roads and bridges and the cost. The meeting minutes also noted that two members of the Board of Commissioners were in attendance, one Commissioner being an appointee to the Plan Commission plus one additional Commissioner.

1. Open Door Law

The Open Door Law ("ODL") requires the governing body of a public agency to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. *See* 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).

Hancock County is a public agency for purposes of the ODL; and thus, subject to the law’s requirements. *See* Ind. Code § 5-14-1.5-2. The Hancock County Board of Commissioners (Commissioners) and Area Plan Commission (APC) are governing bodies of the county for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). So, unless an exception applies, all meetings of the Commissioners and the APC must be open at all times to allow members of the public to observe and record.

1.1 Defining “meeting”

Under the ODL, “meeting” means a gathering of a majority of the governing body of a public agency for the purpose of taking official action¹ upon public business.² Ind. Code § 5-14-1.5-2(c).

In other words, unless an exception applies, any time at least two of the Hancock County Commissioners or a majority of the APC gather to take official action on public business it will constitute a meeting for purposes of the Open Door Law; and thus, must be open to the public.

Here, the issue presented involves the primary exception to the ODL’s open meeting requirement: Executive sessions.

1.2 Executive sessions

Under the Open Door Law, “executive session” means “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. The governing body may also admit an individual who has been elected to the governing body but has not been sworn in as a member of the governing body.” Ind. Code § 5-14-1.5-2(f).

Therefore, the governing body holding the meeting can act as the gatekeeper of entry to the meeting. It can invite whomever it chooses so long as they are necessary – this includes members of other governing bodies.

The ODL authorizes executive sessions in limited, specific circumstances, which must be properly and specifically noticed by reference. *See* Ind. Code § 5-14-1.5-6.1(b)(1) to – (15).

The enumerated instances allowing a legal executive session are relatively narrow. There are no catch-all subject matters allowing closed door meeting. They are for specific, limited reasons only.

¹ “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).

² “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).

Here, based on the APC minutes of an August 10, 2021, meeting, the justification for holding the closed-door session does not appear to be consistent with the language of the statute. “Sensitive matters” are not enough to qualify for the exception. Similarly, there is no executive session subsection for discussing road work.

Notably, the ODL requires meeting memoranda for executive sessions, like all other meetings, but with modified requirements. Specifically, Indiana Code section 5-14-1.5-6.1(d) provides the following:

the memoranda and minutes from an executive session must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice

It does appear as if the APC is meeting this requirement, subject matter deficiencies notwithstanding.

This office has maintained that when a majority of one governing body is attending the meeting of another, dual notice should be posted. Here, a member of the APC is also a member of the Board of Commissioners. With the addition of the second Commissioner, a majority was present from the Board. Arguably, a Commissioner cannot take off that hat when performing as an APC member due to those duties being inextricably linked.

When interpreting a statute, courts presume that the General Assembly intended the provision to be applied in a manner in which the policies and goals of the law are achieved³. Those policy goals, of course, are a fully informed public and an accountable public governing body.⁴

Going forward, it is advisable that the County governing bodies shore up its executive session practices insofar as notice is concerned. While this complaint was informal and not adversarial, this office does field formal complaints which could rise to the level of civil liability⁵ if taken far enough. Sound compliance with the law avoids those complications.

Please do not hesitate to contact me with any questions.

³ *Commissioner, Indiana Department of Insurance v. A.P.*, 121 N.E.3d 548 (Ind. Ct. App. 2018), transfer denied, 111 N.E. 3d 197 (2018).

⁴ *Ind. Code 5-14-1.5-1*

⁵ Notably, per a question posed by a local prosecutor, there is no criminal liability under the Open Door Law.

Best regards,

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

Luke H. Britt
Public Access Counselor