



STATE OF INDIANA

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OPINION OF THE PUBLIC ACCESS COUNSELOR

STEVEN PORTER,

Complainant

v.

EASTERN HOWARD

SCHOOL CORPORATION

Respondent

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17-FC-46

ADVISORY OPINION

April 10, 2017

This advisory opinion is in response to a formal complaint alleging the Eastern Howard School Corporation (“School”) violated the Open Door Law (“ODL”), Indiana Code § 5-14-1.5-1 et. seq. The School responded March 16, 2017 via Mr. Jonathan Mayes., Esq. The response is enclosed for review. Pursuant to 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 February 27, 2017.

BACKGROUND

The formal complaint alleges the Eastern Howard School Corporation violated the ODL by conducting public business in private. The Complainant claims the school received information and took final action via email regarding a proposal and decision to retain outside legal counsel. On February 27, 2015, Liberty Counsel sent an email offering pro bono legal assistance and consultation following allegations in the local newspaper. The following day an email copying the message to all five (5) school board members accepting the representation was sent. The Complainant claims the acceptance of such representation was not allowed under ODL.



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The representative for the School has responded stating the formal complaint is untimely and the claims are inaccurate. The Freedom from Religion Foundation sent a letter to the School in regard to a teacher's classroom. Liberty Counsel was unilaterally solicited by a teacher wherein Liberty Counsel offered its services to the School superintendent. The following day the superintendent accepted the offer and copied the other school board members on the acceptance email. The Board members replied over the course of the next few hours stating support for the engagement.

ANALYSIS

It is the intent of the Open Door Law ("ODL") that 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 Indiana Code § 5-14-1.5-1.*

As to the timeliness issue, for complaints regarding allegations of the Open Door Law, a complaint to this Office is considered timely if it is filed within thirty (30) days of when the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. *See Indiana Code § 5-14-5-7.* Notice occurred pursuant to a public records request in January 2017, which would begin the period for the statute of limitations; it is tolled until an individual receives notice in fact.

Nevertheless, I am disinclined to make a conclusive determination regarding a meeting which took place over two (2) years prior. Had the actions of the School caused substantial prejudice to the public at large, it is likely I would have fielded a formal complaint at that time from another member of the public. Therefore, I will opine on the issues at hand, but I decline to state a determinative conclusion.

The School correctly identifies that some, but not all of the issues presented in the formal complaint are beyond the scope of this Office. The particulars of what constitutes a valid attorney-client privilege are better left for a fact-finder, however, I will opine on the issues related to the Open Door Law¹

The crux of the complaint appears to seek a determination as to whether the email correspondence constituted a violation of the Open Door Law. The Complainant and Respondent have both cited my

¹ One of the Complainant's queries was whether the relationship between the School and pro bono counsel qualify for exceptions related to attorney-client privilege. Based on the information provided, there appears to be a legitimate offer and acceptance between an agent of the School and Liberty Counsel, therefore the School may assert any applicable privilege based upon that relationship.



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prior opinions addressing email communication in relation to the Open Door Law and are familiar with my guidance. To summarize those opinions, email communication is appropriate as long as no final action is taken and the timing of the correspondence does not rise to a certain degree of immediacy. It has been my long-standing opinion the Open Door Law governs simultaneous communication akin to a face-to-face conversation. Anything short of concurrent messages would not be considered a trigger to the Open Door Law. Official actions such as deliberations and discussions contemplate a real-time call-and-response exchange. The mere circulation of thoughts and ideas over email, if they are not instantaneous, do not rise to that level. As I have stated previously, text messages, instant messaging and comment boards could be a different matter. Similarly, the expectation of an immediate email response by a majority of a governing body could be simultaneous under the right circumstances.

The safeguard to transparency is that these emails are public record which must be either disclosed or retained in the regular course of business. Clearly this safeguard was effective given the Complainant was able to obtain the messages. There is a danger to using emails amongst a governing body, however, and I caution the school to be mindful of this consideration: it potentially gives the perception public business is being done outside of the scrutiny of the public – the very thing the Open Door Law seeks to protect against. It does not appear as if the Board officially ratified the superintendent's acceptance of counsel or guided her toward that decision. It would have been accepted regardless of the Board's input. And while certain replies took place in a matter of minutes, they were mostly declarative statements and not dialogue.

I am hopeful the School takes heed of this guidance and conducts its business accordingly, however, based on the information provided their actions in this situation do not raise a significant concern.

Please do not hesitate to contact me with any questions.

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

Luke H. Britt
Public Access Counselor

Distribution: Mr. Jonathan L. Mayes, Esq.