



STATE OF INDIANA

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January 21, 2014

Ms. Sara E. Clifford
147 E Main St.
Nashville, IN 47448

Re: Formal Complaint 13-FC-352; Alleged Violation of the Open Door Law by the Brown County Commissioners

Dear Ms. Clifford,

This advisory opinion is in response to your formal complaint alleging the Brown County Commissioners (“Commissioners”) violated the Open Door Law (“ODL”), Ind. Code § 5-14-1.5-1 *et. seq.* The Commissioners responded to your complaint via Mr. John Kernard, President. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on December 19, 2013.

BACKGROUND

Your complaint alleges the Brown County Commissioners violated the Open Door Law by conducting a closed meeting without notice.

You allege in your formal complaint that on or about November 18, 2013, the Brown County Commissioners met in a local restaurant to discuss a road improvement project over lunch. They allegedly received information from a constituent affected by the project. You have also cited several other instances in the past where the Commissioners may have met without notice.

The main area of contention appears to be the Commissioners’ interpretation of Ind. Code § 5-14-1.5-(5)f(2) which allows governing bodies to meet to receive information in order to carry out administrative functions. The Commissioners concede that the meeting took place, however, the gathering was solely intended to receive information. The Commissioners characterize that meeting in particular as an “executive session administrative meeting.”

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).

The ODL requires that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. See Ind. Code § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if no such office exists, at the place where the meeting is held. See Ind. Code § 5-14-1.5-5(b)(1).

As the Commissioners point out, the requirements for posting notice do not apply when the executive of a county or the legislative body of a town meets, if the meeting is held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. See Ind. Code § 5-14-1.5-5(f)(2). Administrative functions do not include the awarding of contracts, the entering into contracts or any other action creating an obligation or otherwise binding a county or town. Even though notice is not required, the administrative meetings must be held in the public, since the notice provision of the ODL is the only provision that does not apply to an “administrative function” meeting. See Ind. Code § 5-14-1.5-5(f)(2).

Administrative functions are not defined in the Indiana Code. I do not find the non-qualifying actions mentioned in Ind. Code § 5-14-1.5-5(f)(2) to be an exhaustive list of what is not an administrative function. For example, in Informal Inquiry of the Public Access Counselor 12-INF-36, Counselor Hoage offered an audit of prior Counselors’ decisions:

In previous opinions, the following have been considered to be an appropriate topic for discussion at an administrative meeting:

- Preliminary matters regarding the status of an individual’s employment with the County, provided that all final actions or any decisions regarding the employment status or obligating the governing body are made at an open public meeting. *See Opinions of the Public Access Counselor 07-FC-250, 10-INF-56, 11-FC-14, 11-INF-69.*
- Making copies of documents with no substance discussion regarding public business. *See Opinion of the Public Access Counselor 09-FC-69.*
- Determining when a meeting will occur and setting an agenda. *See Opinion of the Public Access Counselor 07-FC-62.*
- Signing documents. *See Opinion of the Public Access Counselor 09-FC-62.*
- Creation of an equipment list and to direct the return of equipment from a Town employee. *See Opinion of the Public Access Counselor 00-FC-04.*

- Receiving status update on ongoing debris removal work. *See Opinion of the Public Access Counselor 12-FC-77.*
- Discussion on the placement of photographs, decorating, and physical configuration of Town Hall. *See Opinion of the Public Access Counselor 12-FC-74.*
- Organize and administer plans to hold the Town Festival. *See Informal Opinion of the Public Access Counselor 11-INF-13.*
- How to deal with the absence of the clerk-treasurer at meetings (e.g. who would be responsible for drafting the meeting memoranda). *See Opinion of the Public Access Counselor 03-FC-05.*
- Alteration of county employee work schedule and amending the county employee handbook. *See Opinion of the Public Access Counselor 08-FC-137.*

Alternatively, the following have been deemed to be an inappropriate issue to be addressed at an administrative meeting:

- Terminating an employee. *See Opinion of the Public Access Counselor 07-FC-250.*
- Considering or evaluating the sale or lease of real property. *See Opinion of the Public Access Counselor 04-FC-138 & 139.*
- Making formal motions with respect to whether the body would allow a document to be inspected or copied and setting an appropriate fee. *See Opinion of the Public Access Counselor 06-FC-200.*
- Approving financial claims. *See Opinions of the Public Access Counselor 07-FC-7, 8, & 9.*
- Discussing whether the governing body was prepared to vote. *See Opinion of the Public Access Counselor 08-FC-186.*
- Hiring a town attorney. *See Opinion of the Public Access Counselor 01-FC-79.*
- Holding deliberations on a town's budget. *See Opinion of the Public Access Counselor 04-FC-154.*
- Discussions regarding ambulance service between the Commissioners and a separate governing body. *See Opinion of the Public Access Counselor 98-FC-5.*

Clearly, the administrative functions deemed permissible are purely managerial and organizational in nature. Once an administrative meeting convenes to receive information regarding substantive public business, it no longer becomes administrative and must be open. When a governing body as a quorum meets to receive information about subject matter in which there is public interest, the meeting falls outside of the intended "administrative" exception.

Counselor Hoage provides more guidance later in the above opinion:

[D]etermining whether a topic or action is appropriate for an administrative meeting generally requires a highly subjective review of the issues. The ODL does not contain a bright-line list of issues or subjects that are appropriate or prohibited from being discussed at an administrative meeting. In reviewing the previous opinions of the public access counselor that opined that an administrative meeting was proper, the

subject matter primarily dealt with the function of carrying out the everyday or routine tasks necessary to ensure the proper management of the county or town. It is my opinion that anytime there is the slightest hesitation on whether an administrative meeting would be appropriate, a meeting should not occur. This is large part due to the declaration made by the General Assembly in I.C. § 5-14-1.5-1, which provided that it is the intent of the ODL that official action of public agencies be conducted and taken openly and the provisions of the law are to me liberally construed with the view of carrying out this policy. *See* I.C. § 5-14-1.5-1.

I wholeheartedly concur with Counselor Hoage. The purpose of the Open Door Law is to give the public access to government activity. At the same time, I recognize the necessity to mobilize and discuss certain operational aspects of government administration without waiting 48 hours to convene. This is not one of those cases.

To address some of your other concerns, Ind. Code § 5-14-1.5-6.1(d) mandates public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. All of the subject matters intended to be discussed fall under the permissible discussion topics for a closed door executive session under the ODL. The declaration that the meeting was an “executive session administrative meeting” is not permissible under the ODL.

The Commissioner submits that not every gathering of a governing body is considered a meeting subject to the ODL. This is correct. Chance or social meetings are not intended to fall under Open Door Laws. See Ind. Code § 5-14-1.5-2(c). Also, the Commissioners accurately point out that one-on-one meetings with constituents to discuss matters individually are appropriate.

Furthermore, while I don’t often speak to intent in determining if a violation has occurred, it does appear that the Brown County Commissioners did not intend to purposely violate the Open Door Law. Both sides suggest as much. They seem to be open and approachable in every other way. Yet despite the good faith on the part of the Commissioners, I find them to be stretching the “administrative function” meeting exception too far.

CONCLUSION

Based on the foregoing reasons, it is the opinion of the Public Access Counselor the Brown County Commissioners violated the Open Door Law.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a long, sweeping underline.

Luke H. Britt

Public Access Counselor

Cc: Mr. John Kennard