
OPINION OF THE PUBLIC ACCESS COUNSELOR

TINA M. PORTER,
Complainant,

v.

TOWN OF WHEATFIELD,
Respondent.

Formal Complaint No.
22-FC-64

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response a formal complaint alleging that the Wheatfield Town Council violated the Open Door Law.¹ Attorney Luis E. Vallejo filed a response on behalf of the town. In accordance with Indiana Code § 5-14-5-

¹ Ind. Code § 5-14-1.5-1-8.

10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on April 25, 2022.

BACKGROUND

This case deals with giving proper notice for an executive session as well as what subject matter items are permitted for executive sessions.

On April 24, 2022, the Town of Wheatfield (“Town”) held an executive session with the following agenda items listed on its notice:

1. Introducing new council member to paperwork for meeting
2. Part-Time interview position for help
3. Best way/procedure for handling public request applications
4. Legal explanation for the water way issue. – Attorney
5. Sewer enlargement plans moving forward

On April 25, 2022, Tina Porter (Complainant) filed a formal complaint alleging the Town violated Open Door Law (ODL). Specifically, Porter argues that a lack of a specific citation to the Indiana Code for each subject matter is a violation of the ODL. Porter also argues that items 3, 4, and 5 do not qualify as proper subject matters for an executive session.

On May 19, 2022, the Town responded, through attorney Luis E. Vallejo, to Porter’s complaint. The Town agrees with Porter that the notice of the executive session was

made in error due to a lack of specific citations to Indiana Code. The Town disagrees with Porter that items 3-5 are improper subject matters for an executive session.

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).

The Town of Wheatfield 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 Town of Wheatfield Council (Council) is a governing body of the agency; and thus, subject to the ODL. *See* Ind. Code § 5-14-1.5-2(b).

As a result, unless an exception applies, all meetings of the Council 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).

Under the ODL, the term “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.” Ind. Code § 5-14-1.5-2(f).

There exists a heightened requirement for executive session notice and for good reason. While the law allows some latitude to a governing body to meet behind closed doors, the public in turn is entitled to specific notice as to why.

The ODL requires public notice of executive sessions to state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). Ind. Code § 5-14-1.5-6.1(d). Subsection (b), of course, lists the specific subject matters that are authorized for an executive session.

Here, the Town concedes that the public notice did not contain the elements required by law insofar as specific subject matter is concerned. In turn, the Town provided a sample notice that it will use going forward. The new template is appropriate, and this office appreciates the Town’s willingness to course correct.

2. Additional subject matter

In addition to the public notice, Porter contends the matters discussed in the Town's executive session were improper under the ODL. She argues the following topics are not consistent with the law's stated purpose:

- Best way/procedure for handling public request applications
- Legal explanation for the water way issue. – Attorney
- Sewer enlargement plans moving forward

Our General Assembly expressly declared that the Open Door Law "shall be liberally construed" in favor of transparency. *See Ind. Code § 5-14-1.5-1.* The Courts have recognized this tenet as well and called for exceptions to be narrowly and conservatively construed. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995).

Given that executive sessions are the exception to the general rule of open meetings, they are closely scrutinized by this office. Therefore, the subject matters discussed in executive session must snugly fit within the statutory parameters. "All doubts must be resolved in favor of requiring a public meeting and all exceptions to the rule requiring open meetings must be narrowly construed with the burden of proving the exception on the party claiming it." *Baker v. Town of Middlebury*, 753 N.E.2d 67, 70 (Ind.Ct.App.2001).

Here, it appears the Town generously interprets the ODL's executive session provision to include matters not specifically enumerated.

The Town argues the discussion of public request procedures falls under the category regarding receiving information about and interviewing prospective employees.² The law does not provide for discussions of general personnel activities or job descriptions. Simply put, this discussion was outside the bounds of propriety for an executive session. No information was received about any prospective employee, nor was anyone interviewed. Those are the only two action items allowable under this subsection.

The second item in question regards advice provided by the Town attorney. Indiana Code section 5-14-1.5-6.1(b)(2)(B) contemplates strategic discussions about litigation that has been threatened by writing. The Town posits that this is appropriate because it received a written litigation threat from a constituent. This justification passes muster so long as it is *specific* to the threatened litigation and not legal advice generally. *See Simon v. City of Auburn, Ind., Bd. of Zoning Appeals*, 519 N.E.2d 205, 211 (Ind.Ct.App.1988).

The final item of the notice listed sewer enlargement plans. The Town argues it should discuss ongoing contracts privately if no official action is taken. Nothing in statute or case law supports this claim.

Any matter not specifically and narrowly cited in the executive session statute must be addressed at a public meeting. This includes any transactional matters for new or ongoing contracts.

² Ind. Code § 5-14-1.5-6.1(b)(5).

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Town of Wheatfield violated the Open Door Law by holding an executive session without proper notice and to discuss subject matters not authorized by law.

While the Town has seemingly remedied the public notice issue, this office encourages it to be more mindful of the limitations of subject matters appropriate for a closed door meeting.



Luke H. Britt
Public Access Counselor

Issued: June 30, 2022