
OPINION OF THE PUBLIC ACCESS COUNSELOR

THE PURDUE EXPONENT,
Complainant,

v.

PURDUE UNIVERSITY BD. OF TRUSTEES,
Respondent.

Formal Complaint No.
22-FC-70

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Purdue University Board of Trustees violated the Access to Public Records Act¹ and the Open Door Law.² Deputy General Counsel Trenten D. Klingerman filed an answer on behalf of Purdue. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal

¹ Ind. Code § 5-14-3-1-10.

² Ind. Code § 5-14-1.5-1-8.

complaint received by the Office of the Public Access Counselor on April 28, 2022.

BACKGROUND

This case involves a dispute about whether the Purdue University Board of Trustees (Board) violated the Access to Public Records Act (APRA) by denying a student newspaper access to board packets before a meeting. This case also considers whether the Board violated the Open Door Law (ODL) by holding too many executive sessions.

On April 5, 2022, the Purdue *Exponent* (Complainant), a student-run news publication, requested the packet for an upcoming Board meeting. The next day, the Board denied access to the packet on grounds that the records qualify as deliberative material under APRA until after the meeting.

On April 26, 2022, the *Exponent* filed a formal complaint with this office alleging the Board violated APRA and the ODL. Specifically, the *Exponent* argues that the Board packets are disclosable under APRA. The *Exponent* relies, in part, on previous opinion of this office as support for its argument. *See Opinion of the Public Access Counselor, 21-FC-200 (2021)*.

Additionally, the *Exponent* argues that the Board violates the ODL by holding an excessive number of executive sessions, which all take place immediately before public meetings. The *Exponent* also contends that the public meetings are not held properly due to the lack of discussion and debate, presumably due to the executive session held just before.

On May 18, 2022, the Board filed an answer to the complaint denying all alleged violations of APRA and the ODL.

First, the Board argues that Purdue did not deny a public records request from the *Exponent*. It maintains the requested board packets are excepted from public disclosure under APRA's deliberative materials exception until after the Board's meeting is finished.

The Board further stated that no request for any particular material was made in response to the denial. The Board also argues that not all boards across the state make their packets disclosable at the entrance of meetings.

Second, as it applies to the *Exponent's* ODL claims, the Board argues that Purdue's executive sessions are properly conducted with sufficient public notice, and the university's public sessions are properly conducted under the law.

The Board cites *Opinion of the Public Access Counselor, 20-FC-126 (2020)*, arguing there is no express cap on the frequency of executive sessions. The Board meets in six scheduled executive sessions per year. The Board also states that the ODL does not require board members to debate or disagree with each other in public meetings. The Board argues that because final action is only taken in public meetings, there is no ODL violation.

ANALYSIS

1. The Access to Public Records Act (APRA)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, APRA states that "(p)roviding persons with information is an essential function of a representative

government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *Id.*

Purdue University is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy Purdue’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

1.1 The *Exponent’s* APRA complaint

The *Exponent* contends that Purdue withholds board packets until after the conclusion of the meeting. Purdue claims the packets are deliberative in nature.

Under APRA, deliberative materials include records that are:

intra-agency or interagency advisory...including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one’s ideas, considerations, and recommendations on a subject or issue for use in a decision-making process.

Prior opinions of this office have largely focused on the manner in which packets can be requested, but not necessarily the timing of their production. For instance, in *Opinion of the Public Access Counselor*, 21-FC-200 (2021), this office concluded that board packets, as commonly known, are self-contained sets of documents. Therefore, a request for a “board packet” is reasonably particular for purposes of APRA. That does not appear to be at issue here.

Purdue instead categorizes the board packet as deliberative prior to the meetings and is only willing to make them available after the fact.

It is true that some board packets could contain materials that would need to be redacted before release, but it is unlikely that the entirety of the packet is nondisclosable. Personnel issues, specific student matters, and other sensitive details would indeed need to be excised from those packets.

Some boards anticipate such matters and have a redacted version of their packets and make them available to the public contemporaneously with the start of the meeting. In that way, attendees do not have to guess as to the content and nature of reference materials while they follow along with the agenda. While that is not a statutory requirement, it is something for Purdue to consider.

More troubling, however, is Purdue’s assertion that the Open Door Law does not require a governing body to “debate or disagree with each other in public.”

Deliberation is a condition precedent to qualifying documents as deliberative material. If, as Purdue suggests, meetings are merely perfunctory obligations to rubber-stamp

predetermined, united action, then there is no credible way to categorize board packets as deliberative. To do so suggests a decision has already been made, which is a segue to part two of this discussion.

2. The Open Door Law (ODL)

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).

Purdue University 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, Purdue University's Board of Trustees is a governing body subject to the ODL. *See* Ind. Code § 5-14-1.5-2(b).

2.1 The *Exponent's* ODL claims

First, the *Exponent* argues the Board of Trustees consistently holds executive sessions before every public board meeting.

Under the ODL, an "executive session" is "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). The ODL authorizes a governing body to hold an executive session only in the specific instances listed in the statute *See* Ind. Code § 5-14-1.5-6.1(b)(1) to -(15). In other words, if the subject matter of an

executive session is not listed in section 6.1(b), then the session violates the ODL.

As set forth above, the ODL limits a governing body's use of executive sessions by authorizing them only in narrow circumstances. The law does not expressly cap their frequency.

Even so, this office consistently advises governing bodies at all levels of government to schedule executive sessions sparingly. And with good reason: the purpose of the ODL is to ensure that public business happens in public:

In enacting this chapter, the general assembly finds and declares that this state and its political subdivisions exist only to aid in the conduct of the business of the people of this state. It is the intent of this chapter that 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. If, as Purdue suggests, there is no debate required at a public meeting and everything is accomplished by consent agenda, it follows that the Board is settling all matters behind closed doors – even those issues that fall outside of the executive session statute.

If a meeting of a governing body is simply a paint-by-numbers, go-through-the-motion exercise, then the Open Door Law is not worth the paper upon which it is printed.

Frequency of executive sessions are not usually a problem area for those boards that still have robust and sincere deliberation in a public meeting. This office does not take exception to Purdue's use of executive session when it is

necessary and appropriate. An agency the size of Purdue will naturally have more than others.

It is critical, however, that when it comes time to take final action, those decisions are explained in public so that observers can evaluate the quality of those decisions. This is true even for those issues that originate in executive session.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Purdue University Board of Trustees should reconsider its position on disclosing board packets prior to its meetings. Similarly, while the frequency of the board's executive sessions does not appear to be immediately problematic, the board should ensure that public meetings contain robust discussion when warranted to give context to its actions.



Luke H. Britt
Public Access Counselor