
OPINION OF THE PUBLIC ACCESS COUNSELOR

MARSHALL D. JENKINS,
Complainant,

v.

JENNINGS COUNTY BD. OF COMMISSIONERS,
Respondent.

Formal Complaint No.
22-FC-98

Luke H. Britt
Public Access Counselor

This advisory opinion is in response a formal complaint alleging that the Jennings County Board of Commissioners violated the Open Door Law.¹ Attorney J. Alex Zimmerman filed an answer on behalf of the board. In accordance with 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 June 13, 2022.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

In this case we consider whether the Jennings County Board of Commissioners (Board) violated the Open Door Law (ODL) by adopting an ordinance that was not included on the public meeting agenda.

On June 9, 2022, the Board adopted an ordinance prohibiting the use of county public records and data for commercial purposes during its public meeting.²

The introduction and adoption of the ordinance were not included on the posted agenda for the meeting or on the county calendar.

The next day, Marshall D. Jenkins (Complainant) filed a formal complaint alleging the Board violated the Open Door Law. Specifically, Jenkins argues the Board did not disclose or discuss the ordinance prior to the public meeting. He asserts the Board presented the ordinance and voted to approve it in a matter of three minutes. Additionally, Jenkins contends the ordinance should have been on the meeting agenda. He also argues that the ordinance will unfairly restrict groups in the county from accessing public records.

On July 5, 2022, the Board filed an answer with this office denying any violation of the ODL. First, the Board argues that Jenkins is without standing to file a formal complaint

² The Access to Public Records Act (APRA) authorizes a political subdivision to enact an ordinance prescribing the conditions under which a person who receives information on disk or tape under subsection (d) may or may not use the information for commercial purposes. *See* Ind. Code § 5-14-3-3(e).

because he has not received a denial under the public access laws.

Second, the Board admits that it did not include the ordinance on the meeting agenda. Even so, the Board asserts that the ODL does not prohibit an agency from changing or adding to the agenda during a meeting.

The Board also argues that the adopted ordinance is lawful in accordance with the Access to Public Records Act (APRA).³

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).

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

³ Ind. Code § 5-14-3-1-10.

As a result, unless an exception applies, all meetings of the Board must be open at all times to allow members of the public to observe and record.

2. Standing to file a formal complaint

The Board argues Jenkins lacks standing to file a formal complaint with this office. Indiana Code section ~~5-14-5-6~~ sets forth the grounds for filing a complaint with this office. Specifically, the statute provides:

A person or a public agency denied:

- (1) the right to inspect or copy records under IC ~~5-14-3~~;
- (2) the right to attend any public meeting of a public agency in violation of IC ~~5-14-1.5~~; or
- (3) any other right conferred by IC ~~5-14-3~~ or IC ~~5-14-1.5~~ or any other state statute or rule governing access to public meetings or public records;

may file a formal complaint with the counselor under the procedure prescribed by this chapter or may make an informal inquiry under IC ~~5-14-4-10(5)~~.

Ind. Code § ~~5-14-5-6~~. This office concludes that Jenkins has standing because he is challenging the Board's agenda procedure under the Open Door Law.

3. Public meeting agendas

Jenkins argues the Board strayed out of compliance with the Open Door Law because the ordinance in question was not included on the meeting agenda. The Board concedes that it

did not include the ordinance on the agenda but argues the ODL does not prohibit a governing body from amending meeting agendas.

Under the ODL, a governing body of a public agency utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. Ind. Code § 5-14-1.5-4(a). Although the ODL does not specify what agenda items are required, it does state that “a rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void.” *Id.*

Additionally, nothing in the ODL prohibits a governing body from amending an agenda for a public meeting. This office has consistently acknowledged meeting agendas to be a worthwhile endeavor, but the purpose is not to strictly bind a governing body to the items listed on the schedule.

3. Jennings County ordinance 2022-10

Finally, Jenkins contends the ordinance in question runs afoul of the Access to Public Records Act. As noted above, APRA contains usage provisions on a handful of select types of records preventing records from being used to serve a commercial or political end.

Notably, a local government unit may enact an ordinance prescribing conditions under which a person may or may not use electronically stored data for commercial purposes. *See* Ind. Code § 5-14-3-3(e). The ordinance here mirrors the statutory language and prohibits use of such records.

Even more specific is the statutory ability of local government to restrict the use of public records for political purposes. Only three types of records qualify for any local ordinance restricting usage for political purposes:

- (1) A list of employees of a public agency.
- (2) A list of persons attending conferences or meetings at a state educational institution or of persons involved in programs or activities conducted or supervised by the state educational institution.
- (3) A list of students who are enrolled in a public school corporation

Ind. Code § 5-14-3-3(f). Problematically, the ordinance can be tacitly read that commercial and political usage are lumped into the same prohibition. While the ordinance does not expressly prohibit general records from political use, one can make an inference based on the wording of the ordinance.

While the ordinance is not troublesome regarding commercial usage, it is ambiguous enough that it may deter political usage of more than just the above-listed categories of records. Toward that end, this office recommends revising the ordinance consistent with this opinion and the Access to Public Records Act.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Jennings County Board of Commissioners did not violate the Open Door Law but should review the ordinance in question to ensure consistency with the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor

Issued: September 7, 2022