



# STATE OF INDIANA

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August 27, 2014

Ms. Lori R. VanOver  
770 W. Markle Road  
Huntington, IN 46750

*Re: Formal Complaint 14-FC-161; Alleged Violation of the Open Door Law by the Andrews Town Council*

Dear Ms. VanOver,

This advisory opinion is in response to your formal complaint alleging the Andrews Town Council ("Council") violated the Open Door Law (ODL), Ind. Code § 5-14-3-1 *et seq.* The Council has responded to your complaint via Mr. Michael Hartburg, Esq. 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 July 29, 2014.

## BACKGROUND

Your complaint dated July 23, 2014, alleges members of the Andrews Town Council conducted business in violation of Ind. Code § 5-14-1.5 *et. al.*

On July 14, 2014, the Andrews Town Council held a regularly schedule public meeting wherein a vote was taken to reassign two personnel positions. The vote passed. It was also indicated two of the three councilmen discussed elements of the decision over the phone prior to the meeting.

The Council contends the vote was not a violation of the Open Door Law, as it was taken in a properly noticed public meeting. Regarding the telephone conversation, the Council asserts the conversation was not a violation of the Open Door Law because the councilmen were not physically present in the same room.

## 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 Andrews Town Council consists of three board members. If any two of those three members hold a discussion relating to Town business outside of a duly-noticed public meeting, the conversation is a violation of the Open Door Law. This is often an inconvenient and cumbersome burden for small governing bodies (Indiana County Commissioners face that same logistical challenge); however, there is no exception for small agencies.

"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). "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). "Official action" is very broadly defined by our state legislature to include everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. Ind. Code § 5-14- 1.5-2(d).

A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. Ind. Code § 5-14-1.5-5(a).

It appears the reassignment vote was authorized Council business and was held in a public forum. It seems you have not identified an Open Door Law violation with respect to their final action.

The referenced telephone conversation, however, is a much more troublesome issue, especially given the Council's interpretation of "meeting". The Council quotes *Opinion of the Public Access Counselor 08-FC-208* as guidance. That Opinion, however, cites Ind. Code § 5-14-1.5-3(d) which has been repealed.

Similarly, however, Ind. Code § 5-14-1.5-3.5(b) states:

A member of the governing body of a public agency who is not physically present at a meeting of the governing body but who communicates with members of the governing body during the meeting by telephone, computer, video conferencing, or any other electronic means of communication:

(1) may not participate in final action taken at the meeting unless the member's participation is expressly authorized by statute; and

(2) may not be considered to be present at the meeting unless considering the member to be present at the meeting is expressly authorized by statute.

To paraphrase my analysis in *Advisory Opinion 14-FC-100*, the Council interprets this statute to imply telephonic presence is not sufficient to constitute a majority for the purposes of taking official action on public business. I disagree. This statute is for the purposes of establishing presence for a quorum in order to take final action or votes. Other subsection of the ODL (see the prohibition on serial meetings at subsection 3.1) consider electronic communication – other than email – to constitute constructive presence.

To accept the Council's interpretation would be authorizing governing bodies to hold telephonic or videoconference discussion sessions behind closed doors. This would effectively erode the objective of the Open Door Law itself. Any kind of *simultaneous communication* by a majority of elected or appointed board members is enough to trigger the Open Door Law. See also *Opinion of the Public Access Counselor 13-FC-275*.

### CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor that the Andrews Town Council did not violate the Open Door Law by voting for the personnel reassignment, but did violate the Open Door Law by having a majority conversation telephonically.

Regards,



Luke H. Britt  
Public Access Counselor

Cc: Mr. Michael Hartburg, Esq.