



# STATE OF INDIANA

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October 19, 2016

Mr. Donald E. Schliz  
3201 Dunes Highway  
Gary, Indiana 46402

*Re: Formal Complaint 16-FC-265; Alleged Violation of the Open Door Law by the Indiana Alcohol and Tobacco Commission (Priority)*

Dear Mr. Schliz:

This advisory opinion is in response to your formal complaint alleging the Indiana Alcohol and Tobacco Commission ("Commission") violated the Open Door Law ("ODL"), Indiana Code § 5-14-1.5-1 et. seq. The Commission has responded via Mr. David Cook, Esq., Chairman. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 11, 2016. Your complaint has been granted priority status.

## **BACKGROUND**

Your complaint dated October 11, 2016, alleges the Indiana Alcohol and Tobacco Commission violated the Open Door Law by conducting public meetings without proper notice and failing to post an agenda.

On or about July 26, 2016, you filed an application for a two-way liquor license from the Commission. The application was delegated to the Lake County Local Board ("Local Board"). The Local Board denied the application at an October 4, 2016 public meeting. You allege there was no notice of this meeting. You have provided a copy of the Indiana Alcohol and Tobacco Commission Local Board Handbook for reference wherein it states Local Boards are subject to the Open Door Law.

You also allege the Local Board failed to post an agenda of the meeting. Additionally, you allege two (2) of four (4) Local Board members communicated 'ex parte' with remonstrators before the hearing and discussed the denial of the application. For these reasons, you seek for this Office to void the denial.

## 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 Indiana 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 Indiana Code § 5-14-1.5-3(a).

Public notice of the date, time, and place of any meeting of a governing body, shall be given at least forty-eight (48) hours before the meeting. See Indiana Code § 5-14-1.5-5. Additionally, 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. See Indiana Code § 5-14-1.5-4. It appears as if the Indiana Alcohol and Tobacco Commission published notice in the local newspaper and the Commission posted it (and an agenda) on the Commission web site. It concedes the Local Board failed to publish notice or an agenda at the physical location of the meeting.

The question is whether this completely de-legitimizes the meeting and the deficiencies become a fatal flaw to the public meeting process. While the absence of notice and agenda is certainly a violation of the Open Door Law, it remains to be seen whether the oversight deprived the opportunity of the public to observe the meeting. As a participant in the meeting, you have not suggested that you have been prejudiced in any way by not knowing when or where the meeting took place -you were clearly at the meeting. Similarly, the remonstrators were also aware of the date, time and location of the meeting.

When evaluating whether non-compliance under the Open Door Law rises to the level of a substantive deficiency, the Courts will look to whether a complainant has been denied the right to attend a meeting or any other statutory entitlement. Consider Indiana Code § 5-14-1.5-7(d):

In determining whether to declare any policy, decision, or final action void, a court shall consider the following factors among other relevant factors:

- (1) The extent to which the violation:
  - (A) affected the substance of the policy, decision, or final action;
  - (B) denied or impaired access to any meetings that the public had a right to observe and record; and
  - (C) prevented or impaired public knowledge or understanding of the public's business.

While this question is clearly for the Courts to decide, my opinion is that your presence and participation in the meeting may compromise your standing to obtain relief.

You also allege in your complaint that two (2) of four (4) members of the Local Board discussed amongst themselves and others the upcoming decision. A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. See Indiana Code § 5-14-1.5-2(c). You argue that two (2) of four (4) members constitute a majority. The term "majority" is not defined under the ODL; therefore, as a general rule of statutory construction, if a statute is unambiguous (i.e., susceptible to but one meaning), Indiana courts give the statute its clear and plain meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). Webster's Dictionary defines a majority as: "a number that is greater than half of a total; a number of votes that is more than half of the total

number; the group or party that is the greater part of a large group. Merriam-Webster Learner's Dictionary (2016).

Two (2) of four (4) members is not a majority. Two (2) of four (4) cannot ratify a decision or make a binding final decision or vote. It must be a numerical majority. For this reason, I do not consider the pre-hearing discussion of two (2) members to be a violation of the Open Door Law.

You also allege that the two (2) members engaged in ex parte communication with remonstrators outside the public hearing. A determination of whether this is a due process violation is outside the scope of this Office's jurisdiction.

Although you have asked this Office to void any action taken at the October 4, 2016 hearing, please be advised the Public Access Counselor does not have the enforcement capability to do so. Only a trial court can overturn a vote or final action as a remedy to a lawsuit. See Indiana Code § 5-14-1.5-7. The decision whether to declare void any policy, decision, or final action taken by a public agency in violation of the Open Door Law is a matter left to the trial court's discretion. *Hinojosa v. Bd. of Pub. Works & Safety*, 789 N.E.2d 533, 543 (Ind. Ct. App. 2003).

Another question is whether the Local Board's technical (or substantive) non-compliance with the Open Door Law is reviewable through the Alcohol and Tobacco Commission appellate process. The Local Board is clearly an instrumentality of the Commission, however, the Commission is the ultimate authority over the permit application process. Exhaustion of administrative relief may be accomplished through an appeal to the Commission. Whether a hearing was conducted properly can be reviewed by the Commission before judicial review. In fact, it can be argued that a final decision has not yet been made as the appeal deadline has not elapsed. If allowable under its statute or administrative rules, it may very well be the Commission remand the hearing back to the Local Board to conduct a hearing with proper notice. But that is beyond the scope of my jurisdiction or recommendations.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish underneath.

Luke H. Britt  
Public Access Counselor

Cc: Mr. David Cook, Esq.; Mr. Joe Svetanoff, Esq.