



STATE OF INDIANA

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It is undisputed that neither the Board nor the Council held a public meeting on April 28, 2017. Toward that end, the Complainant claims that both the resolution and the declaration are evidence of the Board and the Council taking final action behind closed doors in violation of the ODL.

The Council denies that an ODL violation has occurred. Mr. Szarmach has stated that two of the three commissioners on the Board were individually notified and provided with the text of the resolution at issue. The Board had also been notified that the resolution must be “signed” prior to May 1, 2017. Szarmach stated that the same two commissioners individually signed Resolution 17-05 at different times without discussion among themselves or through a third party. Further, he claims that there was no gathering by a majority of the Board for purposes of taking official action, as evidence for his conclusion that the Board complied with the ODL.

At the same time the Board was receiving and signing Resolution 17-05, Szarmach had requested a declaration from the Council in support of the resolution. He provided the seven members of the Council with a copy of the Resolution 17-05. In addition, he explained that he needed the declaration to be signed prior to Monday May 1, 2017. As a result, five members of the Council signed and returned the declaration on April 28, 2017.

Lurking in the atmosphere of this ODL complaint is Senate Enrolled Act 213 (P.L. 261), which was enacted by the Indiana General Assembly on April 22, 2017, and signed into law by Governor Holcomb on May 2, 2017. The legislation, in relevant part, authorizes telecommunications companies to install new utility poles, specifically small-site 5G wireless communication poles, in public right-of-ways where electricity and other utilities already are carried above ground, with only limited need for local approval. Even so, the legislation authorized county and municipal governments to prohibit the installation of new small-site 5g in areas “designated strictly for underground or buried utilities before May 1, 2017” by ordinance. As a result, numerous local governments—viewing the issue as one of state versus local control—were scurrying to amend ordinances to keep local regulatory authority.

ANALYSIS

The intent of the Open Door Law (“ODL”) is 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. Ind. Code § 5-14-1.5-1. Indeed, under the ODL, public agencies are permitted to meet privately in executive session under certain limited circumstances. *See* Ind. Code § 5-14-1.5-6.1.

Generally, there is no prohibition on individual members—or a non-majority gathering—of a governing body taking *official action* outside of public meetings.



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Under the ODL, the term “official action” means to:

- receive information;
- deliberate;
- make recommendations;
- establish policy;
- make decisions; or
- take final action.

Ind. Code § 5-14-1.5-2(d).

Indeed, some of the actions contained in the ODL definition of “official action” are able to be effectuated individually without a public meeting. Final action, however, is not to be taken. The term “final action,” as contemplated by the ODL, means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. Ind. Code § 5-14-3-4(2)(g). Moreover, final action must be taken at an open public meeting. Ind. Code § 5-14-1.5-6.1(c).

Whether the Board intentionally attempted to avoid public scrutiny or not, its signing of the resolution was tantamount to a vote. Even before official ratification, there is no other way to categorize the action. The same can be said about the Council’s declaration of support, provided the support was a condition precedent to passage. There can be no argument disputing that the signing of the two documents constituted a final action taken behind closed doors—even if done individually. I discourage such actions regardless of whether the governing body is facing an impending deadline. Although I recognize the window for the resolution was narrow, 48-hours notice is not an overly prohibitive obstacle to schedule a meeting of at least two commissioners and four council members. It is worth noting that some local governments—in anticipation of SEA 213’s enactment—started the process of amending its local ordinance well before the bill became law.

The Complainant has also questioned whether a final action taken in violation of the ODL is valid. Under the ODL, a person may file an action in a court of competent jurisdiction to declare void any policy, decision, or final action carried out in violation of the statute. Ind. Code § 5-14-1.5-7(a)(3). In determining whether to declare an action void, the court must consider several statutory factors. *See* Ind. Code § 5-14-1.5-7(d)(1)–(4).

Notably, if the court finds that a governing body of public agency has violated the ODL, the statute simultaneously prohibits the court from finding that the violation was cured by the governing body by only having taken final action at a meeting that complies with the ODL. Ind. Code § 5-14-1.5-7(c).



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To be sure, the subsequent vote to ratify the resolution at a public meeting alleviates the harm done to the public based on those considerations to some extent. It is doubtful a court would void the actions of the Board and the Council. Even so, this should not be taken as a license to take this kind of final action in the future. While receiving information, discussing, and deliberating by a non-majority of a governing body is appropriate, final actions and binding decisions taken in secret by a governing body do nothing but erode the public's trust, even if the misdeed is subsequently remedied.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Lake County Board of Commissioners and Lake County Council has violated the Open Door Law.

A handwritten signature in black ink, appearing to read "LHB", is written over a horizontal line.

Luke H. Britt
Public Access Counselor

Distribution: Mr. Ray L. Szarmach