
OPINION OF THE PUBLIC ACCESS COUNSELOR

JERRY W. WISE, KATHY L. WISE, ET.AL,
Complainant,

v.

OWEN COUNTY BD. OF ZONING APPEALS,
Respondent.

Formal Complaint No.
19-FC-132

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Owen County Board of Zoning Appeals violated the Open Door Law.¹ Attorney John J. Moore filed a response 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 December 5, 2019.

¹ Ind. Code § 5-14-1.5-1, to -8.

BACKGROUND

This case is an offshoot of ongoing property dispute between an Owen County gun range and adjacent property owners.

On June 10, 2019, all three members of the Owen County Board of Zoning Appeals (“BZA”) visited a rifle range operated by Precision Gun Range LLC (“PGR”). The BZA met with a representative for PGR to review the standard operating procedures for rifle range, ask questions, and observe certain safety enhancements PGR had made to the range.

On December 5, 2019, Jerry W. Wise, Kathy L. Wise, David A. Drake, and Brozia L. Drake (“Complainants”), filed a formal complaint alleging the BZA’s visit to PGR on June 10, 2019, violated the Open Door Law because the BZA failed to provide public notice and met privately with the opposing party in a BZA proceeding.

On December 19, 2019, the BZA filed a response with this office denying any ODL violation.

First, the BZA argues that the formal complaint is untimely under Indiana Code section 5-14-5-7(a) because the complainants failed to file within 30 days after receiving notice of the alleged violation.

Second, the BZA asserts that it did not conduct a meeting or take official action in violation of the ODL when it made an on-site inspection of the PGR.

ANALYSIS

1. The Open Door Law (“ODL”)

It is the intent of the Open Door Law (“ODL”) 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. Except as provided in section 6.1, 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. Ind. Code § 5-14-1.5-3(a).

There is no dispute that Owen County is a public agency for purposes of the ODL; and thus, subject to the law’s requirements. *See* Ind. Code § 5-14-1.5-2. Additionally, the Owen County Board of Zoning Appeals (“BZA”) is a governing body of the county for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). So, unless an exception applies, all meetings of the BZA must be open at all times to allow members of the public to observe and record.

2. Time for filing a formal complaint

The BZA argues that the Complainants missed the deadline to file a formal complaint with this office; and thus, this office should dismiss it. Conversely, the Complainants argue they only discovered on November 6, 2019 that the BZA’s site visit on June 10, 2019, constituted a meeting under the Open Door Law.

The formal complaint procedure administered by this office has applicable statutory provisions. Indiana Code section 5-14-5-7(a) provides, in relevant part, the following:

A person or a public agency that chooses to file a formal complaint with the counselor must file the complaint not later than thirty (30) days after:

...

(2) the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice.

Notably, the term “notice in fact” is not statutorily defined in the context of filing a formal complaint for review by this office.

Even so, the Open Door Law is instructive on this issue. Specifically, the ODL states, in relevant part, that a person must file a civil action within 30 days of either:

(A) the date of the act or failure to act complained of; or

(B) the date that the plaintiff knew or should have known that the act or failure to act complained of had occurred;

whichever is later. If the challenged policy, decision, or final action is recorded in the memoranda or minutes of a governing body, a plaintiff is considered to have known that the act or failure to act complained of had occurred not later than the date that the memoranda or minutes are first available for public inspection.

Ind. Code § 5-14-1.5-7(b)(2). Here, based on the information provided, this office can only conclude that the Complainants had notice in fact—for purposes of filing a formal complaint with this office—that all three BZA members gathered on June 10, 2019 during a visit to PGR.

Granted, the Complainants contend that they discovered on November 6, 2019 that the BZA’s gathering at PGR constituted a meeting under the ODL—instead of an on-site inspection—based on alleged *ex parte* communications between the BZA members and a party to a matter pending before the board.

Even if that is true, it does not change the conclusion here.

Here is why: the BZA’s gathering on June 10, 2019, would not convert from an on-site inspection (an exception to the definition of a meeting) to a meeting subject to the ODL based on its members communicating with a party in violation of Indiana Code section 36-7-4-920(g).

Under the ODL, “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). Moreover, “official action” means to:

- (1) receive information;
- (2) deliberate;
- (3) make recommendations;
- (4) establish policy;
- (5) make decisions; or
- (6) take final action.

Ind. Code § 5-14-1.5-2(d). “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).

Notably, the definition of a meeting under the ODL does not include:

Any on-site inspection of any:

(A) project;

(B) program; or

(C) facilities of applicants for incentives or assistance from the governing body.

Ind. Code § 5-14-1.5-2(c)(2). That was a long way to say that if the BZA’s visit to PGR was indeed a meeting for purposes of the ODL, it was not because of BZA members communicating with a party to a pending matter, but rather that the on-site inspection exception to the definition of a meeting did not apply.

Undoubtedly there was a majority of the BZA gathering to take official action on public business on June 10, 2019. The fundamental question is whether the BZA could rely on the on-site inspection exception to the definition of a meeting under the ODL.

A gun range regulated by a local authority is not a project or program to which the statute is speaking. Likewise the range is not soliciting incentives or assistance in terms of economic development. It is a wholly private established enterprise, a limited portion of which the BZA merely happens to have some adjacent regulatory jurisdiction.

The statute, narrowly construed, implies the development of a prospect or ongoing program under contract or wholesale supervision of a government body: roads, bridges, economic development prospects, etc.. The statute is not a blanket exception to travel to a place of business to chit chat with the proprietor as a group about matters very much germane to the public's business – the enforcement duties of a board of zoning appeals pursuant to an administrative proceeding.

This office is not convinced that the on-site inspection exception to the definition of a meeting, narrowly construed, applied to the BZA's gathering on June 10, 2019.

Regardless, since the Complainants missed the time for filing a formal complaint and are currently in litigation, this office declines to further address the issue of whether the BZA's gathering that day constituted a meeting under the ODL.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Complainants' formal complaint is untimely under Indiana Code section 5-14-5-7(a); and thus, will not be addressed on the merits.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor