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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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SARA SIDERY,  
*Complainant,*

v.

GEORGETOWN TOWN COUNCIL,  
*Respondent.*

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Formal Complaint No.  
19-FC-94

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Georgetown Town Council (“Council”) violated the Open Door Law.<sup>1</sup> Attorney Kristi Fox filed an answer on behalf of the Council. 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 September 25, 2019.

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<sup>1</sup> Ind. Code § 5-14-1.5-1 to -8

## **BACKGROUND**

This case involves a dispute over the types of restrictions that are considered reasonable regarding the recording of public meetings.

On September 16, 2019, Sara Sidery (“Complainant”) and Hobie Crase, a reporter and photojournalist for WDRB-TV respectively, attended a meeting of the Georgetown Town Council.

Sidery asserts that council president Everett Pullen prohibited Crase from putting a wireless lavalier microphone on the table where the council members and town attorney were sitting. Sidery says she and Crase complied with Pullen’s demand of no recording devices on the table.

On September 25, 2019, Sidery filed a formal complaint alleging the council’s action violates the Open Door Law.

Specifically, Sidery argues that the surface area of table was not cluttered and appeared capable of supporting the wireless lavalier microphone without impeding the council’s ability to conduct business. Although Sidery asserts that WDRB is not aware of any restrictions concerning equipment and use, she maintains that actions were not intrusive or unreasonable. As a result, Sidery argues the town council’s action constitute a violation of the law.

Georgetown denies WDRB’s claim that the town council violated the Open Door Law.

First, Georgetown argues that the meeting room is small enough that amplification is unnecessary. The town suggests that WDRB is not complaining about the general

sound in the room but rather that their equipment is not sufficient enough to pick up the sound unless it is “directly on top of, within a foot of, the Town Council.” Further, the Town asserts that it is not required to have microphones or amplification.

Second, Georgetown argues that the council is not under any obligation to “allow anyone to place any equipment, material, or other item on the table where the Town Council, along with the Attorney, Clerk Treasurer, and Engineer, sit.” What is more, the Town argues that the council is not required to make any accommodations to ensure the quality of any recordings of public meetings. Georgetown also argues that it is the responsibility of the individuals recording to make sure that their equipment is sufficient.

Third, the town is concerned that placement of an audio device directly in front of the council would likely infringe on their ability to ask questions or get advice from their attorney during public meetings, which the Town argues would be a violation of Indiana Code section 34-46-3-1.

In sum, Georgetown argues that the ODL does not require it to allow a member of the public to place recording equipment on the table where the council and other officials sit during public meetings.

## ANALYSIS

The principal issue in this case is whether a governing body's prohibition on placing a recording device, in this case a lavalier microphone, on the table where the town council and other officials sit during public meetings comports with the Open Door Law's directive that meetings must be open for the public to observe and record.

### 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 the Town of Georgetown 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 Georgetown Town Council ("Council") is a governing body of the town for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). So, unless an exception applies, all meetings of the Council must be open at all times to allow members of the public to observe and record.

Here, the parties disagree about whether the public's right to observe and record encompasses the public's ability to

place a recording device (e.g., a wireless lavalier microphone) on the table where the council and other officials were sitting during the public meeting.

## **2. Observe and Record**

As set forth *supra*, the Open Door Law secures the public's right to "observe and record" public meetings. Ind. Code § 5-14-1.5-3.

Although the ODL does not define the term "record," our courts have long observed it to mean "the reasonable use of recorders, cameras and any other recognized means of recording." *Berry v. Peoples Broad. Corp.*, 547 N.E.2d 231, 234 (Ind. 1989).

In other words, the ODL's directive that meetings must be open for the public to record includes the reasonable use of a recognized means of recording.

Here, a television news crew attempted to put a wireless lavalier microphone—the small ones that usually clip to a lapel—on the table where the town council and other officials were sitting for the public meeting. The Council said no and argues it has no obligation under the ODL to permit a recording device within ten feet of the council.

This office cannot agree.

Placing a small, wireless microphone on a table in front of a council is a reasonable use of a recognized means of recording. To conclude otherwise would amount to an absurd result.

Notably, the town offers little substance to support why this would be such an unreasonable accommodation. In essence,

the town's argument is that it prohibits recording devices within ten feet of the council because it is not required to allow it under the law.

Georgetown's interpretation of the Open Door Law is too narrow.

It is reasonable to conclude that members of the public who wish to record the council's proceedings with an innocuous device may place it near the council so long as long as the equipment is not disruptive to the public business at hand. This is especially true with a governing body that does not use microphones.

This office has seen enough grainy video and listened to enough audio with ambient noise to know—regardless of room size—that recording from the audience does not always result in the highest quality of footage. Distorted quality is the often silent killer of public meeting audio recordings.

Granted, the public's right to observe and record a public meeting under the ODL is not absolute. A governing body is certainly able to manage the meeting environment.

Still, a categorical prohibition on a small gadget being within ten feet of the council is unreasonable. The public's right to record a proceeding under the ODL is not limited to merely bringing a microphone or camera in the room and powering up. Again, the Indiana Supreme Court concluded that "record" encompasses *reasonable use*. *Berry v. Peoples Broad. Corp.*, 547 N.E.2d 231, 234 (Ind. 1989)(emphasis added).

If the recording device isn't obtrusive—preventing the council from conducting public business or obstructing other members of the public from viewing or hearing the meeting – it can be placed in any reasonable location, including at or near the table at which members sit.

That constitutes a reasonable use of a recognized means of recording. “All doubts must be resolved in favor of requiring a public meeting, under Open Door Law, and all exceptions to the rule requiring open meetings must be narrowly construed, with the burden of proving the exception on the party claiming it.” *Frye v. Vigo County*, 769 N.E.2d 188, 192 (Ind. Ct. App. 2004).

The overwhelming majority of governing bodies allow microphones to be placed in close proximity to board members during public meetings. In fact, some voluntarily record their meetings for posterity. Microphones, especially those of the lavalier variety, are usually anything but obtrusive.

To the extent it interferes with a board member's “personal space” while conducting public business, perhaps a small podium or table could be placed in front of the dais to alleviate such violence visited upon the public official's sensitivities.

### **3. Privileged Communication in Public**

Georgetown also argues that a microphone placed near the council would infringe on the council members' ability to ask questions or get legal advice from the town attorney during a public meeting. Specifically, the Council argues this would violate Indiana Code section 34-46-3-1 and Rule 1.6 of the Indiana Rules of Professional Conduct. Indiana Code sec-

tion 34-46-3-1 protects the attorney-client privilege by preventing attorneys from having to testify to confidential communications to their clients.

WDRB is not seeking testimony from the Georgetown town attorney regarding confidential communications. Despite popular opinion, not all communication to or from an attorney is *de facto* confidential. It is also important to remember that the client holds the privilege and can waive it as well.

Attorneys regularly attend board meetings as real-time advisors and communicate non-privileged advice to the board as meetings proceed.

Nothing in Indiana Code disallows communicating general legal advice to governing bodies publicly; and thus, it is a regular occurrence at town board meetings. In fact, the Indiana Code does not even enumerate an instance where an executive session can be held to give general legal advice.

In *Hinojosa v. Board of Public Works & Safety for City of Hammond, Ind.*,<sup>2</sup> the Indiana Court of Appeals affirmed the trial court's ruling that a governing body violated the Open Door Law by conferring with legal counsel off-record during the course of a public meeting. More specifically, the court in *Hinojosa* concluded that the board violated the ODL by failing to comply Indiana Code section 5-14-1.5-6.1, which is the executive session statute.

What is more, the Indiana Court of Appeals rejected the Hammond Board of Public Works' argument that the trial court's determination that conferring with its legal counsel during the course of the hearing violated attorney-client

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<sup>2</sup> N.E.2d 533 (Ind. Ct. App. 2003).



privilege. Instead, the court concluded that the board's actions violated the ODL.

It is worth mentioning, that the court in *Hinojosa*, acknowledged that a governing body "has the right to confer with legal counsel during a duly noticed meeting, on the record and in public." N.E.2d 533 at 549.

In context, the significance of the *Hinojosa* case is that the court acknowledged a governing body's right to confer with legal counsel during a public meeting on the record and in public in furtherance of the ODL.

In other words, a public meeting is not the forum for confidential conferences with the governing body's attorney.

Similarly, the Indiana Rules of Professional Conduct provide that a lawyer must not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by rule. *See* Ind. Prof. Conduct Rule 1.6.

Without more, providing real-time public legal advice does not necessarily reveal client secrets.

## **CONCLUSION**

Based on the foregoing, it is the opinion of this office that an unobtrusive microphone can be placed near, or even on, a council table during a public meeting because it constitutes the reasonable use of a recognized means of recording.

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

Luke H. Britt  
Public Access Counselor