
OPINION OF THE PUBLIC ACCESS COUNSELOR

LAWRENCE R. MURRELL,
Complainant,

v.

KOKOMO HOUSING AUTHORITY,
Respondent.

Formal Complaint No.
20-FC-5

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Board of Commissioners for the Kokomo Housing Authority violated the Open Door Law.¹ Attorney Erik J. May filed an answer on behalf of the housing authority. 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 January 13, 2020.

¹ Ind. Code §§ 5-14-1.5-1 to -8

BACKGROUND

On December 16, 2019, the Board of Commissioners for the Kokomo Housing Authority convened an executive session in accordance with Indiana Code section 5-14-1.5-6.1(b)(5),² which authorizes a governing body to meeting privately to receive information about and interview prospective employees. The KHA Board held another executive session for the same purpose on December 19, 2019.

On December 26, 2019, the KHA Board adopted a resolution approving a 3 year employment contract for the organization's new chief executive officer Derick Steele.

On January 13, 2020, Lawrence R. Murrell ("Complainant") filed a formal complaint alleging the KHA Board violated the Open Door Law. Specifically, Murrell argues that the board took improper final action at the executive session on December 19, 2019.

First, Murrell contends that he spoke with member of the KHA Board on December 20, 2019, who said the board conducted interviews and selected Steele. During the same phone call, Murrell asserts that the board member told him that the KHA gave Steele until noon on December 20 to accept the contract. Murrell also contends that the board member confirmed Steele's acceptance of the contract. Murrell asserts that the board member indicated the KHA would "finalize" the decision during a public meeting the following week.

² The public notices for both executive sessions erroneously cites Indiana Code section 5-14-1.5-6.1(h)(5)(5).

Second, Murrell contends that KHA Board attorney sent a text message on December 23, 2019, to Kokomo mayor-elect Tyler Moore, which said, in relevant part, the following:

Also, the input you provided helped cultivate the process and ultimately the decision to select Mr. Steele.

As set forth above, the KHA Board held a public meeting on December 26, 2019, to approve Steele's contract, which was the only item of business on the agenda.

In essence, Murrell argues that the KHA Board took improper final action at its executive session on December 19, 2019, by selecting Steele for the job.

Murrell says the inference is clear based on the board offering the contract to Steele, requiring acceptance by noon the day after the executive session, the KHA Board attorney's text message to mayor-elect Moore, and the board's public meeting to approve a prior negotiated contract.

On February 3, 2020, the KHA filed a response to Murrell's complaint denying any violation of the Open Door Law at the board's executive session on December 19, 2019.

During the executive session, the KHA interviewed four candidates and ranked each based on their résumé, qualifications, and interview. KHA argues that it did not select a candidate at that time and did not exclude any candidate from consideration.

KHA asserts that it requested Steele—the board's highest ranked candidate—to appear at a public meeting scheduled

on December 23, 2019,³ for the purpose of voting on his candidacy and proposed contract.

In sum, KHA argues that its procedure and deliberation at the executive session is expressly authorized by law. Specifically, KHA relies on the decision of the Indiana Court of Appeals in *Baker v. Town of Middlebury*⁴ as authority for the board's process.

Specifically, KHA contends the *Baker* decision expressly allows for making recommendations and decisions during an executive session, which informed the board's action in ranking the four candidates it interviewed for the job.

ANALYSIS

1. The Open Door Law (“ODL”)

The Open Door Law (“ODL”) requires public agencies to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. Ind. Code § 5-14-1.5-1. As a result, 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. *See* Ind. Code § 5-14-1.5-3(a). The Kokomo Housing Authority is a public agency for purposes of the ODL; and thus, subject to the law's requirements. Ind. Code § 5-14-1.5-2. So, unless an exception applies, all meetings of the Board of Commissioners for the KHA must be open at all times to allow members of the public to observe and record.

³ The information presented to this office shows the KHA Board met on December 26, 2019, to approve Steele's contract.

⁴ 753 N.E.2d 67 (Ind. Ct. App. 2001).

Under the ODL, the term “executive session” means “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.” Ind. Code § 5-14-1.5-2(f).

Notably, the ODL expressly states that “final action must be taken at a meeting open to the public.” Ind. Code § 5-14-1.5-6.1(c). “Final action” means “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.” Ind. Code § 5-14-1.5-2(g).

This office, just like our courts, must liberally construe the provisions of the ODL, which means exceptions are narrowly applied.⁵ Indeed, an executive session is the law’s primary exception to the ODL’s mandate of open government meetings. To that end, executive sessions are given extra scrutiny by this office because they carry the expectation of both substantive and technical compliance.

2. Baker v. Town of Middlebury

Murrell argues that KHA violated the ODL’s prohibition on taking final action outside of a public meeting when the agency’s board selected a candidate to become chief executive officer during an executive session. In response, KHA argues that it acted in accordance with the law. Specifically, the agency relies on the Indiana Court of Appeals decision in *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001).

⁵ “All doubts must be resolved in favor of requiring a public meeting and all exceptions to the rule requiring open meetings must be narrowly construed.” *Evansville Courier v. Willner*, 553 N.E.2d 1386, 1388 (Ind.Ct.App.1990)

As an initial matter, it is worth mentioning that the court in *Baker* addressed an entirely different subsection of the Open Door Law than the one presented here.

In *Baker*, the underlying dispute involved the scope of the subsection permitting an executive session to discuss “a job performance evaluation of individual employees,” which is now codified at Indiana Code section 5-14-1.5-6.1(b)(9).

This case is about the scope of the ODL provision that permits a governing body to convene an executive session to “receive information about and interview prospective employees.” Ind. Code § 5-14-1.5-6.1(b)(5).

To be sure, the *Baker* case involved an underlying ODL dispute about the scope of a specific executive session statute, but the court’s review did not involve same exception at issue here.

Subsection (b)(9) authorizes a governing body to engage in discussion regarding employee job performance. The *Baker* court correctly noted that “discussion” entails other types of official action, including receiving information, making recommendations, establishing policy, and making decisions in executive session.

Conversely, subsection (b)(5), however, is unique in that it allows a governing body to go behind closed doors to do only two things: To receive information about and interview prospective employees. Subsection (b)(5) is more limited in its scope than (b)(9).

It is exceedingly difficult to reconcile “to receive information about and interview” with KHA Board’s process of actively scrutinizing and ranking candidates.

Indeed, where the words of the statute are clear and unambiguous, they will be given their plain, ordinary, and unbridled meaning. *Common Council of the City of Peru v. Peru Daily Tribune*, 440 N.E.2d 726, 729 (Ind.Ct.App.1982).

This tracks harmoniously with the remainder of Section 6.1, particularly in subsection (b)(10), which also deals with filling vacancies. It is also limiting and contains different action verbs than general “discussion.” Subsection (b)(5) contains two transitive verbs with two definite objects.

Granted, the analysis in *Baker* arguably extends to some of the other instances of appropriate executive session rationales as well, but (b)(5) is unique, as are certain others. The difference is in the language of the subsection itself. Simply put, subsection (b)(5) is self-limiting where other executive sessions are not.

3. Policy considerations

Both *Baker* and the KHA’s response pay service to the policy consideration of applicants for public employment. In context, *Baker* considered job performance evaluations, which is different from applicants for public employees although both arguments are well taken.⁶

This opinion does not stand for the notion that the names or rankings of candidates for public employment need be publically disclosed. Merely that the rankings and selection process be done in a public meeting. This can be effectuated by

⁶ See generally *South Bend Tribune v. South Bend Community School Corp.*, 740 N.E.2d 937, (Ind.Ct.App. 2000)(“Applicants for public employment are specifically excepted from the disclosure requirements”).

assigning candidates non-identifying monikers and public discussion using generalities.

Either way, ranking implies the identification of a preferred candidate during a selection process. If done as a consensus, it is akin to final action or a vote. Nothing in the Open Door Law, requires votes be taken by motion, second of a motion or roll call vote. *Evansville Courier v. Willner*, 553 N.E.2d 1386 (Ind. Ct. App. 1990), *adopted in part, vacated in part* by 563 N.E.2d 1269 (1990).

It can very much be merely the intent of the board to finalize a decision, which appears to have been done.

There is no dispute that final action is prohibited in an executive session. If choosing a candidate takes place behind closed doors and the hiring requires board ratification, it is violative of at least the spirit of the prohibition, if not its express language.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Kokomo Housing Authority violated the Open Door Law by taking improper action in an executive session. Additionally, the KHA should be mindful of citing the correct and accurate statute in its executive session notices.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor