
OPINION OF THE PUBLIC ACCESS COUNSELOR

STEPHEN S. SANDERS,
Complainant,

v.

TRUSTEES OF INDIANA UNIVERSITY,
Respondent.

Formal Complaint No.
21-FC-169

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Indiana University Board of Trustees violated the Open Door Law.¹ General Counsel Jacqueline A. Simmons filed an answer on behalf of IU. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint filed on October 8, 2021, and received by the Office of the Public Access Counselor on October 14, 2021.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

In this case we consider whether a public university's board of trustees violated the Open Door Law (ODL) by approving, without a public meeting, an addendum to the previous university president's employment contract.

In 2021, the IU Board of Trustees negotiated and ultimately approved an addendum to the employment contract of IU President Michael McRobbie. Initially, the addendum was to operate as an extension to McRobbie's term as president, which ran through the end of 2021 while the board searched for his replacement.

The dispute between these parties dates back at least to May of 2021 at which time Stephen Sanders, complainant and IU professor, filed a public records request with IU. In the request, Sanders sought, among other items, the "currently in-force agreement between Indiana University and President Michael A. McRobbie."

The May request became the subject of *Opinion of the Public Access Counselor* 21-FC-91, which is incorporated by reference.

Sanders received documents pursuant to this request on August 20. Those documents led to speculation that a new agreement, which extended the responsibilities of the current president was galvanized in secret throughout 2021. His suspicions were confirmed when the agreement was ratified at a meeting on October 8, 2021.

Sanders argues that the documents reveal the agreement was negotiated in secret, executed, and took effect without a public meeting or vote by the IU Board of Trustees.

Sanders argues this “consulting agreement”—as it came to be known—amounted to final action taken outside of a public meeting.

On October 8, 2021, Sanders filed a formal complaint with this office alleging IU’s Board of Trustees violated the Open Door Law by failing to take final action on McRobbie’s extension in a public meeting.

IU filed an answer to Sanders’ complaint denying any violation of the Open Door Law. First, IU argues that Sanders’ complaint is time-barred because more than 30 days elapsed between the alleged violation and his filing. Second, IU argues that the ODL does not apply to the actions of the board chairperson. IU asserts that Chair Mirro acted in accordance with the authority delegated to him by the full board. Third, IU asserts that the Board of Trustees is not required to discuss and vote on the consulting letter at a public meeting.

ANALYSIS

1. The Open Door Law

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).

Indiana University is a public agency for purposes of the ODL; and thus, is subject to the law’s requirements. Ind.

Code § 5-14-1.5-2. Moreover, the IU Board of Trustees is a governing body for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b).

As a result, unless an exception applies, all meetings of the Board must be open at all times to allow members of the public to observe and record.

1.1 ODL definitions

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).

“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). Notably, the ODL defines “final action” as “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order.” Ind. Code § 5-14-1.5-2(g). Additionally, “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 ODL requires a governing body to take any final action at public meeting. *See* Ind. Code § 5-14-1.5-6.1(c).

2. Statute of limitations for PAC complaints

IU contends that Sanders’ complaint is time-barred, which Sanders disputes. The General Assembly sets forth a statute of limitations for filing complaints with this office, which limits complaints within 30 days of:

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.

Ind. Code § 5-14-5-7. For its part, IU spends the majority of its response reasoning that this situation does not warrant scrutiny through the lens of the Open Door Law yet uses a procedural ODL statute to argue the claim is barred. The university cannot have it both ways.

While Sanders fostered concerns regarding the process when he received the production of documents in August, he did not receive *notice in fact* until the Indianapolis Business Journal reported upon a statement made by an IU spokesman. This is what prompted the complaint and it is therefore timely.

3. Powers and duties of IU's Board of Trustees

The substantive portion of the complaint is relatively straightforward: Does the extension of a university president's employment require affirmative final action by the university's governing body. If so, the final action must happen at a public meeting under the ODL.

Realistically, it stands to reason that the board of trustees of any institute of higher learning would be closely involved in the personnel decisions of its most critical employee. This is not to say certain negotiating – or signatory – authority cannot be delegated to an individual point person, only that it strains credulity that a board was wholly uninvolved until an agreement was signed, sealed, and delivered.

IU's response is dismissive of the import of the McRobbie agreement because it only involved a mere \$500,000 contract within an organization that spends hundreds of millions of dollars in contracts per year. It is unlikely that the average taxpayer or tuition remitting student would view it similarly.

Although IU does not cite any statutory authority in its response, the law contemplates the hiring process generally. Indiana Code section 20-38-3-4 states, in relevant part, the following:

The board of trustees of Indiana University may:

- (1) elect a president, the professors, and other officers for Indiana University as necessary and prescribe the duties and salaries of those positions;

Furthermore, the board of trustees of a state educational institution may delegate to (1) persons employed by the board of trustees; and (2) others; the authority that the board of trustees possesses. *See* Ind. Code § 20-38-3-2.

In practical terms, the entire board would likely not be involved in every discussion, negotiation, and intimate detail, even for the university president. Therefore, a delegate to work through the minutia is a perfectly acceptable, and legal, option. This is so even for large high-dollar contracts.

IU's bylaws contain a provision that a designated member of the Board of Trustees may be selected as a signatory for the administrative purposes of executing agreements. Even so, IU has not provided any evidence or authority

showing how an individual board member could unilaterally take final action on behalf of the board that binds the university financially.

Granted, IU cites *Dillman v. Trustees of Indiana University*, 848 N.E.2d, 348 (Ind. Ct. App. 2006), as support of its delegation theory. In *Dillman*, IU's president fired long-time basketball coach Bob Knight due to a zero-tolerance clause in Knight's contract. The Board convened in a series of gatherings without a majority present at the president's home authorizing him to take the action. The court observed that IU's president was the "properly authorized individual university official" to fire the coach. 848 N.E.2d at 353.

Notably, the *Dillman* case led to an amendment to the Open Door Law prohibiting serial meetings. *See* Ind. Code § 5-14-1.5-3.1.

Here, the authorization to delegate an individual to take personnel action never took place in public whereas in *Dillman*, it was an emphasized matter of fact:

The minutes of the Trustees' September 11, 1987, public meeting demonstrate the Board's intention "to become more actively and deeply involved in the substantial policy issues" affecting the university. Appellants' App. p. 123. In order to "streamline the Board's operations[;]" the Trustees delegated to the "President of the University" their administrative authority under [subsequently repealed] Indiana Code chapter 20-12-1. Appellants' App. pp. 123-29.

By using this language, the Trustees clearly delegated their authority to the person holding the

office of president of the university, and not to [prior University president] Thomas Erlich personally. Included in this delegated administrative authority is the power “to govern, by lawful means, the conduct of its students, faculty, and employees[.]”

Id. at 253. This case is distinguishable from *Dillman*. Here, IU argues that because signatory authority was given to board chair Mike Mirro, the execution of the McRobbie agreement was valid and above-board.

In a letter sent by Chairman of the IU Compensation Committee Jim Morris to the rest of the Board, Morris indicates Mirro was given the signatory authority during executive session in early March.

First, in contrast to *Dillman*, the delegation of authority was not done in public but in executive session. Second, the Open Door Law does not authorize an executive session for the purpose of delegating authority to approve an addendum to the university president’s contract to an individual trustee. Finally, the ODL requires a final action (e.g., a vote) to be taken at a public meeting. Ind. Code § 5-14-1.5-6.1(c). In other words, a governing body cannot take final action on public business during an executive session.

To be sure, despite IU’s casualness regarding high-dollar contracts, a contract extension or consulting agreement worth over \$500,000 to a single employee is undoubtedly an action item that would need authorization via final action and warrant discussion in an open meeting. The particulars then may be worked out with the delegate. IU’s argument that the agreement was not an extension but

rather a whole new “consulting” contract only exacerbates the matter.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indiana University Board of Trustees violated the Open Door Law.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the name of the signatory.

Luke H. Britt
Public Access Counselor