
OPINION OF THE PUBLIC ACCESS COUNSELOR

ETHAN SANDWEISS,
Complainant,

v.

INDIANA UNIVERSITY BOARD OF TRUSTEES,
Respondent.

Formal Complaint No.
24-FC-41

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana University Board of Trustees violated the Open Door Law.¹ Attorney Anne K. Ricchiuto filed an answer 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 June 10, 2024.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

In this case we consider whether the discussion of multiple topics during an executive session warrants multiple notices and whether action directly subsequent to an executive session counts as final action.

On May 10, 2024, the Indiana University (IU) Board of Trustees (“Board”) posted notice that it was holding an executive session on May 14, 2024. The announcement cited “Open Door Law Sec. 5-14-1.5-6.1(b)(2)(B)” which concerns litigation strategy discussions. Notably, the ACLU of Indiana had threatened a lawsuit against IU earlier that month although the Board did not (nor is it required to) cite particular litigation in its notice.

On May 15, the day after the executive session, the Board released a statement stating that the Board requested that the President commission an independent review of the campus climate following several weeks of turmoil related to protests.

Complainant Ethan Sandweiss argues that the statement was proof positive that the Board discussed matters in the executive session other than litigation strategy. The Board had not met since March 1, 2024, and Sandweiss argues there was no other opportunity to discuss the recent controversies on campus.

For its part, the Board concedes that discussion “veered slightly” into the President’s performance, yet because employee performance is a permissible discussion point within the executive session statute, the lack of notice was a mere technicality.

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. IU's Board of Trustees (Board) is a governing body of the University; and thus, subject to 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). 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).

2. Executive Sessions

Under ODL, executive sessions are defined by the legislature as “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.”²

Executive sessions are the exception to the rule of ODL; they allow a governing body to meet privately to discuss certain matters too sensitive or nonsensical to discuss in public. These exceptions are explicitly laid out in the statute, intended to be read narrowly. Such relevant examples of permitted executive sessions include those to discuss litigation³ and to discuss a job performance evaluation of individual employees.⁴

There are two main concerns laid out by the complainant: one related to discussing topics not outlined in the meeting notice and the other related to taking final action. We will first discuss the notice and broadening of topics by the Board.

² Ind. Code § ~~5-14-1.5-2~~(f)

³ Ind. Code § ~~5-14-1.5-6.1~~(b)(2)(B)

⁴ Ind. Code § ~~5-14-1.5-6.1~~(b)(9)

2.1 Notice of Executive Sessions

Even though the public is not open to executive sessions, the Board is still required to post notice of the meeting 48 hours in advance.⁵ Unlike regular notices, executive sessions require additional specificity to the reason why the board may hold this meeting.⁶

Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b).

It is clear that by the language “enumerated instance or instances,” the legislature intended governing bodies to describe each permitted reason for each topic being discussed in the executive session, even if there are multiple.

In the original notice, the IU Board of Trustees solely notified to the public that the meeting would be about litigation strategy; however, the Board conceded that the topics of the executive session “may have veered slightly beyond litigation to discussion of President Whitten’s performance more generally.” We agree that such discussion easily falls under another exemption for executive sessions⁷; however, with multiple topics requires multiple statutory references.

Insofar as the parties citing previous PAC opinions to justify positions either way, persuasive arguments are always

⁵ Ind. Code § 5-14-1.5-5(a)

⁶ Ind. Code § 5-14-1.5-6.1(d)

⁷ Ind. Code § 5-14-1.5-6.1(b)(9)

welcome. Nonetheless, each case has a unique context that must be considered.

The statement released after the executive session indicates that the Board veered *mightily* from its noticed purpose. The statement did not cite any litigation at all, but rather focused almost solely on the performance of the administration in a time of unrest.

It is true that an executive session may be held to discuss such matters, but given the gravity of the moment, it is difficult to grasp that IU would not mind the particulars of compliance.

If there was any time to be precise, this was it.

Especially amid the recent campus protests, IU has been under significant scrutiny. In times like these, it is best practice to ensure transparency and compliance with public access laws to not only avoid further litigation but to also quell the public's concerns already aflame.

2.2 Final Action after an Executive Session

Notably, executive sessions do not allow for any final action. Final action is defined by the legislature as “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.”⁸

While the Board has said they took no final action, and simply discussed strategies for pending or potential litigation, there is a fine line between forming that strategy and taking final action. Discussing options for next steps with

⁸ Ind. Code § 5-14-1.5-2(g)

regards to litigation is clearly within the bounds of an executive session but commissioning an “independent review of the campus climate” per their statement released on May 15 appears to edge towards final action. There was no reported vote to make this happen, but the outwards assumption is there was a consensus behind a choice like this.

This office is in no position to verify what truly happened in that meeting but is sympathetic to the concerns of the community about transparency. The Board should be mindful that action arising out of an executive session, even if it is not something that necessitates a vote, can still give the perception of opacity.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the IU Board of Trustees violated the Open Door Law by posting notice of an executive session for one purpose and then discussing other matters behind closed doors.

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

Luke H. Britt
Public Access Counselor

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