



# STATE OF INDIANA

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October 6, 2022

Robert L. Buggs  
4002 Rhode Island St.  
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**RE: Informal opinion 22-INF-6; Secret Ballots**

This informal opinion<sup>1</sup> examines whether the Gary Public Library Board of Trustees (Board) violated the Open Door Law by voting by secret ballot to elect board officers.

On May 23, 2022, the Board held a regularly scheduled meeting. On the agenda was the election of officers. Then-Board president Robert Buggs nominated an individual for his successor as president, the motion was seconded, and it appears a vote took place. After some discussion, however, the election was formally tabled until the next meeting.<sup>2</sup>

At the June 27, 2022, meeting, the election was held. This time, Mr. Buggs' prior nominee did not secure the position of Board president. Buggs' contention is that the prior election should have remained in place. Furthermore, it appears as if the vote was taken by secret paper ballot and votes were not individually announced.

Sometime later, before Buggs reached out to this office, the Board's attorney contacted this office expressing concern about the voting procedure. It was telephonically confirmed that the officer election procedure should not have been taken by secret ballot and that going forward, all votes need to be conducted publicly and minutes reflecting individual votes.

On August 23, 2022, Mr. Buggs contacted this office expressing the same concerns. The public access counselor confirmed the discussion and attempted to explain the difference between an internal, technical procedural deficiency and a substantive violation of the Open Door Law. The public access

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<sup>1</sup> The 30-day statute of limitations for filing a formal complaint had elapsed by the time the complaints were received. See Ind. Code § 5-14-5-7(a)(2). Even still, the situation merits official commentary by the public access counselor.

<sup>2</sup> May 23, 2022, minutes of the Gary Public Library Board of Trustees

counselor was not successful in convincing Buggs that a formal complaint would not be accepted due to the passage of time, even though it was apparent a violation did indeed occur.

Nevertheless, Buggs filed a shotgun complaint on August 31, 2022, approximately 67 days after the meeting. He seeks to have the June 27 officer election overturned, among other demands. What is more, Buggs asserts that the current Board president violated the Open Door Law by having individual conversations with three other Board members to schedule a meeting.

Additionally, Buggs raises a concern over a situation wherein he hired a videographer to document the August 26, 2022, public meeting but she felt “intimated and harassed.”

Also at that same meeting, Buggs suggests a violation occurred because three of the seven board members continued to conduct business after the public meeting was adjourned.

Finally, Buggs contends that a vote took place at some point during an executive session but does not provide any additional context.

### **1. Open Door Law**

The Open Door Law (“ODL”) requires the governing body of a public agency to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. *See* 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).

Gary Public Library 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. The Gary Public Library Board of Trustee is a governing body of the library for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). So, 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 Defining “meeting”

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<sup>3</sup> upon public business.<sup>4</sup> Ind. Code § 5-14-1.5-2(c).

In other words, unless an exception applies, any time at least four of the Board Trustees gather to take official action on public business it will constitute a meeting for purposes of the Open Door Law; and thus, must be open to the public.

## 2. Secret Ballots

The primary issue here concerns voting procedure for officers of the Board. Buggs contends that the method by which the Board elected its officers was deficient. He has also telephonically inferred that all subsequent actions of a Board are rendered void as a result.

Despite Buggs’ assertions to the contrary, there has never been disagreement between him and this office that secret ballots are prohibited. Indiana Code section 5-14-1.5-3(b) expressly declares that a secret ballot may not be taken at a public meeting. This was explicitly relayed to the Board attorney when she reached out. The public access counselor’s understanding of the conversation was that the attorney conceded the fact and acknowledged that it would not happen in subsequent meetings.

What Buggs is unwilling to accept is that there is a statute of limitations of formal complaints and litigation on Open Door Law deficiencies. If a violation took place on June 27 —and apparently it did—a complaint would have need to be filed by the end of July at the latest. Buggs filed his complaint on August 31, 2022.

Moreover, the matter at hand involves an internal, procedural governance issue—the election of officers—and not a substantive public business issue directly affecting the community at large.

Courts have recognized that an agency may commit a technical violation yet substantially comply with the Open Door Law. *Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind. Ct. App. 1998).

Mr. Buggs’ interprets these considerations as this office being dismissive of his concerns. He also considers the statute of limitations and the courts’ technical vs. substantive violation analysis as being “legal loopholes.”

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<sup>3</sup> “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).

<sup>4</sup> “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).

In reality, courts determine whether to declare any policy, decision, or final action void by determining the extent to which the violation: (A) affected the substance of the policy, decision, or final action; (B) denied or impaired access to any meetings that the public had a right to observe and record; and (C) prevented or impaired public knowledge or understanding of the public's business. *See* Ind. Code § 5-14-1.5-7(d)(1).

Therefore, the assertion that the Board's business is automatically voided due to a deficient officer election is not grounded in any legal authority - persuasive, binding, or otherwise.

### **3. Serial meetings**

Buggs also alleges that the current Board president's conversations with three other Board members constitutes a meeting. Given that a public meeting is defined as a majority gathering simultaneously – in this case four of seven – presumably Buggs is referring to a serial meeting.

According to Buggs, the Board president took a “straw poll” with three other members to set a meeting time. She did not use a conference call but rather phoned them “back-to-back”.

In order for a serial meeting to be triggered, the statutory elements must be met. A governing body of a public agency violates the Open Door Law if members of the governing body participate in a series of at least two gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

- (1) *One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.*
- (2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.
- (3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

Ind. Code § 5-14-1.5-3.1(a) (Emphasis added). It does not appear that any of the conversations including more than two individuals. Therefore, further analysis is unnecessary.

### **4. Recording public meetings**

Buggs contends he hired a videographer to record the August 26 meeting but that she felt “intimated and harassed” and she was “grilled by a barrage of questions and negative comments” by Board members. Buggs does not explicitly say if she was allowed to continue recording.

Unless an exception applies, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* Ind. Code § 5-14-1.5-3.

As a result, anyone has the unequivocal and statutory right to record a public meeting. The circumstances of Buggs' videographer are unclear, but unless she was being disruptive or obstructing the view of other attendees, she should have been able to record the meeting unencumbered.

Without more, this office is unable to make a conclusive determination.

#### **5. Non-majority taking official action on public business**

Buggs alleges that after the August 26, 2022, three of seven Board members stayed behind for over an hour to hear a presentation from contractors. He concedes this was not a quorum.

Unless a serial meeting situation arises, a majority of board members is a required element in the definition of a public meeting. *See* Ind. Code § 5-14-1.5-2(c) Here, three of seven board members does not constitute a majority. A fourth would have needed to participate.

What is more, a "quorum for the transaction of business" for public library boards is explicitly defined by Indiana Code section 36-12-2-23(b) as four members. This gathering was not a violation of the law.

#### **6. Final action in executive session**

Buggs asserts that the Board president took a vote during an executive session. He does not, however, describe when, how, or what the decision entailed.

Final action is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* Ind. Code § 5-14-1.5-2(g). Indeed, final action during an executive session is prohibited by Indiana Code section 5-14-1.5-6.1(c), but these allegations need facts to support a conclusion.

### **Conclusion**

Without more, it does not appear the Gary Public Library violated the Open Door Law save for a misstep in its handling of an officer election by secret ballot. All other allegations appear to be without merit.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor