



STATE OF INDIANA

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February 27, 2015

Sam Weist
C/o John T. Wilson
924 Meridian Street
Anderson, Indiana 46016

Re: Formal Complaint 15-FC-19; Alleged Violation(s) of the Open Door Law by the Markleville Town Council

Dear Mr. Weist,

This advisory opinion is in response to your formal complaint alleging the Markleville Town Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.* The Council has responded via Karen Arland, Esq., counsel. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on January 21, 2015.

BACKGROUND

Your complaint dated January 21, 2015 alleges several violations of the Open Door Law by the Markleville Town Council. The complaint alleges a failure to provide notice of an executive session dated December 17, 2014, in violation of Ind. Code § 5-14-1.5-6.1. Additionally, you allege council members were discussing town business outside of a properly noticed meeting via text message.

On December 29, 2014 the Council met in a public meeting. Your complaint also alleges the Council prevented the public from attending the meeting by posting notice limiting maximum capacity of the town hall. Complainant alleges this was the first time such a notice was posted and prior meetings had been held which exceeded the forty (40) person capacity. Complainant alleges members of the public were denied entrance to the meeting and the Council had refused to move to larger accommodations.

In its response, the Council acknowledges the failure to provide proper notice for the executive meeting on December 17, 2014. However, it notes that after the notice was

deemed improper, the “members took no official action and canceled the meeting prior to convening.”

With regard to the December 29, 2014 meeting, the Council contends the ODL does not require governing bodies to conduct meetings in locations large enough to accommodate everyone who may wish to attend.

Counsel also does not find a violation with regard to the text messages, contending that even if messages were sent to the majority of the council members, it does not constitute a meeting and is merely speculation on the part of one member to another.

ANALYSIS

It is the intent of the Open Door Law (ODL) 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. Accordingly, except as provided in section 6.1 of the ODL, 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(a).

Ind. Code § 5-14-1.5-6.1(d) states 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. Notice of an executive session must be given 48 hours in advance of every session, excluding holidays and weekends, and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held.

It appears from the information provided the Council properly recognized the deficient executive session notice and chose to cancel the meeting instead of going forward with the session. Although the notice was improper, the Open Door Law was not violated because the executive session was not held.

The issue with text messages is a problematic. The Open Door Law does not define “meeting” in terms of physical presence. I have stated in the past that in certain instances, a majority could gather digitally and violate the Open Door Law, although they are not physically face-to-face. Text messages could potentially run the risk of being construed as a meeting of the minds if the back-and-forth communication is simultaneous.

You have not provided any information, however, to suggest if the text messages were an immediate call-and-response and therefore, it would be difficult to determine if the conversation was ‘simultaneous’. However, I would recommend public officials be very cautious when communicating over any medium as any discussion of public business amongst a majority of a governing body could potentially trigger the Open Door Law. The perception such communication

perpetuates can be just as damaging to credibility as if the Open Door Law was actually violated.

As for the size of the meeting location, I have addressed this issue previously in *Opinion of the Public Access Counselor 13-FC-285*. In that particular case, I found a violation on the part of the municipality because it had been on notice for several weeks the meeting would generate a substantial amount of interest. The presiding officer of the Council had specifically been asked to relocate the meeting. Given the meeting space in that specific town would only accommodate (20) twenty people (the majority of which were reporters), 50-60 people were left outside of the building.

That particular Opinion was also referenced in *Opinion of the Public Access Counselor 14-FC-289*. In that case, I stated:

In the instant case, the Council was notified the night before a concerned citizens group expected a large turnout. I do not have sufficient evidence or documentation before me which suggests the turnout would have been so large the Council could be reasonably expected to move the meeting to another location...

In an ideal scenario, there would have been a public broadcast system or closed circuit television in the hallway; however, nothing in the Open Door Law suggests this is a requirement. I am more inclined to be consistent with former Public Access Counselor, Anne O'Connor's *Advisory Opinion in 00-FC-13*. She did not find a violation although 30 people were excluded from the meeting. A factor in that particular Opinion (as well as *13-FC-285*) was the number of people who were allowed to remain.

Again, I cannot conclude the Council was on sufficient notice to expect a crowd which would exceed capacity by a considerable amount. It certainly seems curious a capacity notice was posted. Also curious was other recent meetings in which excess capacity was allowed to remain.

A governing body cannot always anticipate attendance at meetings. In *13-FC-285*, turnout exceeding capacity was virtually guaranteed. I do not have sufficient information to determine whether the anticipated turnout was to greatly exceed capacity in order that moving the venue was warranted.

So while I decline to find a violation on the part of the Council, I will state I do not believe they have acted in a manner completely consistent with the spirit of the Open Door Law. I implore the Council to be mindful of its responsibility as a governing body to be accessible and transparent, even in the face of inconvenience and potential public dissent.

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Karen Arland, Esq.