
OPINION OF THE PUBLIC ACCESS COUNSELOR

MICHAEL T. SANER,
Complainant,

v.

CITY OF NOBLESVILLE,
Respondent.

Formal Complaint No.
17-FC-191

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging the City of Noblesville (“City”) violated the Open Door Law¹ (“ODL”). The City responded on September 13, through attorney Michael A. Howard. 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 August 11, 2017.

¹ Ind. Code §§ 5-14-1.5-1 to -8

BACKGROUND

Michael T. Saner (“Complainant”) filed a formal complaint against the City of Noblesville alleging the City violated the state’s Open Door Law (“ODL”). Saner claims the City’s Common Council held an improper executive session on February 22, 2017 to discuss plans for a rails-to-trails project titled: *The Nickel Plate Trail*. Saner contends the meeting was held under the auspice of economic development. Essentially, Saner contends that the umbrella topic of economic development does not satisfy ODL requirement for an executive session.

Saner filed his complaint after obtaining a set of emails from the City through a public records request. The emails include messages to and from Noblesville officials, some of which reference the project. Saner argues that dozens of the emails he obtained are marked confidential by City officials and are evidence of the City’s then desire to keep the project secret.

In its response, the City admits that the notice for the executive session at issue in this complaint did not comply with the notice requirements of the ODL, but suggests the actual subject matter of the executive session as it pertained to the *Nickel Plate Trail* did satisfy the ODL’s requirements for an executive session. As support, the City cites Indiana Code Section 5-14-1.5-6.1(b)(4)(H), and (b)(2)(D) as the authority that permits—if proper notice had been given—the *Nickel Plate Trail* discussion during the executive session.

What is more, the City claims at the time of this executive session its officers believed that discussions of a general eco-

conomic development nature were a permissible use of executive sessions, and the meeting at issue in this formal complaint occurred several weeks prior to the correction of the City's misunderstanding of the proper statutory uses of executive sessions.

It is worth noting that the project has been approved as a cooperative agreement between the Cities of Noblesville and Fishers.

ANALYSIS

The public policy of the Open Door Law ("ODL") is that 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. Simply put, 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(a).

The public may, however, be excluded from certain meetings, such as executive sessions. *See* Ind. Code § 5-14-1.5-6.1(b). Notably, a public agency may hold an executive session only in the specific instances set out by statute. *Id.* What is more, a public agency must provide notice of any executive session 48 hours prior to the meeting. Ind. Code § 5-14-1.5-5(a). The notice must include date, time, and place of the meeting. Ind. Code § 5-14-1.5-4(a). In addition, the notice of an executive session *must* also state the subject matter of the meeting *by reference to the specific statutory instance* or instances for which the meeting may be held. Ind. Code § 5-14-1.5-6.1(d).

Here, the City concedes that it failed to provide adequate notice for the executive session at issue in Saner's complaint. Thus, I will not belabor the point. Still, going forward, the City should be mindful that failure to give proper notice of any executive session violates the Open Door Law. *See Town of Merrillville v. Blanco*, 687 N.E.2d 191 (Ind. App. 1997); and judicial remedies are available for violations of the ODL. *See* Indiana Code § 5-14-1.5-7.

Even if the public notice had been adequate under the ODL, the subject matter of the meeting must also adhere to the statute's requirements.

As set out *supra*, executive sessions are only appropriate in the limited, and specific instances enumerated in Indiana Code Section 5-14-1.5-6.1(b). Stated differently, if the subject matter of the meeting is not found on the statutory list, then any official action as it pertains to a particular issue must be taken at a *public* meeting, not an executive session.

Here, the City stated that *Nickel Plate Trail* discussion involved the residential and commercial economic development possibilities of the proposed trail corridor along with the proposed route and costs. The City contends that it believed the subject matter qualified for an executive session under Indiana Code Section 5-14-1.5-6.1(b)(4)(H).

That subsection provides that an executive session may be held in the following instance:

Interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects by:

...a governing body of a political subdivision.

Undoubtedly, the City is a political subdivision as contemplated by the cited exception; and thus, the common council as the governing body could hold an executive session for that purpose consistent with the law.

The plain language of that subsection, however, expressly requires *interviews and negotiations with industrial or commercial prospects or their agents*. It is difficult to understand how the City could interpret or believe that language to include general economic development discussions *among itself*.

In addition to the economic development possibilities, the City discussed the issue of the competing real estate interests which occur upon abandonment or change of use of a railroad right-of-way; and land acquisition. The City has declared that it believes this subject matter qualifies for executive session under Indiana Code Section 5-14-1.5-6.1(b)(2)(d).

That subsection provides that an executive session may be held:

For discussion of strategy with respect to any of the following:

... (D) The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

Once again, the City acknowledged that it did not provide adequate notice for the executive session at issue in this case, but suggests the subject matter is appropriate under this exception.

The land acquisition executive session subject matter would indeed qualify for a closed-door meeting so long as the discussion was limited to strategy for the purchase or lease of railroad rights of way. So long as the executive session was kept on that point, there would not be a problem.

That said, it is more important in terms of government accountability and transparency that the notices for closed-door meetings be focused *before the meeting* instead of trying to match an exception after the fact. It appears the City realizes this and will be changing its practices in the future. In any event, I highly encourage all agencies to be judicious in its use of executive sessions and only use them when necessary to protect sensitive information.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor that the City of Noblesville violated the Open Door Law.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor