



STATE OF INDIANA

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OPINION OF THE PUBLIC ACCESS COUNSELOR

JOHN B. HERRIMAN, Esq.

Complainant

v.

THE TOWN OF ROCKY RIPPLE

Respondent

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17-FC-11

ADVISORY OPINION March 6, 2017

This advisory opinion is in response to a formal complaint alleging the Town of Rocky Ripple (“Town”) violated the Open Door Law (“ODL”), Indiana Code § 5-14-1.5-1 et. seq. The Town responded February 6, 2017 via Ms. Carla Gaff-Clark, Town Board President. The response is enclosed for review. Pursuant to 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 January 20, 2017.

BACKGROUND

The formal complaint alleges the Town of Rocky Ripple violated the Open Door Law by failing to post notice of meetings and gatherings of a majority of the Town Board.

The Town Board is comprised of three (3) members. Any two (2) of the three (3) members gathering to take official action on public business would trigger Open Door Law requirements. The Complaint takes exception to several alleged instances, including an executive session, in which proper notice was not posted.



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The Town of Rocky Ripple, in conjunction with the City of Indianapolis (“City”) and the Army Corps of Engineers (“Corps”) has considered flood prevention measures for the past several years. Those measures are the subject of controversy and debate among the community.

On January 10, 2017, the Town Board held a regularly scheduled public meeting. During that meeting, it was discussed the Board met with the Town’s attorney on January 5, 2017 in an executive session without notice. Additionally, the Board indicated it met with the City of Indianapolis to discuss tree removal in relation to the project; as well as a site visit along the levee. A final meeting with the City and Corps was proposed for February 3, 2017 to discuss details. Finally, the Complainant takes exception to a series of emails discussing the project amongst Board members.

The Board responded acknowledging the executive session on January 5, 2017 was held without proper notice, however, it justifies its action in regard to email use and other alleged violations. It also states one of the meetings was a gathering to discuss a commercial prospect and receiving information should be defined narrowly.

ANALYSIS

It is the intent of the Open Door Law (“ODL”) 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 Indiana Code § 5-14-1.5-1*. Section 6.1 provides an exception, allowing public agencies to conduct executive sessions which are closed to the public in order to discuss strategies with respect to certain specified topics.

Emails

The discussion of public business in emails by a majority of a governing body is not expressly prohibited by the Open Door Law. This Office has previously issued guidance suggesting public officials on governing bodies may communicate via email as long as there is not an immediate expectation of a response. Communications contemplated by the Open Door Law hinge on the simultaneous nature of the communication. Most email messages are not generally read and responded to in real time. Therefore, the members of the Town Board are receiving them individually as opposed to as a majority gathering. Group text messages, listserv forums and instant messaging services are more likely to be considered simultaneous communications, but email is not a medium in which immediacy is an issue.



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With that comes a caveat; emails should be used judiciously and sparingly to avoid the perception a board or governing body is conducting the entire decision-making process outside of public scrutiny. There is nothing wrong with posing ideas, suggestions or recommendations for Board review over an email, but any substantive discussion or decisions should be made in a public meeting. Similarly, mere status updates, administrative discussions and operational considerations are appropriate for email. Public employees and officials should be mindful these messages could be disclosable public records subject to disclosure.

Other Alleged Meetings

Apart from email, it appears the Town has a rather narrow interpretation of the Open Door Law. For example, it considers the flood wall a *commercial* prospect because it would mitigate flood insurance premiums and affect housing and real property values – matters of general commerce. A gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources is not a meeting pursuant to Indiana Code § 5-14-1.5-2(c).

By the Town's logic, any meeting involving financial resources could ostensibly be a "commercial" prospect because it would involve general matters of commerce. I soundly reject this argument. A commercial prospect is an economic development initiative mutually exclusive from an infrastructure project. Courting a private sector partner to bring jobs or income revenue into a community (before an offer) is allowed to take place behind closed doors. But considering an infrastructure project to be paid for with taxpayer funds is the very subject matter the Open Door Law requires to be transparent. I find the Town's response troubling in regard to this line of reasoning. Site visits or on-site inspections are not included in the definition of meetings, but *discussions or deliberations of pending projects is most definitely official action which should take place in an open meeting.*

Emphasis added.

Additionally, "official action" is defined as broadly to include the mere act of receiving information. *See Indiana Code § 5-14-1.5-2(d).* The Town attempts to define "receiving information" extremely narrowly as "testimony received officially, on the record"... "as in a committee meeting". The Town cites no authority for this and the position is contrary to the spirit of the Open Door Law. If a majority of a governing body is present together and receiving information germane to public business, regardless of source, manner, form or characteristic, they are taking official action. The commencement of a formal meeting on record is not a condition precedent to receiving information. The public has the right to



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know where and from whom their representative officials are gathering information, if they do so simultaneously as a collective. This is consistent with 18 years of public access counselor opinions.

From the information provided, it appears as if the Town Board received information in a meeting with the City and the Corps without notice. This meeting concerned an infrastructure project which did not rise to the level of heightened sensitivity justifying a closed-door gathering.

It is not lost on this Office that certain discussions during public meetings regarding high-profile, controversial initiatives are at times inconvenient and uncomfortable. But that very discomfort is the price of being a steward of the public's trust, and rightfully so. Withstanding public scrutiny, whether justified or not, is a foundational principal of transparency, accountability and good governance. The Town of Rocky Ripple would be well served to conduct its business more openly in the future.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Town of Rocky Ripple has violated the Open Door Law.

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

Luke H. Britt
Public Access Counselor

Distribution:

Ms. Carla Gaff-Clark