
OPINION OF THE PUBLIC ACCESS COUNSELOR

KIM KRULL,
Complainant,

v.

TOWN OF ST. JOHN,
Respondent.

Formal Complaint No.
19-FC-57

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Town of St. John, through its town council, violated the Open Door Law.¹ Attorney Joseph C. Svetanoff filed a response to the complaint on behalf of the town. 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 July 23, 2019.

¹ Ind. Code § 5-14-1.5-1 to 8

BACKGROUND

On July 22, 2019, the St. John Town Council convened a special meeting to consider Ordinance No. 1692, an ordinance amending the town's 2019 salary ordinance.

After discussing the purpose of the amendment, receiving public comments, and feedback from the clerk-treasurer, council member Rose Hejl requested a brief recess. Council President Mark Barenie granted the request.

Kim Krull ("Complainant") contends that three members of the council along with the town manager and the town attorney reconvened in back room for a discussion. Krull also asserts that the clerk-treasurer tried to join the group but was not permitted in the room.

As a result, Krull filed a formal complaint alleging a violation of the Open Door Law by the St. John Town Council. Essentially, Krull contends the council's recess and gathering during the special meeting amounts to an improper executive session under the ODL.

On August 26, 2019, the Town of St. John filed a response to Krull's complaint denying that the town council violated the ODL.

The Town concedes that council member Rose Hejl requested and received a recess for the purpose of discussing and clarifying with the Town Manager the accuracy of the statements made by the Clerk-Treasurer concerning the town's budgetary and financial position. The Town asserts that Hejl met with the Town Manager in his office during the recess, and during the discussion Council President Barenie joined them.

The Town describes Krull’s allegation that council member—Libby Popovic—joined Hejl, Barenie, and the Town Manager for the discussion during the recess as unsubstantiated. The Town contends Krull did not attend the meeting.

Still, the Town acknowledges that Popovic entered the Town Manager’s office during the recess after Hejl left.

The Town argues the Open Door Law does not prohibit a governing body from taking a recess during a public meeting. Moreover, the Town contends that three members of the council must be present in order to convene a meeting subject to the ODL.

Although the Town admits that two members of the council met with the Town Manager during the meeting recess to discuss public business, it argues the gathering is permissible under the ODL because it is not a majority of the council.

ANALYSIS

1. The Open Door Law (“ODL”)

It is the intent of the Open Door Law (“ODL”) that 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.

Toward that end, except as provided in section 6.1, 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. Ind. Code § 5-14- 1.5-3(a). There is no dispute that the Town of St. John 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. Additionally, the Town Council for the Town of St. John is a governing body of the county for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). As a result, unless an exception applies, all meetings of the St. John Town Council must be open at all times to allow members of the public to observe and record.

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). “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). The definition of “official action” includes: (1) receiving information; (2) deliberating; (3) making recommendations; (4) establishing policy; (5) making decisions; or (6) final action (e.g. taking a vote). Ind. Code § 5-14-1.5-2(d).

2. Krull's Claim

The crux of Krull's complaint is that the St. John Town Council violated the ODL by convening an executive session during the council's special meeting on July 22, 2019. In sum, Krull asserts that three council members joined together with the town manager during a meeting recess to discuss public business.

The Town disputes Krull's claim based on the assertion that only two council members—a non-majority—gathered together during recess to discuss town business; and thus, did not trigger the ODL.

As a preliminary matter it is important to note that this office is not a finder of fact. When a material dispute of fact remain, this office will address both outcomes.

We now turn to the potential outcomes.

If Krull's assertion is accurate, and a majority of the St. John Town Council assembled during the recess of the special meeting to take official action on public business (e.g., discussing the accuracy of the clerk-treasurer's statements about the town's finances and budget), that would more than likely violate the Open Door Law.

The ODL expressly prohibits a governing body from "conducting an executive session during a meeting, except as otherwise permitted by applicable statute." Ind. Code § 5-14-1.5-6.1(e). That same subsection expressly says that a "meeting may not be recessed and reconvened with the intent of circumventing this subsection." *Id.*

Granted, there is an intent element present, but considering the town's admission that the subject of the discussions during the recess was the accuracy of the clerk-treasurer's statements and conclusions about the town's finances and budget, it is reasonable to conclude that the council's conscious objective of the recess was to avoid having that discussion in public.

Conversely, if the Town's version of the facts is accurate, and only two council members (Hejl and Barenie) convened with the Town Manager in an office to discuss public business that probably would not violate the Open Door Law. For purposes of the ODL, a non-majority of a governing body cannot convene a meeting or an executive session. The

St. John Town Council has five members; and thus, at least three of them must gather together for the purpose of taking official action on public business to activate the ODL.

Here, the Town's principal argument is that there was not a majority gathering of the council during the recess. Without a majority, there cannot be an improper executive session under the ODL.

Viewing of the video is inconclusive. It is clear that Popovic exited Council chambers but only for a period of less than two minutes and it is unclear who she spoke to, if anyone.

As a final aside, the Town should be mindful that our courts have long recognized that "[a]ll doubts under open door requirement must be resolved in favor of requiring public meeting, and all exceptions to the rule requiring open meetings must be narrowly construed." *Evansville Courier v. Willner*, 553 N.E.2d 1386 (Ind. Ct. App. 1990), *vacated in part, adopted in part* 563 N.E.2d 1269.

By its own admission, the Town puts three members of the council in the office of the Town Manager during the recess albeit only two at time.

Resolving the doubts under the ODL in favor of transparency in this case would certainly lead to a particular result. Even so, because that conclusion turns on a dispute of fact, this office declines to do so.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the St. John Town Council did not violate the Open Door Law.

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

Luke H. Britt
Public Access Counselor