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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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KRISTOPHER BILBREY,  
*Complainant,*

v.

HENRY COUNTY BOARD OF COMMISSIONERS,  
*Respondent.*

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Formal Complaint No.  
20-FC-169

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Luke H. Britt  
Public Access Counselor

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This advisory opinion is in response to a formal complaint alleging the Henry County Board of Commissioners violated the Open Door Law (ODL).<sup>1</sup> Commissioner Ed Tarantino filed an answer on behalf of the board. 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 December 7, 2020.

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<sup>1</sup> Ind. Code § 5-14-1.5-1-8.

## **BACKGROUND**

This case involves a dispute about whether the Henry County Board of Commissioners violated the Open Door Law (ODL) by taking official action on public business outside a public meeting to discuss the non-renewal of the board's attorney's contract.

Kristopher Bilbrey (Complainant), alleges that between November 25 and November 30, 2020, two of the three commissioners met to discuss not renewing the contract with the Board's attorney. The Board notified the attorney of the decision on November 30 and the public at a board meeting on December 1, 2020. Additionally, the Board offered a new attorney the position on November 30, 2020.

On December 5, 2020, Bilbrey filed a formal complaint with this office alleging a violation of the ODL.

The Board concedes that two commissioners had a telephone conversation in October to discuss ending the contract. Furthermore, the Board contends that it explored new attorney options with a potential replacement as a majority.

The Board ratified the approval of the new attorney's contract at a meeting on December 16, 2020.

The Board contends that the meeting with the attorney was a caucus because both commissioners are members of the same political party. It argues there was no meeting at all and was not subject to the Open Door Law. In the event it would be, the Board argues that the public notice requirements do not apply to administrative function meetings and

the discussions regarding the status of the county's attorney are administrative in nature.

## ANALYSIS

### 1. The Open Door Law

The Open Door Law (ODL) requires public agencies to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. 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).

Henry County is a public agency for purposes of the ODL; and thus, subject to the law's requirements. Ind. Code § 5-14-1.5-2. The Henry County Board of Commissioners (Board) 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 Board must be open at all times to allow members of the public to observe and record.

#### 1.1 Meeting

Under the ODL, a meeting is "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). "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).

Moreover, “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).

Notably, a caucus is an exception to the definition of meeting under the Open Door Law. Ind. Code § 5-14-1.5-2(c)(4). In other words, caucuses are not subject to the ODL.

## **2. ODL caucus exception**

As set forth above, the Open Door Law removes a caucus from the definition of meeting. So, what is a caucus for purposes of the ODL? Under the ODL, the term “caucus” means:

A gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussion designed to prepare the members for taking official action.

Ind. Code § 5-14-1.5-2(h). The question here is whether this definition applies to a gathering of two of the three commissioners to receive information, deliberate expected issues, and hold discussions concerning anticipated official action and public business.

As a preliminary matter, it is worth mentioning that one of statutory powers of the public access counselor is to issue opinions interpreting the state’s public access laws. *See* Ind. Code § 5-14-4-10(6). As part of providing interpretive guidance, this office first examines Indiana caselaw for any binding precedent or other instructive guidance from our courts.

To be sure, Indiana courts have had little opportunity to interpret the caucus exception embedded in the ODL. Even so,

we are not completely without judicial interpretation. In *Evansville Courier v. Willner*,<sup>2</sup> the Indiana Court of Appeals held that the private meetings and discussions between two county commissioners—both Democrats—regarding the hiring of a fellow Democrat as superintendent of county buildings were not political caucuses exempt from the Open Door Law.

In *Willner*, the court reversed, as clearly erroneous, the trial court’s conclusion that the commissioners’ discussions “merely constituted the planning of political strategy and the preparations for final action by fellow Democrats.” *Id.* at 1390.

The court reasoned, in part, that “one of the Commission’s functions, for which it had authority to take final action, was the hiring of a new Superintendent of County buildings who would also serve as Administrative Assistant for the Commission.” *Id.* at 1389.

The court’s line of reasoning tracks with the ODL’s definition of “public business.” *See* Ind. Code § 5-14-1.5-2(e). Notably, the Indiana Supreme Court granted transfer in the case and adopted the court of appeals opinion in part and vacated it in part. *Evansville Courier v. Willner*, 563 N.E.2d 1269 (Ind. 1990).

In essence, our supreme court left the court of appeals’ holdings intact but wrote to clarify the scope of the caucus exception. At the same time, the Indiana Supreme Court ob-

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<sup>2</sup> 553 N.E.2d 1386 (Ind. Ct. App. 1990), *vacated in part, adopted in part* by 563 N.E.2d 1269 (Ind. 1990).

served that a political caucus is not transformed into meeting subject to full public scrutiny under Open Door Law merely “if the persons attending such meetings happen to constitute a majority of a governing body.” *Id.* at 1271.

Although the Indiana Supreme Court’s analysis in *Willner* is far from exhaustive, it adopts the court of appeals’ holding acknowledging that the ODL caucus exception did not apply when the majority of a governing body took official action on public business. Two Democratic county commissioners met several times, deliberated, and took final action on public business without a public meeting. Since they were both Democrats, the two commissioners relied on the ODL caucus exception to justify their actions as lawful based on their political party affiliation. The trial court ruled that the caucus exception applied to the commissioners’ gatherings, the Indiana Court of Appeals reversed the trial court’s conclusion as clearly erroneous, and the Indiana Supreme Court adopted that holding.

This office agrees.

A caucus is certainly a vehicle for taking official action on the political party’s business, which is why a caucus is not subject to the ODL. The goal of the ODL is to ensure the people are informed on the business of the public, not political parties. A county’s executive and legislative body is to carry out its roles and duties pursuant to Indiana Code section 36-2-2 in a public meeting. None of those enumerated powers are necessarily political in nature; they are public.

Therefore to the extent any caucus purports to take official action on those duties germane to a governing body’s powers, it is a subversion of the Open Door Law. Conversely, a

public meeting is not intended to include internal discussions of a political party's strategy, methodology, or ideology in terms of its platform or strategy. Those are items for a caucus.

In essence, this case follows the *Willner* case almost to a T. The meeting to discuss the non-renewal of an attorney's contract is not inherently political in nature and is overwhelmingly the public's business. The discussions and action should have taken place in a public meeting.

Henry County is not alone in this argument. Even so, it is time to retire the notion that governing bodies themselves can simply call a caucus to discuss matters with their like-minded colleagues to subvert the Open Door Law. Official political party proceedings notwithstanding, caucuses are generally not appropriate within a government unit.

### **3. Administrative function meetings**

Alternatively, the Board argues the meeting may have been an administrative function meeting, which does not require 48-hours-notice under the ODL.

Under the ODL, the public notice requirement does not apply, in relevant part, to the following:

The executive of a county... if the meetings are held solely to carry out the administrative functions related to the county executive or town legislative body's executive powers.

"Administrative functions" means only routine activities that are reasonably related to the everyday internal management of the county or

town, including conferring with, receiving information from, and making recommendations to staff members and other county or town officials or employees.

“Administrative functions” does not include:

- (A) taking final action on public business;
- (B) the exercise of legislative powers; or
- (C) awarding of or entering into contracts, or any other action creating an obligation or otherwise binding the county or town.

Ind. Code § 5-14-1.5-5(f). Here, the Board contends that it may carry out administrative functions outside of a public meeting.

That is not true.

Instead, the ODL merely removes the usual 48 hour public notice requirement for administrative function meetings. The rest of the ODL provisions still apply.

Moreover, it stands to reason that if the entering into contracts is prohibited by subsection 5(f)(C), then the inverse must be true as well: the non-renewal of contracts.

Indiana Code section 36-2-2-30 authorizes a county executive to employ an attorney, but does not give the ability to do so outside of a public meeting. While a lone commissioner putting out feelers to potential prospects is not subject to meeting requirements, the decision not to renew a contract and replace an attorney should play out in public.



## **CONCLUSION**

Based on the foregoing, it is the opinion of this office that the Henry County Board of Commissioners 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