

OPINION OF THE PUBLIC ACCESS COUNSELOR

RACHAEL L. BARLOW,
Complainant,

v.

SHELBY COUNTY PLAN COMMISSION,
Respondent.

Formal Complaint No.
20-FC-178

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Shelby County Plan Commission violated the Open Door Law (ODL).¹ Attorney Mark W. McNeeley filed an answer on behalf of the commission. 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 28, 2020.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

This case involves two allegations that the Shelby County Plan Commission (Commission) violated the Open Door Law.

Rachael Barlow (Complainant) alleges that members of the Commission continued to discuss public business with the commission's attorney after adjourning the meeting on December 22, 2020. Barlow observed the meeting but was instructed to leave the building.

Barlow also claims the commission failed to post the meeting agenda and she never received a response to a request for the agenda before the meeting.

As a result, Barlow filed a formal complaint with this office on December 28, 2020.

On January 18, 2021, the Commission filed a response to Barlow's complaint. The Commission did not directly address Barlow's allegations, but rather contextualizes the tenor of recent Commission meetings as it considers matters germane to a solar plant.

The Commission contends that a citizen advocacy group, which Barlow is either directly or ideologically affiliated, harasses and annoys Commission members to the point of intimidation. The response speaks for itself otherwise.

As for the agenda, the Commission asserts that the executive director was ill and failed to post the agenda. It is unclear if it was made available contemporaneous with the beginning of the meeting.

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).

Shelby 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 Shelby County Plan Commission (Commission) 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 Commission must be open at all times to allow members of the public to observe and record.

2. 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).

3. Barlow's first complaint

Barlow's first complaint concerns a discussion between a majority of the Commission and its attorney after adjourning the meeting on December 22, 2020.

It is unclear whether the Commission discussed public business during this conversation. There is also insinuation that members of the public approached the gathering to present information.

It should be noted that after the conclusion of a public meeting, public business cannot continue. This includes deliberation of matters before a governing body. This does not mean that members have to immediately separate themselves from each other after the gavel falls. Instead, it means that Commission members should limit any discussions to non-public business subjects.

There is an exception in the Open Door Law for "chance gatherings." Contextually this simply means that if a constituent approaches a majority of the board with questions or discussion items and the board chooses to engage, it is not a meeting, by definition.

This office encourages civic engagement and interaction between public officials and their constituents as a primary transparency tool. A dialogue between board members and those they represent is necessary and crucial. Once elected or appointed, representatives are not in an insular vacuum devoid of input from the public.

Moreover, Indiana courts do not recognize a prohibition on ex parte communication with public officials like they do with judges. "[Board] members are local officials who are

expected to receive citizen input in a less formalized manner than a court proceeding.” *Worman Enterprises, Inc. v. Boone County Solid Waste Management Dist.*, 805 N.E.2d 369, 376 (Ind. 2004).

That said, the engagement should remain professional and civil. Threats, intimidation, and harassment should have no part in public discourse.

On the other hand, elected or appointed officials need to have thick skin and be able to accept criticism, scrutiny, and opposing viewpoints. Mere disagreement, advocacy, or lobbying does not equal bullying.

All that written, from the information provided, there is no indication that the Commission conducted any substantive public business after the meeting to warrant a declaration of noncompliance with the Open Door Law.

4. Public meeting agendas

Barlow also alleges she was unable to procure an agenda before the start of the meeting.

Under the ODL, a governing body of a public agency utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. Ind. Code § 5-14-1.5-4(a).

Again, it is unclear from the information provided whether the Commission posted the agenda at the entrance contemporaneous with the start of the meeting or simply was not available in advance. The burden on the agency is the former and not necessarily the latter.

CONCLUSION

Based on the foregoing, I am disinclined to make a formal conclusion on this matter because it would likely make the situation worse. What I can recommend is that members of the public be mindful of the appropriate time, place, and manner for demonstrating their positions to public officials. At the same time, I advise public officials to accept that input with a manner consistent with good governance.

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

Luke H. Britt
Public Access Counselor