

OPINION OF THE PUBLIC ACCESS COUNSELOR

JUSTIN M. KIEL,
Complainant,

v.

TRI-TOWNSHIP CONSOLIDATED SCHOOL CORP.,
Respondent.

Formal Complaint No.
20-FC-26

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Tri-Township Consolidated School Corporation violated the Open Door Law.¹ Attorney Monica J. Conrad filed an answer on behalf of the school corporation. 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 February 25, 2020.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

This case involves a dispute about the sufficiency of the published notices for executive sessions, improper application of an Open Door Law (ODL) exemption, and whether a public agency improperly took final action during an executive session.

Justin M. Kiel (Complainant), a reporter for *The RegionalNews*, alleges the Board, on at least four separate occasions, published notices of executive sessions, all of which failed to comply with the requirements outlined by the ODL. Specifically, the Board properly cited Indiana Code. 5-14-1.5-6.1(b), however the subject portions of the notices never included any specific details that would describe the purpose of the private meetings.

Additionally, Kiel contends the Board, on multiple occasions, misapplied the ODL exception that allows executive sessions to discuss strategy with respect to the purchase or lease of property. Kiel asserts the Board did not hold these executive sessions for competitive or bargaining reasons and the meetings were not free of competitive or bargaining adversaries.

When asked by the media, various board members and the superintendent confirmed that one of the items discussed during at least one of the executive sessions was the acquisition of Wanatah's Lions Park, a park adjacent to Tri-Township's Wanatah School campus and is owned by the Wanatah Lions Club.

Moreover, as it relates to the discussion of purchasing the park, Kiel believes that since the Board's president, Tim Guse, is also the treasurer for the Wanatah Lions Club there may be a conflict of interest. Specifically, if Guse attended the executive sessions where the Board discussed purchasing the park, then that meeting could not have been "... free of competitive or bargaining adversaries."

Finally, in a letter published on the schools' website, the superintendent shares that the Board, during one of their executive sessions, "spoke at great length regarding [his] strategic vision and recommendations presented earlier in the evening."

Kiel asserts that the letter proves that the Board discussed topics that would not fall within the exceptions provided under the ODL. Kiel also alleges that the Board took final action during one of the executive sessions.

In the letter, the superintendent wrote regarding recommendations that the Board escalate meetings to inform the public of the stated plan and implications from any further delay. At a prior public meeting the Board shared with the public the recommendations mentioned in the letter, but the Board did not take any votes during that meeting. Kiel argues that by initiating the upcoming public meetings and by agreeing to follow Shepard's recommendation during the executive session, the Board has taken final action.

As a result, Kiel filed a formal complaint with this office on February 25, 2020.

The Board filed an answer to Kiel's complaint on March 19, 2020. The Board argues that it did not violate the Open Door Law.

First, the Board asserts that each of the public notices for the executive sessions sufficiently met all of the requirements. The language used in the notices is almost verbatim to what is written in the statute allowing executive sessions to discuss the purchase of property and school safety.

Second, as it pertains to the executive sessions held to discuss the acquisition of the Wanatah Lions Club park, the Board argues that it had every right to keep those discussions private because, even if the club was willing to transfer the property to the school corporation, the terms of that transfer would still need to be negotiated and the school has an interest in keeping any proposed terms private so that other potential buyers could not undercut the school's offer.

Also, when it comes to the presence of Guse at the acquisition meetings, the Board argues there is no issue because he does not meet the definition of a competitive or bargaining adversary.

Third, the Board argues that it never took final action during any of the executive sessions because it never took a vote during an executive session. The letter, as mentioned above, was simply inviting the public to attend the next few meetings so that the Board could provide further explanation regarding the recommendations created by the superintendent. At this point in time the strategic plan that the Board would eventually vote on was still just a recommendation.

Finally, the Board dismisses Kiel's allegation that it discussed topics other than what it included in the public notice for the executive session. The Board concedes that it briefly talked about the school's strategic plan at the beginning of one of the executive sessions but seeing as it directly relates to the primary reason for the meeting, which was the discussion school safety and security, the discussion was permissible under the ODL.

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).

The Tri-Township Consolidated School Corporation 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 school corporation's board is a governing body of the agency 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).

1.2 Public notice

Under the ODL, the governing body of a public agency must give public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting at least 48 hours—excluding weekends and legal holidays—before the meeting as follows:

The governing body of a public agency shall give public notice by posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held.

Ind. Code § 5-14-1.5-5(b)(1). Public notice for an executive session require additional information. Specifically, executive session notices must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b).²

The ODL, in relevant part, authorizes executive sessions for the following reasons:

² Ind. Code § 5-14-1.5-6.1(d)

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

(A) Collective bargaining.

(B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing. As used in this clause, "litigation" includes any judicial action or administrative law proceeding under federal or state law.

(C) The implementation of security systems.

(D) A real property transaction including:

- (i) a purchase;
- (ii) a lease as lessor;
- (iii) a lease as lessee;
- (iv) a transfer;
- (v) an exchange; or
- (vi) a sale;

by the governing body up to the time a contract or option is executed by the parties. This clause does not affect a political subdivision's duty to comply with any other statute that governs the conduct of the real property transaction, including IC 36-1-10 or IC 36-1-11.

(E) School consolidation.

See Ind. Code § 5-14-1.5-6.1(b). Here, Kiel takes exception to the manner in which the notice is worded. Indeed, the notice does not restate the statute verbatim, however, the statute does not require an exact recitation of the language, only specific reference to the provision which allows a governing body to meet in executive session.

A public notice provision cannot be too broad or general, nor can it be misleading. The notice here is neither of those things because it gives the public adequate notice of the subject matter of the executive session. The subsection cited was in fact amended in 2019 to include more types of real estate transactions. This office recommends the Board update its public notice accordingly, but declines to find its current notice inadequate or misleading.

1.3 Bargaining adversaries

The executive sessions cited come with a caveat found at the end of subsection (b)(2). It states:

However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.

Here, the Wanatah Lions Club is the bargaining adversary. Unlike prior definitions used by previous PACs, I do not define “adversary” as “antagonist” in this sort of transaction. The modifier “bargaining” simply means that the two parties have independent competing interests as in any transactional exchange.

In any case, the controversy stems from the School Board president’s role as treasurer of the Lions Club. The Board’s point is well taken that acting alone, the Board member would likely not have unilateral authority to make a binding decision on behalf of the Lions Club simply by virtue of its treasurer.

However, the Board member is surely an agent of both entities. While this office does not regulate conflicts of interest, it raises a presumption that the caveat to

subsection (b)(2) may have been taken too casually. This office's recommendation would have been for the Board member to recuse himself from these meetings or else hold the meetings publicly so as to maintain the appearance of propriety.

Simply because an executive session may be held for a certain subject matter does not necessarily mean a closed door meeting absolutely must be held to discuss it.

1.4 Improper discussion and final action

The ODL allows governing bodies to meet in executive session to discuss assessment, design, and implementation of school safety and security measures, plans, and systems. Ind. Code § 5-14-1.5-6.1(b)(3). The Board properly cited this provision in the public notice.

Kiel, however, further alleges that the Board broached other subject matters during the executive session. Specifically, the Board discussed other strategic visions and recommendations of the superintendent. The superintendent seemingly confirms this in an email.

The Board rationalizes this discussion because it was tangential to an appropriate subject matter – school safety measures. Still, the Board also appears to concede that the superintendent's strategic plan was broader in scope than mere safety measures because it included other subject matters including, but not limited to, the construction of a new high school. It is unclear to what depth the Board discussed the strategic plan or what those discussion entailed.

Additionally, Kiel argues that the Board took final action as the strategic plan was presented but not ratified at a subsequent meeting. Toward that end, the School issued a statement suggesting more public meetings are needed to suss out that plan.

Those statements do not necessarily suggest that final action was taken at the executive session. At least not action which would require a vote. Notably, under the ODL, decisions can be made in executive sessions, just not the kind that necessitate a vote. The Board's decision to further discuss the plan in subsequent public meetings is not inappropriate.

In any event, executive sessions are a privilege enjoyed by governing bodies only to discuss the most sensitive of matters as authorized by the statute. Undoubtedly, school safety measures are one of the most sensitive subject matters enumerated by the Open Door Law.

Kiel also alludes to problems with the frequency and length of the Board's executive sessions.

A school board will get no quarrel from this office regarding the necessity of an executive session to discuss school security and safety. At certain times – including for building planning – executive sessions may be more frequent and longer than normal.

It is, however, critical to emphasize the narrow scope of executive sessions. With little oversight, governing bodies are, in some ways, on the honor system with executive sessions. The temptation to stray off topic is great and it takes discipline to stay on target. This office encourages the Board to be mindful of these considerations.

1.5 Certifying memoranda

This segues into the final portion of Kiel's complaint: certifying memoranda. As it stands, digital signatures are merely affixed to copies of the Board's notice, but there is no affirmative statement certifying that the only subject matter discussed was what was noticed.

Indiana code section 5-14-1.5-6.1(b)(4) states:

The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

Satisfying this provision requires an attestation. While wet ink signatures from all of the Board members is not required, a statement certainly is. This goes into the agency's minute book in perpetuity and provides the public a written commitment that a meeting is in compliance with the law.

The Board appears to agree in its response and will modify its actions going forward.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Tri-Township Consolidated School Corporation has acted in noncompliance with the Open Door Law on certain matters. While none of those actions seem to be fatally grievous or intentionally malevolent, it can do better to demonstrate full conformity with the law.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned to the right of the text.

Luke H. Britt
Public Access Counselor