
OPINION OF THE PUBLIC ACCESS COUNSELOR

BETH E. REED,
Complainant,

v.

SULLIVAN COUNTY COUNCIL,
Respondent.

Formal Complaint No.
20-FC-63

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Sullivan County Council violated the Open Door Law.¹ Council attorney Edward C. Linneweber filed an answer on behalf of the council. 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 May 1, 2020.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

This case involves a dispute about a meeting allegedly held to address nonessential public business during the COVID-19 pandemic.²

Beth E. Reed (Complainant) notes that in March 2020, and in response to the COVID-19 outbreak, Governor Holcomb signed a series of executive orders to help prevent spread of the disease. Executive order 20-04 mandated that state and local government limit business to essential matters critical to the operation of government. This office released guidance recommending government units postpone or cancel meetings addressing nonessential matters.

On April 27, 2020, the Sullivan County Council considered and voted on a measure to allow county employees to join the Public Employee Retirement Fund (PERF). Reed provided a newspaper clipping indicating the council voted the measure down. Regardless, Reed argues this action amounted to nonessential business. Additionally, Reed contends the vote was not on the agenda for the meeting.

As a result, Reed filed her complaint on May 1, 2020.

The Sullivan County Council responded on June 3, 2020, addressing the April 27 meeting. It contends argues “essential matters” is not a defined term in the governor’s executive order; and thus, local government has the discretion to determine those matters. In other words, the county argues

² This opinion considers temporary executive orders in effect in March 2020, which have not been codified. Any analysis and holding is strictly between these parties and regarding these specific facts.

that employee benefits through the Indiana Public Retirement System (INPRS) are essential government functions and time-sensitive because turnover in Sullivan County is high and the measure is needed to recruit and retain employees.

The Council also argues that agendas are not strictly necessary and deviating from them is not a violation of the Open Door Law.

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).

Sullivan 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 Sullivan County Council (Council) is a governing body of Sullivan 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 Council 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 Reed’s complaint & the March 20 meeting

Reed contends the Council’s meeting on April 27 where it voted on the PERF provision was nonessential and the agenda did not include the issue.

Both parties omit that on March 23, 2020, Governor Holcomb clarified that—in Executive order 20-08—the term “essential government functions” in Executive order 20-08 means:

all services provided by the State of Indiana or any municipality, township, county, political subdivision, board, commission or agency of government and needed to ensure the continuing operation of government agencies or to provide for or support the health, safety and welfare of the public, and including contractors performing Essential Governmental Functions.

While our governor’s executive orders have the force of law, they do give some latitude to local government as to how to handle their business.

One of the most frequent questions posed to this office during this pandemic is: what qualifies as essential business? The answer always hinges on a case by case analysis of the facts. While essentiality is defined in the executive orders, there is room for subjective interpretation. This office, like all other statutes, considers statutory interpretation of the access laws – and any other related authority - consistent

with Indiana Code section 5-14-3-1: liberally in favor of transparency.

With that in mind, this office has also interpreted essential government functions in a manner that limits those activities to public health and safety during the pandemic. Even giving the county the benefit of the doubt, it is highly suspect that the consideration of the INPRS issue in the middle of a global pandemic was immediately essential or critical.

1.2 Meeting agenda

Under the Open Door Law, if a governing body uses an agenda, it must post the agenda at the entrance to the meeting location before the meeting. Ind. Code § 5-14-1.5-4(a). Although the ODL does not specify what agenda items are required, it does expressly state that “a rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void.” *Id.*

Here, the crux of the dispute involves the addition of the INPRS issue to the agenda of a meeting of the Sullivan County Council. The Council argue that it has a right to amend the agenda at any time during the course of a meeting.

Granted, nothing in the ODL prohibits a governing body from amending an agenda for a public meeting. This office considers meeting agendas to be a worthwhile endeavor, but the purpose is not to strictly bind a governing body to the items listed on the agenda.

At the same time, this office has consistently acknowledged that if an agenda item is reasonably expected to generate increased public interest (e.g., personnel matters), a governing

body should include the item on the agenda it posts before the meeting. If that is not practical, then it makes sense to table the issue until a later date.

Here, the Council considered a vote on INPRS to be under “new business” and therefore appropriate.

This office does not interpret the ODL in a way that prohibits a governing body from amending a meeting agenda. Still, the law requires a governing body that uses an agenda to post it before the meeting. So, substantive additions involving votes to the agenda of a meeting that is already underway is a practice best avoided. This is especially true when the addition to the agenda involves items related to a legitimate public interest.

Reasonable people may disagree—and frequently do—about what the ODL specifically requires from a governing body. Still, the public policy that underlies the ODL is less vulnerable to any sort of reasonable dispute: the government must conduct the business of Hoosiers openly so they may be fully informed.

Sullivan County argues the INPRS issue had been on the table for some time and therefore this office will not conclude that the county violated the ODL in this case.

Even so, the optics are bad.

Going forward, this office recommends the Sullivan County Council and all governing bodies stop the practice of making substantive additions to the meeting agenda after a meeting is considerably underway unless they involve mere preliminary discussions. This is especially true when the additions

involve items that relate to issues of legitimate public interest.

Indeed, this would be a perfect time for Sullivan County to retire the overbroad argument that the ODL authorizes a governing body to substantively add to a meeting agenda any time during the life of that meeting. That approach is inconsistent with the express purpose of the law and renders an agenda potentially obsolete before a meeting even begins.

The ODL provides a governing body some flexibility to amend a meeting agenda, but the law's underlying purpose is transparency.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Sullivan County Council did not violate the Open Door Law. Still, the Council acted in a manner inconsistent with Governor Holcomb's executive orders supplementing the ODL regarding essential government functions.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the name of the signatory.

Luke H. Britt
Public Access Counselor