
OPINION OF THE PUBLIC ACCESS COUNSELOR

SARAH E. VITALE,
Complainant,

v.

DELAWARE COUNTY ELECTION BOARD,
Respondent.

Formal Complaint No.
20-FC-82

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Delaware County Election Board violated the Open Door Law.¹ Attorney Joseph Rhetts 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 June 9, 2020.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

This case involves a dispute about the adequacy of the public notice provided for a meeting of the Delaware County Election Board.

Sarah E. Vitale (Complainant) alleges that on May 21, 2020, the Delaware County Election Board (Board) held a public meeting to test voting machines for the 2020 Primary Election. The Delaware County Clerk posted notice of the meeting on the clerk's Facebook page.

Vitale contends that the Board held another meeting on May 29, 2020, which was not posted on the clerk's Facebook page like the previous meeting notice. On June 4, 2020, Vitale emailed Delaware County Clerk Rick Spangler asking why public notice for the May 29 meeting had not been posted online, while the previous meeting notice had been. Vitale had yet to receive a response as of the day she filed her formal complaint with this office on June 9, 2020.

The Board responded on June 29, 2020, addressing the May 29 meeting. The Board explained that it was forced to hold an emergency meeting after being informed on May 28, 2020—three days before the primary—that a polling location would have to relocate due to public health concerns. In accordance with Indiana Code section 5-14-1.5-5(d), the Board called an emergency meeting in order to vote on whether the use of the polling place would be dangerous or impossible. Since the Board decided that the situation could easily be categorized as an emergency, they were only required to provide members of the news media with the same notice as is given to the members of the governing body and notice to the public by posting a copy of the notice where the

meeting will be held, according to Indiana Code 5-14-1.5-5(d)(1)&(2). Thus, the Board asserts that it took all required steps to provide notice for the May 29 meeting.

Overall the Board asserts that it believes in the benefit of informing the voting public of the change to their polling place as far in advance as possible outweighed the risk of holding its meeting 48 hours after posting its notice. Therefore, the Board argues that given the time-sensitive nature of the situation, its actions related to the May 29 meeting do not constitute 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).

Delaware 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 Delaware County Election Board (Board) is a governing body of Delaware 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).

1.2 Notice

Generally, under the ODL, the governing body of a public agency must provide 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).² Here, Vitale alleges the lack of public notice for the Board’s May 29 meeting renders it illegal under the ODL. Conversely, the Board contends emergency circumstances made normal notice impractical.

² Executive Order 20-04, Sec. 5, for the duration of the current public health emergency, allows an agency to post notice electronically as well.

1.3 Emergency meeting

In this case, the Board argues that its emergency meeting was necessary to deal with a polling place change due to the public health emergency.

The legislature has provided an exception to the 48 hour notice requirement in the event that an emergency meeting is warranted. If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of governmental activity under the jurisdiction of the public agency by any event, then the usual advance notice time requirements do not apply. News media that have requested notice of meetings, however, must still be given the same notice as is given to members of the governing body, and the public must be notified by posting a copy of the notice according to section 5. Ind. Code § 5-14-1.5-5(d).

Former Public Access Counselor Davis analyzed the meaning of this provision in a 2006 opinion:

Since there is no case law interpreting Indiana Code 5-14-1.5-5(d), I must rely on the rules of statutory construction to interpret this statute. When construing a statute, the interpreting body attempts to give words their plain and ordinary meaning. *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99, 103 (Ind. 1998).

“Emergency” is defined as “an unforeseen combination of circumstances or the resulting state that calls for immediate action.” Merriam-Webster On-Line Dictionary (2007). The term “disruption” is defined as “to throw into disorder” or

“to interrupt the normal course or unity of” and
“event” means “something that happens.”

Op. of the Pub. Access Counselor, 06-FC-223 (2006). Given that Indiana was—and still is at the time of this writing—in the throes of a public health emergency, the circumstances qualify. The question then turns as to whether the Board’s actions were justified by the circumstances.

The Board argues that the necessity of a change in a polling location was justified in order to maintain a safe and healthy and election for in-person voters. The Delaware County Clerk was notified a mere two days before the scheduled election by the owner of the former site that there were health concerns.

Because of the need for a last minute change, the Board argues it there was not time for 48-hours’ notice and a disruption of government activity—the primary election—was imminent. Indiana election law requires a vote to change a polling location in these circumstances.³

There is no question that governing bodies often use the emergency meeting exception to notice inappropriately. Missed deadlines, rushed projects, and impatient board members are often the real reason behind a so-called emergency. This does not appear to be one of those cases.

With an unusual election year and justifiable concern over the spread of COVID-19, the entire cycle was rendered upside-down. Last minute adjustments were inevitable and expected. Avoiding disruptions to the process was critical. Ad-

³ Ind. Code § 3-11-8-3.2(c)

vising the public of the new location in advance of the election outweighed the immediate import of 48-hours' notice of the meeting. Hence the true purpose of the emergency meeting statute.

Seeing as how the actions of the Board were appropriate, it also appeared to have satisfied the remainder of the requirements – notice at the place of the meeting and notice to the media.

Based on the Board's response, it has satisfied the burden of demonstrating its actions were appropriate under the Open Door Law.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Delaware County Election Board 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