
OPINION OF THE PUBLIC ACCESS COUNSELOR

ANDY COOK,
Complainant,

v.

WESTFIELD COMMON COUNCIL,
Respondent.

Formal Complaint No.
21-FC-115

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Westfield Common Council violated the Open Door Law.¹ Attorney Anne Hensley Pointdexter 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 August 17, 2021.

¹ Ind. Code § 5-14-1.5-1 to -8.

BACKGROUND

This case involves a dispute concerning various actions of a city council, taken over the span of several months, allegedly constituting violations of the Open Door Law.

On August 17, 2021, Westfield Mayor Andy Cook (Complainant) filed a formal complaint alleging that the Common Council violated the Open Door Law on multiple occasions.

First, Mayor Cook asserts that a quorum of the Council purposefully participates in the public meetings of other governing bodies. Specifically, the mayor claims that there are often four or more Council members present during Finance Committee meetings, which would functionally serve as a majority of the City Council itself.

Second, Cook contends that a majority of the members of the Finance Committee, which was created by the Council, held a meeting with a developer, for which a notice was not published. The Complainant emphasized that he was concerned that any action that could result from the meeting would end up being invalidated due to noncompliance with the Open Door Law.

Third, Mayor Cook alleges that a majority of the Council, on at least three different occasions, took final action in secret. Cook describes one instance where the Council president indicated to another governing body that the Council opposed a road project.

Mayor Cook describes another example where the Council approved the filing of an attorney grievance with the Indiana Supreme Court on behalf of the City of Westfield without holding a public meeting to approve such an action.

Similarly, Cook asserts that the Council President *pro tem* told a reporter that the Council was fully aware of the actions the Clerk-Treasurer was taking to investigate a software issue. The mayor contends this statement implies that the Council received information at some point, which constitutes an official action of the governing body. Mayor Cook claims at no point did the Council hold a public meeting to receive information from the Clerk-Treasurer.

On September 7, 2021, the Council filed an answer to Mayor Cook's complaint. First, the Council acknowledged when four or more councilors meet that it constitutes a majority. At the same time the Council noted that it was previously unaware that a committee meeting should simultaneously be noticed as a Council meeting so that additional Council members not on the Committee could observe without violation of notice requirements. With that in mind, the Council agreed to issue public notice when the majority of the body is in attendance at Committee meetings.

Regarding the allegation that a majority of the Finance Committee met with a developer in a meeting that was not publicly noticed, the Council argues there are statutory carveouts for certain activities that the Committee may or may not have engaged.

Finally, the Council addressed each of the mayor's allegations of official action being taken in secret.

Regarding the Council President's indication of the Council's opposition to the highway project, the Council argues the president's comments were an expression of his own opinion, not the agreed upon conclusion of the Council. The Council also notes that it ultimately approved the project in question, which proves the Council president's statements were not representative of the Council as a whole.

Similarly, the Council argues that the attorney grievance was neither filed on behalf of the Council nor official action of the Council under the ODL. Instead, the Council claims the Council members submitted the grievance individually in their unilateral discretion.

Lastly, the Council maintains that it has not met or received information from the Clerk-Treasurer in secret.

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 City of Westfield is a public agency for purposes of the ODL; and thus, is subject to the law's requirements. Ind. Code § 5-14-1.5-2. Moreover, the Westfield City Council (City) is a governing body 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 school board must be open at all times to allow members of the public to observe and record.

2. Committees

Whenever official action is delegated to a subset of a governing body, the group becomes an entirely new governing body, potentially subject to the Open Door Law if a majority of the new board meets to take official action on public business. *See* Ind. Code § 5-14-1.5-2(b)(1) to -(3).

In sum, if a committee serves as the functional equivalent of a governing body, it is likely subject to the Open Door Law. This office explored this concept at length regarding the Westfield “finance committee.” *See Informal Opinion of the Public Access Counselor*, 15-INF-09 (2015).

There are many reasons for forming committees, but chief among them is so the entire Council does not need a quorum to address certain subject matters. Moreover a committee’s membership is rostered by those who have expertise or interest in those particular matters. Committees can be more nimble when tackling an issue. Nevertheless, when the remainder of a council shows up to a committee meeting, it constitutes a meeting of the full governing body. If attendance by the remainder is a coordinated effort, it should be noticed as a dual meeting. If the council attendees just happen to show up without coordinating with each other, it would simply be a chance gathering, which is an exception to the Open Door Law’s definition of a meeting. *See* Ind. Code § 5-14-1.5-2(c)(1).

In any case, it appears as if the Westfield City Council acknowledges this and will proceed accordingly going forward.

3. Gatherings for certain purposes

Mayor Cook alleges that some Finance Committee meetings were held without proper public notice. While not specific in his allegations, his concern is that a majority gathering may have triggered the Open Door Law yet its provisions were not followed.

As noted above, while it certainly true that the Finance Committee is a governing body, all provisions of the Open Door Law apply to it, including its exceptions.

As noted by the Council's response, the ODL establishes a category of "non-meetings" defined at Indiana Code section 5-14-1.5-2(c). In addition to the aforementioned chance gathering, the definition of meeting also excludes, in relevant part, the following:

- (2) Any on-site inspection of any:
 - (A) project;
 - (B) program; or
 - (C) facilities of applicants for incentives or assistance from the governing body.
- (3) Traveling to and attending meetings of organizations devoted to betterment of government.
- (4) A caucus.
- (5) A gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources.

(6) An orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action.

To the extent the Finance Committee engaged in any of those activities, the Open Door Law does not apply and notice is not required.

Notably, 15-INF-09 also addressed these considerations, in part, and cautioned against stretching or overusing these provisions, particularly subsection (6). This is largely to avoid optics and perception issues that discussions are taking place secretly. Exercising these options judiciously can avoid undue scrutiny, even if technically legal.

4. Final actions taken outside public meetings

Mayor Cook raises a number of potential situations where the Council took final action outside of a public meeting.

The ODL is clear that no final action is to be taken outside of a public meeting. *See* Ind. Code § 5-14-1.5-6.1(d). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. Ind. Code § 5-14-1.5-2(g).

The ODL does not specifically enumerate every instance where final action by a governing body is needed. While undefined terms like “proposal” or “order” are open-ended, certain administrative or technical items likely do not rise to the level of a vote requirement. Some lower-level action items can be accomplished by an individual member or a board president outside of a public meeting. Those decisions

may or may not be ratified subsequently by the rest of the board.

Support or opposition to an infrastructure project, for example, is inextricably linked to a municipal council's powers and duties to fund those projects. Signaling such support or opposition to a project would indeed raise an inference that the matter had been discussed previously. If done so outside of a public meeting as a majority, this would be a potential violation of the Open Door Law.

According to the Council, however, this was not the position of the Council as a collective, as evidenced by subsequent support of the project. Rather, it was the lone opinion of the Board President.

Nevertheless, when serving as an agent of the Council, individual members should be mindful not to imply they are acting on behalf of the body as a whole, lest these suspicions manifest.

The mayor also cites an example of potential final action taken outside a meeting where the Council filed an attorney grievance with the Indiana Supreme Court Disciplinary Commission of the Office of Judicial Administration.

The Council claims the individual members acted unilaterally in submitting the grievance and not as an official act of the Council as a majority. However, the grievance submitted as evidence of the act has four signatures of members on the same complaint and identifies them as "City Council" members. This office has independently verified the authenticity of this document. While it has come to the attention of this office that two other complaints were filed, the first appears

to have been submitted by a majority of the Council as a collective.

Based on the information provided, the act of submitting an attorney grievance was effectuated by a majority of the Council. As such, it should have been discussed at a public meeting. No executive session provisions – including litigation strategy discussions – would apply. While any affidavits and documents themselves are confidential insofar as the Office of Judicial Administration is concerned,² the attorney receives a copy of the grievance itself and the fact of submission is not inherently confidential. If an attorney grievance is submitted as a majority of a governing body, it is the position of this office that the act requires a vote.

Finally, the Council president *pro tem* made it known to a media outlet that the Council was aware of the goings-on of an issue involving the Clerk-Treasurer. Again, this is not necessarily proof positive of an Open Door Law violation as there is no indication that the Council did anything as a collective. Merely receiving information on an individual level would not rise to the level of requiring a meeting.

² Rules for Admission to the Bar and the Discipline of Attorneys, Rule 23, Section 22

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Westfield City Council submitted an attorney grievance to the Indiana Supreme Court Disciplinary Commission as a majority. This type of action would necessitate a vote to do so. Since the act was done as a collective and not as individual members, it is likely an Open Door Law violation occurred.

As for the remainder of the issues raised by the mayor, the Council's actions do not appear to be in noncompliance with the law.



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