
OPINION OF THE PUBLIC ACCESS COUNSELOR

LINDA S. WILK,
Complainant,

v.

MARION COMMON COUNCIL,
Respondent.

Formal Complaint No.
22-FC-68

Luke H. Britt
Public Access Counselor

This advisory opinion is in response a formal complaint alleging that the Marion Common Council violated the Open Door Law.¹ Council President Brian Cowgill 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 April 28, 2022.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

In this case we consider whether the Marion Common Council (Council) violated the Open Door Law (ODL) by holding an improper executive session and taking official action on public business without a public meeting.

On April 19, 2022, the Council met in executive session at 6:00 p.m. followed by a regular public meeting an hour later. During the public meeting, the Council voted to retain the law firm of Taft Stettinius & Hollister as outside legal counsel to assist the Council in making changes to Marion's process for paying claims.

On April 28, 2022, Linda S. Wilk (Complainant) filed a formal complaint alleging the Council violated the ODL. Specifically, Wilk asserts that the Council's executive session to discuss hiring the law firm was improper under the law.

Additionally, Wilk contends on March 31, 2022, the Council received a letter from Taft Stettinius & Hollister LLP thanking the Council for retaining the firm. Based on the date of letter, Wilk believes the the Council took official action outside of a public meeting by deciding which firm to hire.

On May 19, 2022, Council President Brian Cowgill submitted an answer to Wilk's complaint. Cowgill confirmed that the Council held an executive session on April 19, 2022, to discuss hiring outside counsel in accordance with Indiana Code section 5-14-1.5-6.1(b)(5).² Cowgill asserts that no action was taken during the Council's executive session, and

² This statute authorizes a governing body to meet in executive session to receive information about and interview prospective employees.

the Council discussed the issue during the regular public meeting that night before voting on the issue.

Cowgill included minutes from the Council's public meeting to support his claim. Cowgill also contends that the March 31 letter from the law firm was merely a proposal, which the Council approved at 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).

The City of Marion 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. The Marion Common Council (Council) is a governing body of the agency; and thus, subject to 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 ODL definitions

Under the ODL, "meeting" means "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). Notably, the ODL defines “final action” as “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 also mandates a governing body to take all final action at public meeting. *See* Ind. Code § 5-14-1.5-6.1(c). Additionally, “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).

2. Executive sessions

Under the ODL, “executive session” means “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.” Ind. Code § 5-14-1.5-2(f).

Here, the parties disagree about whether the Council’s executive session on April 19, 2022, complies with the Open Door Law.

Indeed, the law allows some latitude to a governing body to meet behind closed doors about certain subjects. At the same time, the public is entitled to specific notice as to why.

2.1 Authorized subject matters for executive sessions

The ODL allows governing bodies to meet in executive session to discuss specific subject matters. *See* Ind. Code § 5-14-1.5-6.1(b)(1) to – (15).

Here, the Council met in executive session to discuss hiring outside legal counsel. Wilk contends, in part, the Council should not have addressed that subject in executive session. Conversely, the Council argues that Indiana Code section 5-14-1.5-6.1(b)(5) authorized the executive session.

The statute referenced by the Council authorizes a governing body to meet in executive session to receive information about and interview prospective employees. Ind. Code § 5-14-1.5-6.1(b)(5).

The Council's argument is problematic because the executive session did not involve interviewing a prospective city employee. Instead, the executive session involved an interview with an independent contractor, which is not authorized by the Open Door Law for executive session.

Consequently, the Council should have conducted the discussion it had in executive session at a public meeting.

2.2 Public notice requirements for executive sessions

In addition to the date, time, and location, the ODL requires public notice of executive sessions to state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). *See* Ind. Code § 5-14-1.5-6.1(d).

Subsection (b), of course, lists the specific subject matters that are authorized for an executive session. *See* Ind. Code § 5-14-1.5-6.1(b)(1) to -(15).

Here, the public notice for the executive session in question includes the date, time, and location as required by law. It does not, however, state the subject matter of the executive

session by specific reference to the listed instance for which an executive session may be held.

Instead, the executive session notice states:

The purpose of this meeting is to consider hiring outside counsel.

The public notice is defective for two reasons. First, the Open Door Law does not authorize an executive session to consider hiring outside legal counsel. Second, the notice does not reference the specific statute authorizing the meeting.

Granted, in response to Wilk’s complaint, the Council referenced the statute authorizing an executive session to receive information about and interview prospective employees.³ As set forth above, that statute does not cover interviews with an independent contractor. In other words, even if the Council referenced it on the public notice—which it didn’t—the notice would not be sufficient under the Open Door Law.

3. Final action without a public meeting

Wilk also contends that the Council already had some kind of commitment established with Taft Stettinius & Hollister before April 19, 2022. Wilk bases this assertion on a letter the Council received from the firm in March, which purportedly thanked the Council for retaining the law firm.

The Council argues the law firm merely sent a proposal on March 31, 2022, which the Council voted to approve at the public meeting on April 19, 2022.

³ Ind. Code § 5-14-1.5-6.1(b)(5).

Notably, neither party filed a copy of the March 31 correspondence with this office. At the same time, the meeting minutes from the Council’s public meeting on April 19 include a reference to the March 31 letter indicating the first line of the letter is: “Thank you for selecting Taft Stettinius & Hollister to represent the Common Council of the City of Marion.”

The Open Door Law expressly requires a governing body to take final action on public business at a public meeting.⁴ The ODL defines “final action” as “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order.” Ind. Code § 5-14-1.5-2(g).

Here, the meeting minutes confirm that the Council voted to retain the law firm at the public meeting on April 19, 2022.

Still, the inquiry does not end there. Arguably, the March letter, the Council’s apparent reluctance to discuss the matter substantively at the public meeting, and the improper executive session support Wilk’s contention that the Council acted contrary to the Open Door Law in more ways than one.

Even so, without seeing the letter, this office cannot reach a definitive conclusion about what the letter means in the context of the ODL.

Inferentially, it looks problematic. If the Council’s public vote on retaining outside legal counsel was merely a performative act for something the Council already approved

⁴ Ind. Code § 5-14-1.5-6.1(c).

in secret, then the Council meandered outside the confines of the law both in letter and in spirit.

This office encourages the Council to remain mindful of the requirements of the Open Door Law going forward. Moreover, the Council should adjust its approach to executive sessions consistent with this opinion.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Marion Common Council violated the Open Door Law by meeting in executive session for an unauthorized purpose and by providing defective public notice for the executive session.



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