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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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DAVID D. PENTICUFF,  
*Complainant,*

v.

DELAWARE COUNTY COUNCIL,  
*Respondent.*

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Formal Complaint No.  
23-FC-12

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging that the Delaware County Council violated the Open Door Law.<sup>1</sup> Attorney Benjamin Freeman 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

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<sup>1</sup> Ind. Code § 5-14-1.5-1-8.

complaint received by the Office of the Public Access Counselor on January 26, 2023<sup>2</sup>.

### **BACKGROUND**

This case involves a dispute over the applicability of the Open Door Law's (ODL) caucus exception.

On January 26, 2023, David Penticuff (Complainant) filed a formal complaint alleging the Delaware County Council (Council) violated the ODL when five of the seven council members gathered out of the public eye to discuss public business, including who the Council would appoint to various boards and commissions.

Penticuff contends the Council members conducted the meeting as a caucus of the Republican Party at the party's headquarters in Muncie.

On February 14, 2023, the Council filed an answer to Penticuff's complaint denying any violation of the ODL. The Council admits that a majority of the Council attended a Republican caucus with other party members, on January 19, 2023, to discuss political strategy with newly elected members.

Specifically, the Council contends it discussed various items of a political nature including: (1) preparations for the 2023 and 2024 elections; (2) political implications of the potential adoption of vote centers in Delaware County; and (3) republican applicants for partisan board appointments.

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<sup>2</sup> Kristopher Bilbrey filed a substantially similar complaint on January 26, 2023 and can also be considered as a party to this administrative proceeding.

## 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, is subject to the law's requirements. Ind. Code § 5-14-1.5-2. Moreover, the Delaware County Council 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 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). “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).

In other words, unless an exception applies, any time at least four members of the Delaware County Council gather for the purpose of taking official action—as defined above—on any function upon which the council is empowered or authorized to take official action, then the gathering constitutes a meeting subject to the Open Door Law.

Notably, a caucus is an exception to the definition of meeting under the ODL. Ind. Code § 5-14-1.5-2(c)(4). As a result, caucuses are not subject to the ODL.

## **2. ODL caucus exception**

Under the Open Door Law, the term “caucus” means:

A gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussion designed to prepare the members for taking official action.

Ind. Code § 5-14-1.5-2(h). It is true that the state’s public access laws do not apply to political parties because they are not public agencies.

At the same time, the Council cannot recast – at its convenience itself - as a political party caucus for purposes of circumventing APRA, the ODL, or both. The law simply does not allow it.

The reason is obvious: the Council, as a public entity, is neither the Republican Party alone nor one of the party’s

organizations despite the individual councilors' uniform political party affiliation.

### **3. Meeting v. caucus**

The central issue in this case is whether the Council's gathering was a meeting subject to the Open Door Law or a caucus, which is exempt.

As a preliminary matter, it is worth mentioning that one of statutory powers of the public access counselor is to issue opinions interpreting Indiana's public access laws. *See* Ind. Code § 5-14-4-10(6).

As part of providing interpretive guidance, this office examines both the relevant statutory language and Indiana caselaw for binding precedent or instructive guidance from our courts.

To be sure, Indiana courts have had little opportunity to interpret the ODL caucus exception. Even so, we are not completely without judicial interpretation. In *Evansville Courier v. Willner*, 553 N.E.2d 1386 (Ind. Ct. App. 1990), *vacated in part, adopted in part by* 563 N.E.2d 1269 (Ind. 1990), the Indiana Court of Appeals concluded the private meetings and discussions between two county commissioners—both Democrats—regarding the hiring of a fellow Democrat as county building superintendent were not political caucuses exempt from the Open Door Law.

In *Willner*, the court of appeals reversed as clearly erroneous the trial court's conclusion that the commissioners' discussions "merely constituted the planning of political strategy and the preparations for final action by fellow Democrats." 553 N.E.2d at 1390.

The court reasoned, in part, that “one of the Commission’s functions, for which it had authority to take final action, was the hiring of a new Superintendent of County buildings who would also serve as Administrative Assistant for the Commission.” *Id.* at 1389. The court’s line of reasoning tracks with the ODL’s definition of “public business.” *See* Ind. Code § 5-14-1.5-2(e).

The Indiana Supreme Court granted transfer in the case and adopted the court of appeals opinion in part and vacated it in part. *Evansville Courier v. Willner*, 563 N.E.2d 1269 (Ind. 1990).

In essence, our supreme court left the court of appeals’ holdings intact but wrote to clarify the scope of the caucus exception.

At the same time, the Indiana Supreme Court observed that a political caucus is not transformed into a meeting subject to full public scrutiny under Open Door Law merely “if the persons attending such meetings happen to constitute a majority of a governing body.” 563 N.E.2d at 1271.

Although far from exhaustive, the Indiana Supreme Court’s holding in *Willner* adopts the court of appeals’ conclusion that the ODL caucus exception did not apply when the majority of a governing body took official action on public business. Two Democratic county commissioners (i.e., a majority of the board) met several times, deliberated, and took final action on public business without a public meeting. Since they were both Democrats, the two commissioners relied on the ODL caucus exception to make their actions lawful based on their political party affiliation. The trial court ruled that the caucus exception applied to the

commissioners' gatherings, the Indiana Court of Appeals reversed the trial court's conclusion as clearly erroneous, and the Indiana Supreme Court adopted that holding.

This office agrees.

A caucus is certainly a vehicle for taking official action on a political party's business, which is why a caucus is not subject to the ODL. The goal of the ODL is to ensure the people are informed on *public* business but not *political party* business.

The powers and duties of a county legislative body are governed by statute. *See* Ind. Code § 36-2-3.5-5. Unsurprisingly, a political party cannot exercise those powers and duties. Therefore, to the extent any caucus purports to take official action on public business, it is a subversion of the Open Door Law. Conversely, a public meeting is not intended to include internal discussions of a political party's strategy, methodology, or ideology in terms of its platform or strategy. Those are items for a caucus.

## CONCLUSION

It is the opinion of this office that a governing body consisting of officials who are all members of the same political party may not rely on the Open Door Law's caucus exception to take official action on public business.

A caucus is appropriate for planning political strategy and the preparations for official action by fellow political party members. To conclude otherwise would short circuit the legislature's intention that public agencies conduct business openly.



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