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RE: Informal opinion 21-INF-4; Executive session attendees

This informal opinion examines whether the Hamilton County Board of Commissioners has authority under the Open Door Law to exclude the Hamilton County Auditor from the board's executive sessions.

The Hamilton County Commissioners contend that they are the only officials that are legally authorized to attend the board's executive sessions; and thus, all other individuals are only permitted to attend if the board admit them to carry out the executive session's purpose in accordance with Indiana Code section 5-14-1.5-2(f).

1. Open Door Law

The Open Door Law ("ODL") requires the governing body of a public agency to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. *See* 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).

Hamilton County is a public agency for purposes of the ODL; and thus, subject to the law's requirements. *See* Ind. Code § 5-14-1.5-2. The Hamilton County Board of Commissioners is a governing body of the county for purposes of the ODL. *See* Ind. Code § 5-14- 1.5-2(b). So, unless an exception applies, all meetings of the Commissioners must be open at all times to allow members of the public to observe and record.

1.1 Defining "meeting"

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[1] upon public business.[2] Ind. Code § 5-14-1.5-2(c).

In other words, unless an exception applies, any time at least two of the Hamilton County Commissioners gather to take official action on public business it will constitute a meeting for purposes of the Open Door Law; and thus, must be open to the public.

Here, the issue presented involves the primary exception to the ODL's open meeting requirement: Executive sessions.

1.2 Executive sessions

Under the Open Door Law, "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. The governing body may also admit an individual who has been elected to the governing body but has not been sworn in as a member of the governing body." Ind. Code § 5-14-1.5-2(f).

The ODL authorizes executive sessions in limited, specific circumstances, which must be properly and specifically noticed by reference. *See* Ind. Code § 5-14-1.5-6.1(b)(1) to – (15).

Notably, the ODL requires meeting memoranda for executive sessions, like all other meetings, but with modified requirements. Specifically, Indiana Code section 5-14-1.5-6.1(d) provides the following:

> the memoranda and minutes from an executive session must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice

A board of commissioners as the county executive and the governing body of the county can certainly take advantage of the executive session privilege. The Open Door Law is silent, however, as to what individual is responsible for the ministerial duties of developing memoranda in executive sessions. For clarity, we then consider the powers and duties of the county auditor.

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[1] "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).

[2] "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. Duties of the County Auditor

The Hamilton County Board of Commissioners assert the county auditor does not have legal authority to attend the board's executive sessions unless specifically invited by the commissioners.

It is worth mentioning that there is no binding case law from our courts on this issue. It also goes without saying that the county auditor does not report to the county commissioners in terms of traditional bureaucracy or hierarchy. It is an independently elected office with its own siloed powers and duties. Intersection with other public officials is governed by statute.

To that point, Indiana Code establishes the county auditor as the clerk of the county executive.[3] Ind. Code § 36-2-9-7(a). As clerk of the county executive, the county auditor must—by statute—attend all meetings of, and record in writing the official proceedings of, the executive. Ind. Code § 36-2-2-11(a).

There is no statutory authority or case law excluding an executive session from the definition of meeting. In fact, the very definition of executive session qualifies it as a "meeting".[4]

It follows then, if an executive session is a meeting of the county executive, and if the auditor is required to attend all meetings of the executive, then the auditor would be abdicating an affirmative statutory duty by not attending. In turn, the county board of commissioners would be contravening the law by excluding an auditor from an executive session.

Just like a clerk or clerk-treasurer at the municipal level, there is no legitimate way to accurately serve as an effective clerk and record keeper of the board of commissioners if excluded from certain meetings.

It is clear that an auditor is not an actual member of the board of commissioners and no one is suggesting an auditor is one. Even still the courts have called an auditor the ex officio clerk of the county executive[5] connoting that an auditor is a vital element of that body's proceedings.

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[3] The board of commissioners is the county executive. *See* Ind. Code § 36-2-2-2.

[4] Ind. Code § 5-14-1.5-2(f).

[5] *Brown v. Board of Com'rs of Bartholomew County*, 31 N.E. 811, (Ind.App. 1892). Author's commentary: While this case may have been adjudicated well before the promulgation of the executive session statute, it nevertheless remains binding case law and its dicta is not eroded simply by its age. No negative treatment could be identified.

As an aside, similar arguments could be made for the auditor's relationship with the county council under Indiana Code 36-2-9-8 but statutory language is even stronger in the case of the county executive.

3. Statutory Construction

The board of commissioners posit that the Open Door Law and the enumerated statutory powers and duties of a county auditor are in direct conflict and therefore the Open Door Law preempts the Title 36 requirements.

Given how often the Open Door Law is systemically dismissed as mere "policy" or performative government window dressing, it is surprising to hear from a public entity that the ODL trumps anything, let alone a home rule provision. This office is confident that if the board of commissioners were to identify one of its own home rule duties creating dissonance with the Open Door Law, the preeminence and sanctity of the Title 36 provision would be vehemently defended in its case.

Rather, this office reads the two statutes harmoniously. When interpreting a statute, courts presume that the General Assembly intended the provision to be applied in a manner in which the policies and goals of the law are achieved[6]. Those policy goals, of course, are a fully informed public and an accountable public governing body.[7]

Executive sessions are privileges extended to governing bodies to discuss sensitive topics away from the public at large. It is not a mechanism to erode the affirmative duties of another public official. Arguably, the duty mandated to a county auditor to attend all meetings of a county executive is to serve as a check and balance to the board to ensure that nothing in the session is discussed other than the notice. Therefore, the integrity of the proceedings (including the required attestation) is preserved by a neutral and objective third party, i.e. the designated elected official who *audits* the county's business.

Additionally, the legislature does not enact useless or easily circumvented statutory provisions.[8] If a statute says an auditor is to attend *all* meetings of the county executive, that does not mean "only those select meetings convenient to the board of commissioners." Once again, an executive session clearly qualifies as a meeting by its very statutory definition.

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6 *Commissioner, Indiana Department of Insurance v. A.P.*, 121 N.E.3d 548 (Ind. Ct. App. 2018), transfer denied, 111 N.E. 3d 197 (2018).
7 Ind. Code 5-14-1.5-1
8 Robinson v. Wroblewski, 704 N.E. 2d 467 (Ind. 1998*); Blackmon v. Duckworth*, 675 675 N.E.2d 349 (Ind.Ct.App. 1996)

Notably, the auditor as clerk and record keeper of the proceedings is a passive observer and not an active participant.

4. Exceptions

Rarely is any issue presenting itself to this office absolute. Such is the case here as well.

The law contemplates the inability of a county auditor to serve as clerk in Indiana Code 36-2-9-7(b):

> If the auditor cannot perform the duties of clerk during a meeting of the county executive, and the auditor does not have a deputy or the auditor's deputy cannot attend the meeting, the executive may deputize a person to perform those duties during the meeting.

What qualifies as "cannot perform" or "cannot attend" is unclear but some disqualifying event justifying an absence has at least been considered by the legislature[9].

This office can indeed envision scenarios where an executive session subject matter could involve the auditor's office. For example, a lawsuit between the parties necessitating a strategy discussion in executive session by the county executive. In such a case, the board could deputize an objective third party to serve as clerk.

Foreseeably, there are other examples as well but they would not include mere personality conflicts or political or ideological disagreements between the two offices.

Just as the county executive should recognize the value and requirement of including a county auditor in its proceedings, so should the auditor administer its duties soberly and professionally. While this office is not immediately privy to the details, information suggests that perhaps executive sessions could be compromised by leaks if the auditor attends. This also cannot be. If an executive session is a sieve, it erodes its very purpose. If any sensitive details of the session's discussion are disclosed without authorization, so too is confidence in its attendees eroded. This office does not generally ratify the use of non-disclosure agreements for public agencies, but as a measure of last resort, they may have their place in certain circumstances.

9 And no, an executive session by itself is not a disqualifying event.

Both parties are expected to be mature enough to carry out their respective duties proficiently for the benefit of the public they serve. As a rule, post-session hints, rumors and gossip serve no one.

4. Conclusion

Our legislature established the county auditor as the clerk of the county executive, which includes an express statutory duty to attend all meetings of, and record in writing the official proceedings of, the executive.

Since executive sessions are meetings—by definition—under the Open Door Law, it follows that the county auditor has a duty to attend the sessions and record in writing what is required by law.

Indeed, the Open Door Law authorizes a governing body to both exclude the public from executive sessions and to admit those necessary to carry out its purpose. This office narrowly interprets this statute to mean that a governing body has authority to exclude the general public from executive sessions but a governing body's clerk is vital to all of its proceedings.

This office does not interpret the statute to authorize a governing body to exclude another duly elected official that has an express statutory duty to attend all meetings of a specific governing body. This office must interpret statutory exceptions narrowly[10]. Therefore an auditor has statutory standing to attend.

Indeed, this office has previously addressed similar disputes with clerk-treasurers and city clerks and have found similarly over at least the past five years. To the extent prior public access counselors have found differently, those opinions are both fact-sensitive to those situations and parties and are not binding on this analysis. Although not precedential, those opinions are useful guidelines and would be persuasive if relied upon as an affirmative defense in the formal complaint process, but they hold no bearing here.

In any event, uncertainty or disputes in nature of powers or duties are relegated to the courts via Indiana Code section 36-4-4-5. If this informal advisory opinion is unsatisfactory to any party, they may seek relief through that mechanism. These are merely recommendations.

It is the conclusion of this office that the Hamilton County Board of Commissioners lacks statutory authority to categorically preclude the county auditor

10 Ind. Code 5-14-1.5-1

from attending executive sessions convened under the Open Door Law absent extraordinary circumstances.

Please do not hesitate to contact me with any questions.

Best regards,

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