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TO: Members of the Monroe County Council and Monroe County Board of Commissioners
CC: Angie Purdie and Kim Shell
FROM: Monroe County Legal Department
SUBJECT: Open Door Law
DATE: April 27, 2020

OPEN DOOR LAW MEMORANDUM

This memorandum is intended to address certain questions which arise periodically and to highlight applicable provisions of the Open Door Law for your edification. This Memorandum is not fully comprehensive of the Open Door Law and does not address recent changes authorized by the Public Access Counselor, in response to the COVID-19 public health emergency, but only addresses codified law. If the recent changes become codified and made part of the Indiana Code, this Memorandum will be updated.

What is the purpose of Indiana's Open Door Law?
The purpose is rather obvious. The Open Door Law was designed so that the public can watch (and, if they want, record) their public business being transacted by their public officials in public.
Public officials exist to serve the public; therefore, they are required to be transparent and do that work in full view of the public. Indiana Code 5-14-1.5-1 "*… declares that this state and its political subdivisions exist only to aid in the conduct of the business of the people of this state. It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed*." It further states that the provisions are to be "*construed liberally*" with the view of carrying out this policy, a concept which has been repeatedly emphasized by various judicial opinions.

What constitutes "official action" under the Open Door Law?
Official action is broadly defined. It includes virtually every step a public official might take in furtherance of the "*business of the people*" including receiving information, deliberating, making recommendations, establishing policy, making decisions, and taking final action.

What is a meeting?
A meeting is defined by Indiana Code 5-14-1.5-2(c) as "*a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business*." Remember that "official action" is broadly defined and includes, simply, receiving information.

What is NOT a meeting?

There are eight types of gatherings which do not count as “meetings” under the Open Door Law. They are are described in Indiana Code 5-14-1.5-2(c) and listed below:

1) any social gathering not intended to avoid the Open Door Law;
2) any on-site inspection of a project or a program, or the facilities of applicants seeking assistance of 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 commercial prospect, provided it does not include a conclusion as to recommendations, policy, decisions or final action on the terms of either 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;
7) a gathering for the sole purpose of administering an oath of office;
8) collective bargaining for school corporations, but only if an agent has not been appointed. (Please see the question below about Executive Sessions for more detail about collective bargaining, generally)

How broad is the “caucus” exception?

A caucus is defined by Indiana Code 5-14-1.5-2(h) as "*a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action*."

There are few cases in Indiana on this issue, but there is an Indiana Supreme Court opinion, arising from a lawsuit filed by an Evansville newspaper complaining of action taken by County Commissioners. This case leads one to believe that the caucus exception is intended to give wide latitude to elected officials for the purposes of “political strategy”, while still requiring decision making to be made publicly. Political strategy is the key business to be transacted in a caucus.

In 1990, the Indiana Supreme Court interestingly enough took exception to certain passages included in a Court of Appeals opinion, because the Supreme Court felt as if the language might “*improperly restrict*” the statutory caucus exception. An opinion was written to call out and clarify two passages from a Court of Appeals decision, which looked at actions two Vanderburgh County Commissioners took regarding the firing of a County employee. These two passages are copied below:

1. *“By their receiving information and deliberating about hiring Riney, we conclude Borries and Willner, . . ., took **official action** about public business. Their meetings and discussions were, therefore, violations of the Open Door Law”*; and

2. “*We . . . hold private discussions and meetings concerning public business and involving official action may not be held between members of a public agency under the political **caucus** exemption from the Indiana Open Door Law.*”

The Supreme Court recognized that elected officials in caucus meetings will, necessarily, receive and discuss information as they develop their “political strategy”. A caucus is not intended, however, to be a

means for elected officials to conduct their public business in the comfort of a private setting. In Evansville Courier v. Willner, 563 N.E.2d 1269 (1990), the Supreme Court stated:

"*The nature of such political meetings will often necessarily involve receiving information, deliberating expected issues, and holding discussions concerning anticipated official action and public business. If the persons attending such meetings happen to constitute a majority of a governing body, such a caucus is not thereby transformed into a meeting subject to full public scrutiny under the Open Door Law.* ***It is the taking of official action which changes the character of a majority political party strategy meeting from a private caucus to a public meeting***." (Emphasis added)

The Supreme Court's opinion is, somewhat, confusing because the very definition of "*official action*" includes receiving information and deliberating, yet the Supreme Court says – in one opinion - that receiving information and deliberating is "okay" and yet taking of "*official action*" is what changes the meeting into a public meeting.

Interpreting case law is not always easy. It has been interpreted by municipal lawyers that the Indiana Supreme Court intended or meant to point out that decision making and **final** action (rather than ***official*** action) must be performed in public. With that in mind, we urge you to limit your caucuses to truly conducting only "political strategy". When "political strategy" discussions and deliberations turn to reaching decisions and drawing conclusions, which should be done in public, the line is arguably and impermissibly crossed. You must not make your decisions in private and then simply announce them in public. You must, actually, make your decisions in public, even if and when you have discussed the political pros and cons of doing so in a caucus. Please stop short of making any decisions or drawing any conclusions in a caucus. Given the ease of piecing together information from emails and text messages from even privately-held devices which are readily discoverable in litigation, the best bet is to perform your public business in public and keep caucuses to a minimum and only for the purpose of truly discussing "political strategy".

Are committees subject to the Open Door Law?
Yes, if they are officially appointed. Indiana Code 5-14-1.5-2(b) makes clear that when two or more individuals are appointed directly by the governing body *or* by its presiding officer and is delegated authority to take "official action" upon public business, then those individuals are also deemed a "governing body" and subject to the Open Door Law. Ad hoc, informal discussions between less than a majority of a governing body will not be considered a committee. A committee is formed or appointed intentionally and with purpose.

If, for example, a committee is announced in a public meeting and it is intended that that the same, small group of members will meet, receive information, deliberate and discuss topics with the intention of reporting back to the entire governing body, such that the governing body can make decisions based on the small group's report or information, then it would appear that a committee has been formed. The group of three County Council members appointed to discuss the impact of COVID-19 on County, for example, would be considered a "governing body" under the Open Door Law, as it was announced and formed in a public meeting **IF** it is the intention that the work of these three members be shared with and relied upon by the County Council. If it is three members just talking informally and it is not the intention that their work be shared or relied upon by the Council, then it would not be a "governing body".

What is a Serial Meeting?

Serial meetings – **which can be held in person, by phone, or by email** – are small group meetings or discussions, held within a week, on the same subject, and when strung together or added up include a quorum of the governing body. Serial meetings violate the Open Door Law. Let's remember that the Open Door Law's philosophy is fairly simple: it requires that public officials do their public business in public, and not off-line and outside the view of the public. While that concept is simple, the requirements of the Open Door Law may not always be so straight-forward, as is the case here. The Serial Meeting section was created in 2007, when it became apparent that email transactions were a way of doing business outside of public view. The section, in large part, intended to cut down on public business being conducted electronically and outside of publicly-noticed meetings. Keep in mind that the word "gathering" can be a virtual gathering, done electronically.

A Serial Meeting, defined by Indiana Code 15-14-1.5-3.1, occurs when a series of at least two gatherings of a governing body meets ALL of the following criteria:

1. One of the gatherings is attended by at least three members but less than a quorum*, and any of the other gatherings include at least two members;
2. The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body (i.e. add up the members at each of the gatherings and if a quorum met in total, this particular criteria is satisfied);
3. All the gatherings concern the same subject matter and are held within a period of seven days; and
4. The gatherings were held to take "official action" on public business.

*It should be noted that the Commissioners – a body of three – cannot satisfy the conditions of a serial meeting; therefore, these provisions do not apply to the Commissioners.

Do the Commissioners have any different rules than the Council?

The Commissioners, because they are the Executive Branch of the County, are allowed to handle "administrative functions" outside of the public view and without posting notice. This exception is authorized by Indiana Code 5-14-1.5-5(f). "Administrative functions" means *only routine activities that are reasonably related to the everyday internal management of the county*, including conferring with, receiving information from, making recommendations to staff members and other county or town officials or employees. "Administrative functions" does NOT include:

1. taking final action on public business,
2. the exercise of legislative powers,
3. awarding or entering into contracts, or
4. any other action creating an obligation or otherwise binding the county.

Also, as noted above, the Serial Meeting rules, by definition, do not apply to the Commissioners.

What other exceptions are there to the Open Door Law?

There are certain times when the law allows public officials to close the doors to the public. These are called "Executive Sessions" and are explained in Indiana Code 5-14-1.5-6.1. Notice is still required and the public must be informed, in that public notice, of the exact statutory exception being applied. Executive Sessions may be held for many reasons, and those that apply to the County include the following:

1. if authorized by federal or state statute;
2. for collective bargaining
3. litigation or pending or threatened litigation (if that threat is communicated in writing);
4. for the implementation of security systems;
5. to discuss real property transactions up to the point in time when a contract has been executed by the parties;
6. for interviews and negotiations with industrial or commercial prospects or their agents;
7. to receive information about and interview prospective employees;
8. to discuss records classified as confidential by state or federal statute;
9. to discuss job performance evaluation of individual employees;
10. to discuss a list of prospective appointees and discuss applications, for appointment of a public official;
11. to discuss information and intelligence intended to prevent, mitigate, or respond to the threat of terrorism;
12. to train members of a board of aviation commissioners;

The law makes clear that final actions must be taken at a meeting open to the public and noticed in advance. Meetings many not be recessed and reconvened with the intent of circumventing the Open Door Law.

As the law is currently written and codified, members of a governing body may participate electronically in a meeting but cannot be counted as present or participate in final action. As we have seen, the rules have recently been relaxed, per Governor's Order and under the direction of the Public Access Counselor. Whether the written and codified law will change permanently is yet to be seen, but we will keep you informed if changes occur. Please notify us if you have questions. It is our hope that we will be able to address your questions in advance, so that we can fend off any formal challenges or litigation.

What about public records and written communication?

An entire memo could be written on this subject alone; however, it is worth noting that Monroe County is also required to give the public broad access to documents and written communications held by the County and its employees, elected officials, and other constituents. Regardless of where public communications and documents are stored (on private or public computers and accounts), if those records are deemed public records under the law or by the Public Access Counselor and no exception applies, the documents are subject to disclosure. With that in mind, we remind you that it is wise to monitor your written work (including email communication), knowing it may be requested and seen by the public. A good rule of thumb is: if one would not want or appreciate your communication being published in the newspaper or online, please do not reduce your communication to writing.