STATE OF INDIANA

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Séamus Boyce
Kroger Gardis & Regas, LLP
111 Monument Circle, Ste. 900
Indianapolis, IN 46204

Re: Informal opinion 21-INF-8; The correlation between civility and public access

Dear Mr. Boyce,

This informal opinion is in response to your inquiry regarding incivility that many communities are experiencing during public meetings and in relation to public records requests as well.

Per your inquiry:

> There has been a sharp uptick in disruptive and even dangerous public meetings. Resource consuming and costly fishing expeditions are likely at an all-time high. The personal attacks if continued could lead to an unprecedented wave of public servants leaving their professions. Overall, we could all use some suggestions for turning down the temperature that currently exists. What guidance do you have, and resources do you suggest, to allow community leaders to appropriately address civility and for patrons to appropriately seek transparency and share their perspective on the topic at hand?

This informal opinion will attempt to address those concerns from a public access perspective and will speak to all Hoosiers and those who represent them.

I will not bury the lede: there is no easy solution. There may not even be a right answer. Anyone hoping for this opinion to be a talisman for civility will be disappointed. Even still, this office has not escaped the impact of recent current events and we would be remiss to pass up the opportunity to weigh in with some professional guidance.

1. Role of the Public Access Counselor

Because public access considerations affect a great deal of interactions between public agencies and their constituents, the reach of the public access counselor is broad. During my tenure, I have taken the role of "counselor" quite literally, advising both the public and those who represent them as to their responsibilities under both the letter and the spirit of the law.

Over the past decade, I have become quite protective of these laws. If applied correctly, they are conduits for effective, righteous and just governance. If wielded inappropriately, they become counter-productive and can easily backfire and cause unnecessary confusion.

But to the point of this inquiry, issues of etiquette, behavior and decorum have knocked on the door of public access. This opinion attempts to answer that call.

2. Public meetings and comment

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).

Notably, nothing in the Indiana Open Door Law guarantees or even mentions the right to *participate* in the proceedings of a governing body much left interrupt. The right to "observe and record" has not been interpreted by any known authority as the right to speak during public meetings. As the Supreme Court of the United States stated in *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984): "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."

Toward that end, governing bodies can choose whether to extend the courtesy of a comment forum, and therefore revoke it if misused. Tumult, disorder and disturbance on the part of the audience should not be tolerated by a board, council or commission.

This office does, and will always, advocate for a meaningful public comment opportunity at public meetings, if practical. Ultimately, however, a public comment forum during a meeting is a privilege and a courtesy extended by a governing body to the public.

Various courts have recognized that reasonable rules, restrictions and regulations can be placed on commenting, if the forum is opened. It is up to each governing body to set those policies and enforce them as objectively as possible. They can include viewpoint-neutral rules regarding time limits, keeping comments relevant to agenda and pending business items, and prohibition on malicious re-marks. These types of measures should pass scrutiny so long as they are enforced consistently.

3. Decorum

The Open Door Law does not speak to civility, even tacitly. The public access counselor is not the behavior sheriff. Anecdotally speaking, however, it has been the experience of this office that reasonable and measured discourse invites more productive solutions.

That written, it cannot be stressed enough that public meetings should be a professional place of business for the governing body to soberly conduct its affairs distraction-and-interruption-free. Board presidents should seek to take control of their meeting rooms with authority and confidence, lest the loudest voices run roughshod.

Stated frankly, governing bodies, including school boards, have explicit power to craft rules and policies to maintain order in its facilities[1]. While those policies cannot conflict with or preempt any state law, Indiana Code gives considerable latitude to school boards to manage operations in any way they see fit, including how to conduct its meetings.

In some cases, it has been necessary for boards to take a "breather" of sorts, pausing public comment and letting the temperature cool. This is not an unwise strategy and will be supported by this office on a case-by-case basis.

What good governance does not include, however, is setting up secret committees to do the work of the public agency behind closed doors. Agencies should be mindful that any board, commission, council, or other body of a public agency which takes official action upon public business is considered to be a governing body2. Clandestinely delegating work to a committee with the intent to make their meetings non-public only exacerbates the problem and invites suspicion.

That written, it takes thick skin to be a public official. Mere dissent or discontent from constituents is not enough to warrant a forced exit from a meeting or ending the meeting prematurely. Overreaction and retreat by the board can be just as harmful to the integrity of the meeting even though forced stoppage of the meeting by an audience member is never appropriate.

Moreover, it has come to the attention of this office that boards have invoked the public health emergency as pretext to hold virtual meetings when concerned about unrest. The new legislation codifying past executive orders do not require a reason for holding the meeting.3

[1] Ind. Code § 20-26-5-4(b)(18)
[2] Ind. Code § 5-14-1.5-2(b)(2)
[3] Ind. Code § 5-14-1.5-3.7

Even still, eventually the opportunity to hold virtual meetings will expire and boards should be prepared and take steps to ensure order during in-person meetings through sound policies and poised enforcement thereof.

To the extent law enforcement is recruited to assist as bailiffs, it would not be considered a barrier to access. We have received several complaints alluding to the passive presence of officers as an intimidation factor for the audience, but I have not seen any video evidence or submitted narrative that credibly support that notion.

4. Public records requests

The Access to Public Records Act is a valuable tool to clarify the goings-on of government units and to hold agencies accountable, but making a successful request can be a bit of an art form.

The Access to Public Records Act (APRA) states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." As a result, unless an exception applies, any person has the right to inspect and copy an agency's public records during regular business hours. Ind. Code § 5-14-3-3(a).

For those new to the public access world, it should be recognized that APRA requires a request to be made with reasonable particularity4. Specificity is key when asking for documents.

While this extends to all manner of records – especially electronic mail, we'll use the school setting as an example. When attempting to evaluate the subject matters taught in schools, many requesters simply have asked for "all curriculum" in a K-12 school corporation or use very broad language in their requests. Problematically, "curriculum" is a fairly general term and, again, can encompass any manner of material and documents.

Title 20, Article 30 of the Indiana Code enumerates the mandatory and optional curriculum for public and charter schools. The breadth of documentation created pursuant to that statute would be overwhelming on its own, hence the need to pare down a request. To wit, if a requester is interested in a particular textbook, lesson plan, syllabus, assignment, etc., they should be able to receive it without interference. But it should be asked for on a piecemeal basis and not as a wholesale audit of all "curriculum". If there are specific school policies on classroom instruction, those should be available as well.

As a practice tip, it might behoove all kinds of agencies to be proactive in posting certain frequently requested materials online or made available for inspection onsite.

Beyond that, the burden is on the requester to specify what they are seeking. It may take a bit of homework to drill down to identify which materials are relevant to a requester's interests. Narrowing down a document request takes the guesswork out of the process and allows for a more efficient and meaningful production of material. Additionally, inviting requesters to narrow down broad requests instead of a hard "no" based

[4] See Ind. Code 5-14-3-3

on specificity grounds might facilitate success. Requesters should also be generally familiar with some of the exceptions to disclosure that may affect records requests. Personally identifiable student information, certain safety protocols of an agency and copyrighted material among them. For some of this information, inspection may be more appropriate than copying at the discretion of the agency.

5. Conclusion

Hoosiers have the right to observe and record a public meeting under the Open Door Law but not necessary participate without invitation. Moreover, anyone can request disclosable documents from state and local government vis-à-vis the Access to Public Records Act.

In the course of my tenure, I have indeed seen greater success when constituents engage public agencies with tact and some measure of graceful conduct and when those courtesies are reciprocated. Exercising kindness and civility is not weakness. Torch-and-pitchfork mobs are rarely successful in getting their way in the long run. It may not be required by law that anyone be nice when interacting with government, but I guarantee professionalism yields better results.

Those seeking information from public officials will always find a friend in this office. Please reach out for suggestions as to ways to civically engage and enjoy productive relationships with those who represent you. We have a wealth of knowledge in that regard. Dissent, scrutiny and protest are not bad words in the public access world so long as they are exercised in the appropriate time, place and manner. It has indeed been disappointing to see the unrest at public meetings recently and it is past time to restore civility to the conversation.

As always, please do not hesitate to contact me with any questions.

Best regards,

Luke H. Britt
Public Access Counselor