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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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JOHN NAURACY,  
*Complainant,*

v.

LAKE COUNTY BOARD OF COMMISSIONERS,  
*Respondent.*

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Formal Complaint No.  
17-FC-189

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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 the Lake County Board of Commissioners (“Commissioners”) violated the Access to Public Records Act<sup>1</sup> (“APRA”) and Open Door Law<sup>2</sup> (“ODL”). The Commissioners responded to the complaint through attorney Tramel Raggs. His response is enclosed for review. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

<sup>2</sup> Ind. Code §§ 5-14-1.5-1 to -8.

to the formal complaint received by the Office of the Public Access Counselor on August 10, 2017.

## **BACKGROUND**

John Nauracy (“Complainant”) claims the Lake County Board of Commissioners violated the Access to Public Records Act (“APRA”) by improperly denying him access to certain public records. In addition, Nauracy alleges the Commissioners violated the Open Door Law (“ODL”) by and through a committee—created by the Commissioners to review all towing-related matters and make recommendations to the full board—that took official action on public business outside of a public meeting.

On July 18, 2017, Nauracy submitted a public records request seeking:

1. A map of towing zones;
2. A list of towing companies required for each zone;
3. Minutes of the commissioner’s committee that selected the towing firms;
4. Document explaining criteria used to select or reject towing firms or rating of each company selected or rejected;
5. Public notice of each committee meeting used to select the towing firms;
6. List of towing companies rejected and reason that they were rejected;
7. A copy of all applications of towing firms for this contract;

8. The names of commissioner's committee members who made the selection of the towing companies;
9. The dates, times, and location the selection committee met;
10. The voting record of the member of the selection committee;
11. A copy of all the anti-collusion affidavits and financial responsibility documents submitted by the applicants;
12. A copy of the legal notice used to advertise bids for the contract;
13. A copy of the executed contract for each successful towing contract; and
14. A copy of the towing fees for each successful towing contractor.

On August 1, 2017, the Commissioners, by letter, acknowledged Nauracy's request. In doing so, the Commissioners denied seven of Nauracy's requests. The board denied four of the requests (2, 6, 8, and 10) because those requests necessitated the creation of a list that was not in existence. The Commissioners denied the three other requests (3, 5, and 9) because the board had no documents in its possession responsive to the request. The remainder were in the process of being fulfilled.

Nauracy argues that some of these denials amount to a violation of ODL and APRA.

The Commissioners argue that no violation of APRA or the ODL has occurred in this case. Specifically, the board claims—as it pertains to four of the requests (2, 6, 8, and 10)—that Nauracy asked for lists to be created, which APRA does not require under Ind. Code Section 5-14-3-3(f)(1).

As it pertains to the three other denials (3, 5, and 9), the Commissioners argue that they have no documents responsive to the request.

Additionally, as it relates to Nauracy's allegation of an ODL violation by a committee established by the Commissioners to review all towing related matters and make recommendations to the full board, the Commissioners argue that Nauracy's complaint is in error because the Commissioners did not authorize the committee to take any official or final action on towing matters; and therefore, the committee is not subject to the ODL.

## **ANALYSIS**

At the heart of this case is the question of whether the requirements of the Open Door Law ("ODL") apply to a committee created by a board of county commissioners, if that committee does not—as the Commissioners argue—make up the majority of a voting body. In this case, the committee consists of one Lake County Commissioner and two administrators employed by the Commissioners.

### **1. The Open Door Law**

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, so the people may be fully informed. The ODL's provisions are to be liberally construed with the view of carrying out its policy. *See* Ind. Code § 5-14-1.5-1.

Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must

be open at all times for the purpose of permitting members of the public to observe and record them. *See* Ind. Code § 5-14-1.5-3(a).

The threshold inquiry in determining the applicability of the ODL is determining whether the entity in question is a governing body for purposes of the statute. If not, the ODL does not apply. Here, the entity in question is a three person committee established by the Lake County Board of Commissioners to review all towing-related matters—including the county’s towing contract—and make recommendations to the full board of Commissioners.

Indiana Code Section 5-14-1.5-2(a) governs the definition of *public agency* under the ODL. Undoubtedly, the Board of Commissioners is a public agency for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(a). So too is the case with the committee established by the Commissioners to review towing-related matters and make recommendations to the board.

Under the ODL a *governing body* of a public agency is defined as two (2) or more individuals who are:

(1) A public agency that: (A) is a board, a commission, an authority, a council, a *committee*, a body, or other entity; and (B) takes *official action* on public business.

(2) The board, commission, council, or other body of a public agency which takes *official action* upon public business.

(3) Any committee *appointed directly by the governing body or its presiding officer* to which authority to take *official action* upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

*See* Ind. Code § 5-14-1.5-2 (b) (emphasis added). The Lake County Board of Commissioners expressly state the committee was established at its behest. “Appointed directly” is not defined by the Open Door Law. Even so, Indiana Code Section 5-14-1.5-1 requires a liberal reading of the ODL and a narrow construction of its exceptions. The term “appointed directly” can be reasonably interpreted as “designated” or “assigned” and most definitely “established.” In fact, I would argue that a direct appointment could be implied or inferred based upon the factual circumstances.

It matters not that only one Commissioner is a member of the committee; what matters is the authority delegated to that committee.

Under the ODL, *meeting* is defined as 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) (emphasis added). This case involves a three member committee. So, two members of the committee constitute the required numerical majority for a meeting governed by the ODL, if that majority is gathering for the purpose of taking official action on public business.

Under the ODL, the term *official action* means to:

- (1) receive information;
- (2) deliberate (defined by Ind. Code § 5-14-1.5-2(i) as *discussing*);
- (3) make recommendations;
- (4) establish policy;
- (5) make decisions; or
- (6) take final action.

Ind. Code § 5-14-1.5-2(d). Moreover, the term *public business* means “any function upon which the public agency is empowered or authorized to take official action.” *See* Ind. Code § 5-14-1.5-2(e).

Here, the Commissioners—by their own admission—acknowledge that the board established this committee to *review all towing related matters* and *make recommendations* to the full board for action. Notably, the act of a making recommendations is expressly included in the plain language of the ODL’s definition of *official action*. Ind. Code § 5-14-1.5-2(d)(3). Moreover, the committee is authorized to *review all towing-related matters*, including the county’s towing contract. The act or process of reviewing all towing-related matters, in my view, necessarily contemplates that the committee receives information and deliberates about that information. Otherwise, it is conceptually difficult—if not impossible—to understand how this committee could make recommendations to the Commissioners on any towing-related matter.

Notably, the acts of *receiving information* and *deliberation* are both included in the ODL's definition of *official action*. Therefore, the committee is taking official action under the ODL where it reviews and makes recommendations to the Commissioners on *public business*.

As set out *supra*, the ODL defines *public business* as:

Any function upon which the public agency is empowered or authorized to take official action.

Ind. Code § 5-14-1.5-2(e). The Board of Commissioners openly state in its response that it established the committee to review all towing-related matters and make recommendations to the full board. The plain language of the ODL states that *any function* upon which a public agency is authorized to take official action is *public business*. Here, the Commissioners established the committee—a public agency—and authorized the committee for the purpose of taking official action on all towing related matters. Plainly enough, the phrase *any function* includes the review of all towing related matters if the committee is authorized to take official action. Such is the case here.

As a preliminary matter, the Commissioners expressly concede that committees are subject to the ODL if the committee has the ability to take official action on public business. Even so, the Commissioners argue that the ODL does not apply to the committee in this case because the committee lacks the ability to take official action on public business; and thus, the ODL is inapplicable.



As support, the Commissioners first point to an Indiana Court of Appeals case from the year 1898 as the legal authority for why the requirements of the ODL—first enacted in 1977—do not apply to the committee. Specifically, the Commissioners argue that *McCullom v. Shaw*, 51 N.E. 488 (Ind. App. 1898), stands for the legal proposition that “official action on public business can only be done by the Board of Commissioner [sic], unless there is an express authorization otherwise.”

Aside from the fact that case law from the year 1898 does not contemplate—far less offer any interpretive guidance on—a statute enacted in the year 1977, that case is distinguishable to the point of being truly irrelevant in this matter. Candidly, I am puzzled how the significance of that case is supposed to be applied here.

It seems—although it is not argued here—that the Commissioners contend that the committee is exempt from the ODL because the membership of the committee includes only *one* county commissioner; and therefore, a single commissioner cannot act on behalf of the board alone without express authorization. I find no allegation challenging the act of a single Commissioner in this complaint. Committees that are comprised of volunteers, other public officials from other agencies and the members of a governing body itself can all constitute committees subject to the ODL if delegated authority to take official action such as making recommendations to the original governing body. For a more recent case indicating that committees of governing bodies are subject to the ODL, see *Azhar v. Town of Fishers*, 744 N.E.2d 947 (Ind. Ct. App. 2001) (ad hoc committees comprised of a

minority membership of a town council and other non-government individuals constituted a governing body because they made recommendations to the council at-large after being established by said council).

The Commissioners also argue that the committee itself has not been authorized to take official or final action on towing matters. Additionally, the Commissioners contend the committee has no independent authority, and the Commissioners have the ability to override any recommendation made by the committee.

The Commissioners' argument here is of no import because the ODL does not require a governing body—like a committee—to possess independent authority from, nor the authority to make binding recommendations to another public agency to trigger its requirements. It's a far simpler matter than that. What is more, the Commissioners expressly admit in their response that the committee at issue in this matter is authorized to *make recommendations* to the full the board. The act of making recommendations is official action under the ODL, period.

It matters not that the full board of Commissioners has the authority to override any recommendation made by the committee. In any case, given the recent scrutiny faced by some in Lake County Government over towing contracts, it stands to reason the Board would be doubly attentive to ensuring transparency and good governance.

Thus, the committee is subject to the requirements of the ODL, just like the Board of Commissioners *en masse*; and

should act accordingly, including the development of notice and minutes for each meeting.

Also, the Commissioners ought to be mindful that the ODL cannot be circumvented by a committee merely because the committee's membership does not include a majority of the governing body that established it. That notion is antithetical to the intent and letter of the law. Therefore, to the extent that the Complainant has been denied records that should exist had the ODL been properly followed, the Commissioners have violated the APRA.

That said, the Commissioners have invited the Public Access Counselor to participate in a county-wide symposium on October 24, 2017, to address public access issues. I am confident this is a showing of good faith and an eagerness to learn. Based on past alleged shortcomings, the Commissioners have shown a willingness to work with this Office to course-correct and perhaps modernize its approach to transparency.

### **RECOMMENDATION**

Based on the foregoing, it is the Opinion of the Public Access Counselor that this and future similarly-situated committees abide by Open Door Law regulations and minutes and notice be developed accordingly.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor