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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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SEAN SMITH,  
*Complainant,*

v.

MADISON COUNTY BOARD OF COMMISSIONERS,  
*Respondent.*

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Formal Complaint No.  
22-FC-30

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Luke H. Britt  
Public Access Counselor

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This advisory opinion is in response a formal complaint alleging that the Madison County Board of Commissioners violated the Open Door Law.<sup>1</sup> Attorney Jeffrey Graham filed an answer on behalf of the Board. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on March 3, 2022.

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

## **BACKGROUND**

This case involves a dispute about whether the Madison County Board of Commissioners (Board) violated the Open Door Law when an advisory committee held a meeting without properly notifying the public.

According to Sean Smith (Complainant), the Board created a committee to evaluate and make recommendations regarding the disbursement of American Rescue Plan Act (ARPA) funds. He alleges that the committee and by extension the Board of Commissioners violated the Open Door Law (ODL) when they met for the review, evaluation, discussion, and decision-making process regarding ARPA funds – all without notice and being open to the public. Smith argues that since the ARPA Committee meets the definition of a governing body, it is required to provide notice of its meetings. He submitted his complaint on March 3, 2022.

The Board argues the ARPA advisory committee is not a governing body of the Madison County Board of Commissioners as defined under the Open Door Law. The Board adopted Resolution 2021-BC-R-15 on November 16, 2021, which adopted guidelines that the Commissioners would use for the possible distribution of Madison County's ARPA funds. This resolution included guidelines drafted by the Madison County Council of Governments (MCCOG), which refers to a "Project Review Committee". The Project Review Committee would be responsible for reviewing MCCOG staff reports which evaluate applications for ARPA funds. This means that the subcommittee referenced by the Complainant, while a part of the MCCOG selection process, is directly appointed by MCCOG, not the Board of Commissioners.

The Board concludes that the committee in question is best described as an informal “ad hoc group” consisting of mostly those involved with county government who were invited to participate by the county’s engineer.

## **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).

Madison 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 governing bodies of Madison County are a governing bodies under the ODL. *See* Ind. Code § 5-14-1.5-2(b). As a result, unless an exception applies, all meetings of qualifying boards, commissions, councils, committees or other bodies 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). Notably, the ODL defines “final action” as “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order.” Ind. Code § 5-14-1.5-2(g). The ODL also mandates a governing body to take all final action at public meeting. *See* Ind. Code § 5-14-1.5-6.1(c). Additionally, “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. The Madison County Council of Governments**

The Open Door Law, subject to limited exceptions, applies to all meetings of the governing bodies of public agencies. Ind. Code § 5-14-1.5-3(a). What constitutes a public agency is governed by statute. Ind. Code § 5-14-1.5-2(a)(1)–(7). Additionally, the ODL defines “governing body.” Ind. Code § 5-14-1.5-2(b).

Here, the parties disagree about whether the Open Door Law applies to the Madison County Council of Governments (MCCOG) committee created by MCCOG in November. The County contends the committee is not subject to the ODL because the committee is neither a public agency nor a governing body of a public agency.

The biggest question here is the function of MCCOG and its relationship to the local Madison County government units. MCCOG represents several local municipalities, the county itself, and smaller portions of adjacent counties.

MCCOG is one of 14 Metropolitan Planning Organizations (MPO) throughout the State of Indiana. They are funded by public monies and created through the Federal Aid Highway Act of 1956<sup>2</sup>. Some MPOs explicitly hold themselves out as subject to the access laws but MCCOG does not specifically do so. It is likely, however, that MCCOG would qualify as a public agency under one of the seven definitions found at Indiana code section 5-14-1.5-2(a), notably one of the following:

(2) Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.

(3) Any entity which is subject to either:

(A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

(B) audit by the state board of accounts that is required by statute, rule, or regulation.

...

(5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a

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<sup>2</sup> Pub. L. 84-627

public agency, except medical staffs or the committees of any such staff.

Problematically, little information can be found on MCCOG's creation or organizational structure through the Indiana Gateway or the Secretary of State's Business Division. Distributions of tax revenue is available, however, from the participating political subdivisions. Given the amount of money that is appropriated by these municipalities directly to MCCOG, chances are good MCCOG would qualify as a public agency.

### **3. ODL applicability to committees and other bodies**

Presuming this is so, we turn to the definition of governing body and whether MCCOG's councils and commissions are subject to the access laws.

The ODL includes three definitions of "governing body":

"Governing body" means two (2) or more individuals who are any of the following:

(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.

Ind. Code § 5-14-1.5-2(b). In this context, the public agency at play is MCCOG itself and possibly Madison County. Subsection (3) would qualify the ARPA Review Committee as subject to the Open Door Law

The review committee is, unquestionably, a deliberative assembly akin to a board, commission, council, or other body. It seemingly has power to exercise a function of the MCCOG or the County, taking official action on public business, namely the preparation of proposals for deliberations by the Madison County Council.

“Official action” means to: receive information; deliberate; make recommendations; establish policy; make decisions; or take final action. See Ind. Code § 5-14-1.5-2(d). Even if the advisory committee did not have the authority to make binding decisions or take final action, it certainly took official action at its meetings.

"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). If a governing body is delegated authority to take official action on its agency's public business, it satisfies the definition of Indiana Code section 5-14-1.5-2(b).

The County concedes the committee was formed for a specific purpose: to review and evaluate proposals to the County. This is the County's public business by any legitimate and reasonable definition. By all accounts, the County

commissioned the committee to do a portion of the County's work vis-à-vis Resolution 2021-FC-R-15.

The County asks this office to take a position whereby a governing body can outsource its work to a third-party group of designees as an end-around to the Open Door Law. It does so in light of a significant amount of public money.

This office declines to do so. The committee should have been subject to the Open Door Law.

### **3.1 Committee makeup**

The County appears to argue as well that the committee is more of an ad hoc, loosely associated group. It is true that in some cases, a set roster or membership will be a controlling factor in the constitution of a committee, but not always.

Both controlling cases on this issue - *Frye v. Vigo County*, 769 N.E.2d 188 (2002) and *Robinson v. Indiana University*, 638 N.E.2d 435 (Ind. Ct. App. 1994) – focused not on the roster of a committee, but its relationship with the establishing governing body. Both cases were ultimately concerned with the origin of the power to act, i.e. from who was their authority to act derived. Both cases dealt with authority bestowed by powers other than the original governing body. Here, however, the committee was directly appointed to advise the governing body and public agency on matters of the district's reentry plan.

We are required to liberally construe the statute in order to give effect to the legislature's intention. Unless an exception applies, "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.” Ind.Code § 5-14-1.5-3(a). All doubts must be resolved in favor of requiring a public meeting and all exceptions to the rule requiring open meetings must be narrowly construed with the burden of proving the exception on the party claiming it. *Baker v. Town of Middlebury*, 753 N.E.2d 67, 70 (Ind.Ct.App.2001), *reh’g. denied, trans. denied*;

Based on the information provided, ARPA review committee meetings should have been subject to the Open Door Law. This is also consistent with guidance from state and local authorities as to how the ARPA funds are to be distributed.

### **CONCLUSION**

Based on the foregoing, it is the opinion of this office that Madison County and its agencies did not provide adequate public notice of the meetings of its committees when they were taking official action on public business.

A handwritten signature in black ink, appearing to read 'LHB', is positioned to the right of the conclusion text.

Luke H. Britt  
Public Access Counselor

Issued: June 1, 2022