



STATE OF INDIANA

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April 14, 2015

Mr. Brian Ferguson
Via email

Re: Informal Inquiry 15-INF-09; Harpe v. Westfield

Dear Mr. Ferguson:

This is in response to your informal inquiry regarding the actions of the City of Westfield and potential violations of the Open Door Law (ODL) arising from those actions.

You are requesting a determination as to whether the Westfield City Council, through a finance committee, violated the Open Door Law by discussing matters relating to the construction of a sports facility, without providing public notice of the discussions. This matter was addressed in Hamilton County Circuit Court in *Harpe v. City of Westfield*, Cause No. 29C01-1412-PL-11753. That case was dismissed due to a statute of limitations issue.

The facts of this case are somewhat in dispute, however, the matter boils down to whether the Council had established a "finance committee" to discuss details of the lease between the builder of the facility and the City. If the Committee constituted a governing body under the Open Door Law, discussions arising from those meetings would need to be properly noticed as with any other public meeting.

Pursuant to Ind. Code § 5-14-1.5-2(b)(3), a governing body is "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." The question here is whether the finance committee was directly appointed by the Council or whether it was simply a non-majority gathering to discuss details of the lease.

"Appointed directly" is not defined by the Open Door Law. Ind. Code § 5-14-1.5-1 requires a liberal reading of the ODL and a narrow construction of its exceptions. Appointed directly could be reasonably interpreted as "designated" or "assigned". In fact, I would argue that a direct appointment could be implied or inferred based upon the factual circumstances.

If the Committee was formally created by some declaration or mandate from the Council, it would be a new governing body - a board within a board. If it was an organically formed ad hoc meeting of a volunteer non-majority gathering of Council members, it would not be a new governing body.

Information provided to this Office suggests the Council had a designated finance committee to discuss financial details of the project. The Council suggests it was formed exclusively by the City's Chief of Staff, however, the details of the committee's responsibility's suggest the Council not only acquiesced to its formation, but recognized it as an established entity.

Membership on this committee was not fluid, nor did the subject matter change. It seems as if it was exclusively established to discuss details of the indoor sports facility. Regardless of whether the presiding officer formally appointed the board members, the Council implicitly ratified membership by relying on the committee for input on financial matters. The remainder of the Council appears to have relied on reports and information generated by the committee in order to make decisions. It has the form and shape of a separate committee as contemplated by the Open Door Law. The finance committee ostensibly derived its existence solely to take official action on public business directly from the Council with no intervening steps.¹

Furthermore, the Council argues that a meeting does not constitute a gathering to discuss an industrial or commercial prospect. See Ind. Code § 5-14-1.5-2(c)(5). Said provision is intended to protect a public agency from having its negotiation position undercut by release of information about the prospect. To broadly suggest the industrial or commercial prospect 'exception' applies to every gathering to discuss the details of a potential initiative with a vendor or third-party contractor is a slippery slope indeed and a dangerous interpretation of the statute. To apply this exception carte blanche would be to erode the very purpose of the Open Door Law.

Despite my opinion of the facts, it could very well be the trial court in *Harpe* may have drawn a different conclusion. This is indeed a matter of fact and this Office is not a fact-finder. However, it is appropriate for me to issue some guidance. And it should be noted, to their credit, the City of Westfield has since reached out to me for advice on best practices moving forward.

The furor over this issue comes down to a basic tenet of government transparency – interested members of the public want to know their government is being a good steward of their tax dollars. From the Access to Public Records Act:

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that

¹ This factual circumstance is distinguished from the controlling case law on the "committee" issue, *Robinson v. Indiana Univ.*, 638 N.E.2d 435, Ind. App. (1994) as that case involved a subcommittee twice removed from the original governing body.

all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing persons with the 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.

My conversations over the past few months with Westfield City Officials have convinced me it was not the Council's intent to subvert or circumvent the Open Door Law. If my presuppositions are correct and a finance committee existed, those meetings should have been properly noticed and opened to the public. I cannot say whether the closed committee meetings greatly prejudiced the public, however, it is clear the public trust has been compromised.

My recommendation to the Council is that members act judiciously when discussing matters behind closed doors even when doing so as a non-majority gathering. Non-majority gatherings should not inherently raise suspicions the law is being subverted. However, when the gathering is recognized by a governing body as being a legitimate, member-sanctioned entity, the perception is a new governing body is being created to take official action on public business. As such, I caution public agencies to be vigilant regarding the issue of delegations, committees and task forces.

Best regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Mr. Brian Zaiger, Esq.