



STATE OF INDIANA

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Via email transmission

July 20, 2016

Mr. Timothy Schultz

Re: Informal Inquiry 16-INF-19; Independent Vendors and the State Board of Education

Dear Mr. Schultz:

This is in response to your informal inquiry regarding whether meetings conducted between independent vendors are subject to the Open Door Law.

BACKGROUND

You seek a determination as to whether the meetings conducted by independent vendors hired by the Board of Education are subject to the Open Door Law. You include several pieces of information relevant to the inquiry.

1. It is the opinion of the Board the vendors constitute a technical advisory committee.
2. The Board interprets case law to exempt TACs from the Open Door Law.

ANALYSIS

It is the intent of the Open Door Law ("ODL") 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. *See Indiana 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 Indiana Code § 5-14-1.5-3(a)*.

"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. *See Indiana Code 5-14-1.5-2(c)*. "Public business" means "any function upon which the public agency is empowered or authorized to take official action." *See Indiana Code § 5-14-1.5-2(e)*. "Official action" is very broadly defined by our state legislature to include everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking

a vote. *See Indiana Code § 5-14-1.5-2(d)*.

In order for the Open Door Law to apply and for the State Board of Education's Technical Advisory Committee to be considered a governing body, the committee must be appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. *See Indiana Code § 5-14-1.5-2(b)(3)*. The SBOE's Technical Advisory Committee members were not appointed by the Board. Therefore, the TAC does not constitute a governing body. The Board initially passed a resolution stating its intention to appoint the committee members. However, it does not appear the resolution was followed by the Board. Instead, the current committee members are contracted with by the Board and provide recommendations as part of these contracts. To be clear, if the resolution had been followed – given the resolution required the Board to ratify appointees – the TAC would have been subject to the Open Door Law.

Instead, the TAC has been staffed by SBOE staff exclusive from any SBOE sitting members' involvement. Because staff members are not part of the SBOE governing body, the TAC was not appointed directly by the Board or its presiding officers.

It is worth mentioning that in your Memorandum dated December 9, 2015, you assert the Indiana Court of Appeals has interpreted the ODL as exempting technical advisory committees. The Court of Appeals briefly discussed technical advisory committees in *Markland v. Jasper County Planning and Development Department*. There, the Court of Appeals rejected an Open Door Law complaint against a Jasper County technical advisory committee holding the complaint was not properly raised and was not relevant to the review sought. *Markland v. Jasper Cty. Planning & Dev. Dep't*, 829 N.E.2d 92, 97.

In my opinion, *Markland* does not provide a carve-out for technical advisory committees. The Appellant in *Markland* brought an Open Door Law claim regarding how an advisory committee made a recommendation to the county planning commission. However, because the Appellant did not raise this claim at trial court, the claim was not addressed. Instead, the Court of Appeals held the Appellant failed to show the Commission's decision was clearly erroneous. *Id.* at 98. You are correct technical advisory committee is a term of art, but the Open Door Law is clear that a committee, by whatever name designated, can potentially be a governing body subject to ODL provisions. It just so happens this TAC in particular does not qualify under the circumstances in which it was created. Once again, had the original resolution been followed to the letter, the TAC would have been subject to the ODL.

Furthermore, based upon the December 9 memo, I find it prudent to address a matter contained therein. You postulate whether advisory committees meetings can be considered administrative in nature. Under Indiana Code § 5-14-1.5-5(f)(2), notice is not required from the

executive of a county or the legislative body of a town if the meetings are held solely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit.

There is no other use of the term "administrative function" within the Open Door Law. The State Board of Education cannot rely on this provision. The State Board of Education is not the executive of a county

or the legislative body of a town. Rather, it is a State agency created by the general assembly to oversee education policy.

You state the advisory committee “was created to conduct research to assist SBOE in its official decision making.” Official action is broadly defined and includes receiving information and making recommendations. See Indiana Code § 5-14-1.5-2(d). Under Indiana Code § 5-14-1.5-2 (b)(3) “[a]ny committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated” constitutes a governing body. Administrative functions are not public business, but assisting a governing body in official decision making most certainly is.

In any case, because the SBOE did not appoint the committee members to serve, but instead entered into a contract with each individual member hired as a vendor, the Technical Advisory Committee is not considered a governing body. But it bears repeating that its official actions would have been subject to the Open Door Law if not for the way in which it was created. Should the SBOE decide in the future to follow its resolution of December 2, 2015 and appoint the committee members, the committee meetings would be subject to the Open Door Law.

Please do not hesitate to contact me with any questions.

Best regards,

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

Luke H. Britt
Public Access Counselor