



STATE OF INDIANA

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August 21, 2013

Dr. Norma J. Kreilein
1366 Altmeyer Road
Jasper, Indiana 47546

Re: Formal Complaint 13-FC-232; Alleged Violation of the Open Door Law by the Jasper City Council/Utility Service Board "Volunteer Group"

Dear Dr. Kreilein:

This advisory opinion is in response to your formal complaint alleging the Jasper City Council ("Council") and Utility Service Board's ("Board") Volunteer Group ("Group") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* William J. Kaiser, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference. I have granted your request priority status pursuant to 62 Ind. Admin. Code 1-1-3(1).

BACKGROUND

You provide that on April 15, 2013, Healthy Dubois County, Inc., ("HDC") issued a press release and recently published article ("Article") regarding the Jasper Biomass Proposal. The HDC provided copies to Jasper Mayor Terry Seitz and Bud Hauersperger, general manager of the Jasper City Utilities. On May 15, 2013, Mr. Hauersperger commented to the *Dubois County Herald* that, "We've discussed it with each other off and on" and "But we are waiting to talk to our attorneys to see if it would be in our best interest to make a response to it." You further note the article provides the officials will meet with their lawyers about the May 10, 2013 case management hearing and discuss how any comments would impact the pending lawsuit. You specifically noted that Mr. Hauersperger stated that "Then we will get together and discuss our next course of action in regards to the lawsuit" and "We will discuss if we should make an official response to the article."

On May 20, 2013, Board Chairman Wayne Schuetter stated during a public Board meeting that after the Article was released, the City of Jasper reviewed it as part of its ongoing due diligence. The City identified several concerns with the Article and issued an official statement of the Board and Council. You allege that prior to the May 20, 2013 public meeting, Mr. Kaiser, the Board and Council Attorney, Mr. Hauersperger, Mr. Schuetter, and Mr. Ken Sendelweck, the Board's Electric Commissioner (e.g. the Group)

met without notice or access to the public, thus violating the ODL. You maintain that the Group is considered to be a governing body, as it was appointed directly by the governing body or its presiding officer pursuant to I.C. § 5-14-1.5-2(b)(3). Specifically you maintain that the Group was appointed somewhere within Jasper government and was created expressly to take the “official action” of discussing the City’s response to the Article. While the Group does not constitute a quorum of the Board, it is still a governing body on its own. You then note the similarities to the pending lawsuit that you have filed against the Council and Board pursuant to Cause No. 19-A04-1201-MI-51, and conclude that the volunteer group that is the subject of the current litigation and the Group, discussed here, are governing bodies under the ODL.

In response to your formal complaint, Mr. Kaiser advised that after review of your formal complaint, it addresses the same allegations that were contained in your previous formal complaint. *See Opinion of the Public Access Counselor 13-FC-168*. The Council and Board rely on its previous response that was provided to the initial formal complaint. You further have made improper demands for sworn statements and information that currently is at issue in the pending litigation. Even if everything alleged in your formal complaint was accurate, you still have failed to demonstrate an ODL violation. Your attempt to rely on the Court of Appeals opinion to support your claim mischaracterizes the opinion, which did not find that any group violated the ODL. Further, the “volunteer group” cited in the Court of Appeals opinion existed only during the negotiation of the Biomass Lease. As the negotiations have concluded, no “volunteer group” existed at any time relevant to the event you cite in your most recent formal complaint. Thus, no such committee, let alone an appointed committee, existed at the time of the event alleged in your formal complaint. A mere discussion between two or more individuals does not trigger the ODL.

ANALYSIS

Many of the issues you have raised in your formal complaint have previously been addressed in a prior advisory opinion. *See Opinion of the Public Access Counselor 13-FC-168*. To the extent you believe the Council and Board continues to violate the ODL, you are free to pursue the legal remedy under Ind. Code 5-14-1.5-7. Further, there also still remains pending litigation between yourself and the Council and Board that you have made reference to throughout your formal complaint. I.C. § 5-14-4-10(6) provides that the counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under I.C. 5-14-1.5 or I.C. 5-14-3. Therefore, I am prohibited from addressing any such matters related to the pending litigation. The sole focus of the opinion will address the allegation that the Group is a governing body under the ODL and violated the law’s requirements by holding meetings without providing notice.

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, in order that the people may be fully informed. *See I.C. § 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* I.C. § 5-14-1.5-3(a).

A “meeting” is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* I.C. § 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). “Public business” means any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14-1.5-2(e). A vote is not required to take place in order for a “meeting” of a governing body to occur. “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c).

The ODL requires that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notice, generally nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

A governing body is defined as:

- (b) "Governing body" means 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; or
 - (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* I.C. § 5-14-1.5-2(b)

In order to qualify as a governing body pursuant to subdivision (2)(b)(3), a committee must be appointed directly by the governing body or its president officer. *Id.* A committee that is not appointed directly by a governing body or its presiding officer does not constitute a governing body under the plain language of the ODL. *See Opinions of*

the Public Access Counselor 05-FC-219, 09-INF-29, 13-FC-97. The Indiana Court of Appeals addressed this issue in *Robinson v. Indiana University*, 638 N.E.2d. 435 (Ind. Ct. App. 1994). *Robinson* was decided after the General Assembly amended the definition of “governing body” to add the word “directly” after “any committee appointed.” In *Robinson*, the Indiana University’s Board of Trustees (a governing body for ODL purposes) delegated the authority to appoint a committee and subcommittee to the university president who, in turn, passed the duty on to an associate vice president for research. *Id.* at 437. The Court held that “the Committee and Subcommittee did not derive their authority directly from the governing body” because the board delegated its appointment authority to the university administration. *Id.* at 438. Consequently, the committee and subcommittee were not governing bodies under the ODL. *Id.* at 437-38; *See also Frye v. Vigo County*, 769 N.E. 2d 188, 196-196 (Ind. Ct. App. 2002). The Court in *Robinson* held:

“It is apparent to us that the legislature’s enactment of the amendment [adding the word “directly”] effectively limits the types of committees that are subject to the Open Door Law...The legislature has clearly narrowed the scope of the Open Door Law’s effect as it applies to various committees.” *Id.* at 438.

You allege that the Group is considered to be a governing body under the ODL pursuant to I.C. § 5-141.5-2(b)(3). Specifically you maintain that the Group was appointed somewhere within Jasper government and was created expressly to take the “official action” of discussing the City’s response to the Article. You make no specific reference as to which governing body or the presiding officer of which governing body appointed the Group. While the final action on the issue at hand was taken during a public meeting of the Board, you allege that prior gatherings of the Group were unnoticed and therefore a violation of the ODL has occurred. As with your previous formal complaint, the Council and Board has denied all allegations and argue that you are conducting nothing more than an improper fishing expedition in an attempt to harass the City.

The Public Access Counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* The trial court would retain authority to make factual determinations regarding the incidents that have been alleged to have occurred. You have alleged that the Group qualifies as a governing body in that it was appointed somewhere within Jasper government and delegated the authority to take official action on public business. In response, the Board and City deny that any “volunteer group” or appointed committee existed at the time of the events alleged. If the Group was appointed directly by the Council, Board, or the President of the Council or Board, or some other governing body of the City of Jasper or its presiding officer, and authority to take official action upon public business was delegated, the Group would have violated the ODL if a majority of the Group convened to take official action on public business. Alternatively if, as

provided by the Council and Board, no such appointed committee or volunteer group existed at the time of the events alleged in your formal complaint, then no violation of the ODL would have occurred.

CONCLUSION

Based on the foregoing, it is my opinion that if the Group was appointed directly by the Council, Board, or the President of the Council or Board, or any other governing body of the City of Jasper or its presiding officer, and authority to take official action upon public business was delegated, the Group would have violated the ODL if a majority of the Group convened to take official action on public business. Alternatively, if as provided by the Council and Board, if no such appointed committee (i.e. the Group) or volunteer group existed at the time of the events alleged, then no violation of the ODL would have occurred.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: William J. Kaiser