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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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ANDY RUTTEN,  
*Complainant,*

v.

PENN-HARRIS-MADISON SCHOOL CORP.,  
*Respondent.*

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Formal Complaint No.  
22-FC-10

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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 Penn-Harris-Madison School Corporation violated the Access to Public Records Act<sup>1</sup> and the Open Door Law.<sup>2</sup> Attorney Jeffery Johnson filed an answer on behalf of the school corporation. In accordance with Indiana Code

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

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

§ 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 18, 2022.

### **BACKGROUND**

This case involves a dispute about whether the Superintendent Advisory Council<sup>3</sup> at Penn-Harris-Madison School Corporation (PHM) is subject to the Open Door Law. This case also involves a dispute over access to records from advisory council's meetings.

On January 5, 2022, Andy Rutten (Complainant) filed a public records request with the PHM seeking the following:

1. PHM SAC (Superintendent's Advisory Council) Steering Committee for DEI meeting minutes or any 'advice' from any SAC meeting occurring after Sept 3rd, 2021.
2. PHM SAC (Superintendent's Advisory Council) Steering Committee for DEI meeting dates & locations subsequent to Jan 1st, 2022.

The next day PHM acknowledged Rutten's request by email. PHM's initial response also advised Rutten that it denied his request to the extent that it includes records exempted from disclosure under APRA. PHM included a list of exemptions and corresponding statutes.

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<sup>3</sup> On the school corporation's website, PHM refers to this entity as SAC Steering Committee for Diversity, Equity, and Inclusion.

On January 18, 2022, Rutten filed a formal complaint alleging PHM violated both the Access to Public Records Act (APRA) and the Open Door Law (ODL).

First, Rutten asserts that PHM's response to his records request constitutes an improper denial of access to public records in violation of the Access to Public Records Act (APRA). In short, Rutten asserts doubt that the disclosure exemptions cited in the PHM's response apply to the records he requested.

Second, Rutten argues the Superintendent's Advisory Council is subject to the Open Door Law.

On February 4, 2022, PHM filed an answer to Rutten's complaint denying his claims. PHM argues since the superintendent appoints the members of the SAC rather than the school board, the meetings are not subject to the Open Door Law.

Additionally, PHM disputes Rutten's claim that it violated APRA by improperly denying his request for records. PHM argues that it timely acknowledged the request and stated that the district staff would reviewing files to determine whether and to what extent PHM had responsive records. The school corporation contends this is not a denial under APRA. PHM also contends that it provided Rutten responsive records on February 2, 2022.

## 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).

The Penn-Harris-Madison School Corporation (PHM) 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 school corporation's governing bodies are subject to the ODL. *See* Ind. Code § 5-14-1.5-2(b).

The fundamental issue in this case is whether the Superintendent's Advisory Council is a governing body of Penn-Harris-Madison School Corporation for purposes of the ODL.

### 2. ODL applicability to committees & other bodies

The ODL, 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. *See* Ind. Code § 5-14-1.5-2(a)(1) to -(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 Superintendent's Advisory Council (SAC). PHM argues the SAC is not subject to the ODL because the school board did not create it.

Under the Open Door Law, "governing body" means two 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). Here, the Superintendent's Advisory Council includes members of the PHM administration, teachers, staff, parents and guardians, students, as well as members of the community. There is no dispute that two or more individuals are members of the SAC.

Contextually, the only public agency at play here is the school corporation itself. Therefore, subsection (b)(1) is eliminated from the discussion, which leaves the latter two definitions.

It is true, as PHM implies, that the ODL expressly applies to any committee appointed directly by a governing body. Subsection (b)(3) makes that clear.

There is, however, more to consider when deciding whether the ODL applies to the Superintendent's Advisory Committee. Even if the school board did not directly appoint the membership of the SAC, it does not necessarily or automatically avoid the reach of the ODL.

Turning to subsection (b)(2), the ODL also applies to the board, commission, council, or other body of a public agency that takes official action on public business. *See* Ind. Code § 5-14-1.5-2(b)(2). In other words, the question is whether the Superintendent's Advisory Council is a governing body of PHM based on the language of subsection (b)(2).

Based on the information provided, PHM is a public agency under the ODL. *See* Ind. Code § 5-14-1.5-2(a). We also know the SAC consists of two or more people taking official action<sup>4</sup> on public business.<sup>5</sup>

Even if the Superintendent's Advisory Council lacks authority to make binding decisions or take final action, it certainly takes official action at its meetings.

To the extent this office has given different guidance in the past, it was likely a consequence of an overly narrow reading of the statutes and caselaw. This office has remedied that in the current updated edition of the Public Access Handbook.

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<sup>4</sup> "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).

<sup>5</sup> "Public business" means any function upon which the public agency is empowered or authorized to take final action. Ind. Code § 5-14-1.5-2(e).

In any case, those Handbook examples, while useful, do not take precedence over statute.

In the meantime, this office issued several published opinions clarifying the prior inconsistent guidance on this issue.<sup>6</sup>

In this case, this office concludes the Superintendent's Advisory Council at Penn-Harris-Madison School Corporation is subject to the Open Door Law based on the language of subsection (b)(2).

As a result, unless an exception applies, the meetings of the Superintendent's Advisory Council must be open to the public. Additionally, the public is entitled to notice<sup>7</sup> of any meeting or executive session and the creation of a meeting memorandum<sup>8</sup> (i.e., minutes).

### **3. Rutten's APRA complaint**

Rutten also argues that PHM violated the Access to Public Records Act by improperly denying him access to public records.

Based on the information provided, PHM's initial acknowledgement of Rutten's request included boilerplate language that preemptively denies a request to the extent that any responsive records are exempted or excepted from disclosure.

Although this is not a denial per se, the inclusion of a conditional denial in the initial acknowledgement could lead to procedural confusion on both sides. APRA requires a denial

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<sup>6</sup> *Opinion of the Public Access Counselor 21-FC-156* (2021); *Opinion of the Public Access Counselor 21-FC-36* (2021); *Informal Opinion of the Public Access Counselor 21-INF-08* (2021).

<sup>7</sup> Ind. Code § 5-14-1.5-5.

<sup>8</sup> Ind. Code § 5-14-1.5-4.

to include a statement of the specific exemption authorizing the nondisclosure along with the name of the name and title of the person responsible for the denial. *See* Ind. Code § 5-14-3-9(d).

PHM's practice of including boilerplate language in its acknowledgements referencing several potential exemptions and exceptions is not specific. If PHM follows up with a specific authority for any eventual denial, there is no immediate problem with the language in the acknowledgement.

The creation and disclosure of the documentation Rutten seeks is largely predicated on the Open Door Law's applicability to PHM's committees. Having established that the committees should have been open, so too should the documentation (minutes, memoranda, notices, agendas, etc.) potentially exist.

The law is not particularly unclear on this matter and this office has taken the position throughout 2021 that committees such as this should be open. The statute on this matter is clear and unambiguous and should have been followed by the School. Legalities aside, outsourcing controversial work to opaque committees should never be considered good governance.



## CONCLUSION

Based on the foregoing, it is the opinion of this office that the Superintendent's Advisory Council for Penn-Harris-Madison School Corporation is subject to the Open Door Law.



Luke H. Britt  
Public Access Counselor

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