
OPINION OF THE PUBLIC ACCESS COUNSELOR

CRAIG C. SIEBE,
Complainant,

v.

HAMILTON EAST PUBLIC LIBRARY,
Respondent.

Formal Complaint No.
23-FC-67

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to two formal complaints alleging the Hamilton East Public Library violated the Access to Public Records Act¹ and the Open Door Law.² Attorney Christopher P. Greisl filed an answer on behalf of the library. In accordance with Indiana Code § 5-14-5-10, I

¹ Ind. Code § 5-14-3-1-10.

² Ind. Code § 5-14-1.5-1-8

issue the following opinion to both formal complaints received by the Office of the Public Access Counselor on July 23, 2023.

BACKGROUND

In this case we consider the matter of the availability of public records, specifically legal work product, for the entirety of a governing body. We also address an allegation of final action outside of a public meeting.

Craig Siebe (Complainant) is a member and officer of the Hamilton East Public Library Board of Trustees (HEPL or Board). At the time of filing, Siebe was the Board's assistant secretary-treasurer.³ On July 12, 2023, Siebe requested a copy of the work product referenced in an invoice HEPL received from its law firm Barnes & Thornburg.

Although the documented work product was ultimately made available in an executive session; however, it was not transmitted directly to Siebe.

While there was no internal policy restricting access to a service provider's information, all HEPL Board members were free to solicit the Board's attorneys.⁴ Siebe takes exception with the way the work product was made available to him, but also with a statement made by the Board's attorneys that a majority instructed them to handle it that way.

At the time of the filing his complaint on July 23, 2023, there was a measure of ideological dissonance between a majority of four HEPL Board members and a minority grouping of

³ Siebe is now vice president of the HEPL Board.

⁴ This policy has since been changed to require prior authorization from a majority before seeking legal work product.

three. Siebe's complaint also raises concerns that a majority of the Board authorized the solicitation and expenditure of legal fees outside of a public meeting.

For its part, the HEPL Board argues that the handling of the work product was appropriate. It was sensitive material that the Board did not want publicly disclosed. Therefore, to mitigate the possibility of dissemination, it limited access to an executive session.

Insofar as the authorization of legal work is concerned, the Board suggests that the president of the Board speaks for the majority and can authorize such expenses unilaterally without express majority approval.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (APRA) states that "(p)roviding persons with 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." Ind. Code § 5-14-3-1. The Hamilton East Public Library is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the Library's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

The records portion of this case involves work product of a contracted legal firm.

2. Legal work product

As always, we view disputes through the eyes of the public agency rather than those of third parties. Here, we consider legal work product submitted to public agency by outside counsel.

“Work product of an attorney” means information compiled by an attorney in reasonable anticipation of litigation. The term includes the attorney's:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

Ind. Code § 5-14-3-2(u). There does not appear to be a dispute that the records in question qualify under this definition.

Disclosure of work product of an attorney is discretionary on the part of the agency client, meaning it may be disclosed or withheld at the agency's choice.

To the extent the work product involved the reasonable anticipation of litigation, the Board could meet and review the material in executive session pursuant to Indiana Code section 5-14-1.5-6.1(b)(2)(B). The purpose of the gathering

would be to discuss strategy with respect to initiation of litigation or litigation that is either pending or has been threatened specifically in writing.

While it is historically unusual for a library board to have such pronounced conceptual dissension, it happens quite frequently on other municipal boards with political splits. In those cases, an executive session would be advisable to review sensitive legal work product if context is appropriate. This is simply to avoid situations where, unintentionally or otherwise, the sensitivity of those documents may be compromised.

So long as the HEPL Board offered a legal and reasonable forum for all board members to inspect the work product, the practice is not inherently problematic.

3. 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 Hamilton East Public Library 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 Board of Trustees (Board) is a governing body for purposes of the ODL. See Ind. Code § 5-14-1.5-2(b).

As a result, unless an exception applies, all meetings of the Board must be open at all times to allow members of the public to observe and record.

3.1 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). “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).

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). Additionally, the ODL mandates a governing body to take all final action at public meeting. See Ind. Code § 5-14-1.5-6.1(c).

3.2 Solicitation of legal advice and the role of officers

Siebe’s primary contention is that the majority of HEPL Board directed the president to seek the work product outside of a public meeting. The Board’s response seemingly confirms this by reiterating that the president speaks on behalf of the majority.

Legal representation of a governing body can be tricky. An agreement between an agency and outside counsel should provide details on when individuals can seek advice or work

product or when a board must give prior authorization to do so.

It is unclear what exact arrangement the HEPL Board enjoyed with their lawyers, however, the Board's response makes it clear that the president "represents the majority of the Board."

This would not be atypical in certain situations where an officer (or director) is delegated the authority to liaise with outside counsel within the scope of legal representation. Without such delegation or another express arrangement, traditional roles and responsibilities of public governing body presidents do not include the ability to incur legal expenses carte blanche, especially those above and beyond a retainer agreement.

Without more, a president's role is largely procedural: running board meetings, creating and appointing committees, setting agendas, etc. They also may be given additional duties, which may indeed include representing the Board to outside parties.

Here Siebe contends that no individual board member or officer was given express authorization to incur legal expenses. The Board does not provide any evidence to the contrary. Instead, the Board argues that the president is an agent of the majority and inherently has that ability. This implies that the majority ratified the president's authority to act, but that does not appear to have taken place at a public meeting.

All of this calls into question when the president was advised of the will of the majority collective and charged to take action. If the president was delegated this authority, it

appears as if the majority was insular from the remainder of the Board and worked with the president outside of a meeting directing her to engage with counsel. Given the circumstances and context, it appears this was the case.

As it turns out, the former majority has now become the ideological minority and the new president is now part of the latter. It is doubtful the new majority would reflect the Board's response to this matter.

Majorities make decisions, not individual officers. Toward that end, it is the understanding of this office that the HEPL Board recently adopted a resolution at the September 12, 2023, meeting to address the situation moving forward.

CONCLUSION

Based on the foregoing, it is the opinion of this office that without express authorization in a public meeting, individual board members cannot unilaterally act on behalf of a majority. Otherwise, it implies the majority directed the officer to do so outside of a public meeting, which is a violation of the Open Door Law.

Insofar as the executive session to review legal work product is concerned, that course of action was appropriate.



Luke H. Britt
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