
OPINION OF THE PUBLIC ACCESS COUNSELOR

MORGAN DALY,
Complainant,

v.

HEALTH & HOSPITAL CORP. OF MARION COUNTY,
Respondent.

Formal Complaint No.
22-FC-125

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging Health and Hospital Corporation of Marion County violated the Open Door Law.¹ Attorney Tenley Drescher-Rhoades filed an answer on behalf of HHC. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on August 22, 2022.

¹ Ind. Code § 5-14-1.5-1—10.

BACKGROUND

In this case we explore whether the Open Door Law (ODL) requires a governing body of a public agency to authorize the agency's executive leadership to petition the Supreme Court of the United States (SCOTUS) to grant a writ of certiorari.

On November 23, 2021, Health and Hospital Corporation of Marion County (HHC) filed a petition for a writ of certiorari with SCOTUS appealing a decision by the Court of Appeals for the Seventh Circuit.² SCOTUS granted certiorari on May 2, 2022.³

The facts and procedural history of the underlying litigation are immaterial in this proceeding save for the fact that HHC decided to file the petition for certiorari challenging an adverse decision by the Seventh Circuit.

On August 22, 2022, Morgan E. Galloway Daly (Complainant) filed a formal complaint with this office alleging HHC violated the Open Door Law (ODL). Specifically, Daly argues HHC filed the petition without the HHC Board of Trustees taking final action on the issue at a public meeting.

On September 22, 2022,⁴ HHC filed an answer to Daly's complaint denying any violation of the ODL. HHC argues

² *Talevski v. Health and Hospital Corp. of Marion County*, 6 F.4th 713 (7th Cir. 2021).

³ *Health and Hospital Corporation v. Talevski*, 142 S.Ct. 2673 (2022), Docket No. 21-806.

⁴ HHC requested and received an extension to file a response to the complaint.

the ODL does not apply because the decision to petition SCOTUS was not made by HHC's Board of Trustees.

HHC argues the complaint fails to recognize the organization's statutorily unique corporate structure.⁵ Specifically, HHC contends the Board—consistent with Indiana Code section 16-22-8-34(a)(1)—delegates the authority to defend HHC against litigation to its executive staff, which includes the president and executive director along with the agency's general counsel.

HHC analogizes the SCOTUS petition to the countless other actions the executive staff has taken to defend the organization's legal interests in the approximately 3,000 other litigation matters that involve HHC annually.

HHC asserts this distinguishes the case from a prior opinion where this office concluded that a board of zoning appeals violated the ODL by advancing litigation without a public meeting.

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).

⁵ *Opinion of the Public Access Counselor, 22-FC-45 (2022).*

Health and Hospital Corporation of Marion County (HHC) is a public agency for purposes of the ODL; and thus, is subject to the law's requirements. Ind. Code § 5-14-1.5-2.⁶ Moreover, HHC's Board of Trustees 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 HHC Board must be open at all times to allow members of the public to observe and record.

1.1 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).

Notably, 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).

⁶ *See also* Ind. Code § 16-22-8-6.

2. Final action

At issue in this case is whether the Open Door Law requires HHC's Board of Trustees to take affirmative final action (e.g., a vote) before filing a petition for certiorari with the Supreme Court of the United States. If so—as noted above—the ODL requires the Board to take that final action at a public meeting.

Daly says yes. HHC argues that its Board of Trustees delegates the duty to defend the corporation against litigation to the executive staff.

As a preliminary matter, it is important to acknowledge that HHC's Board of Trustees—by statute—is expressly vested with both the executive and legislative powers of the corporation. *See* Ind. Code § 16-22-8-7.

This office agrees with HHC that this case is distinguishable from the case addressed in our prior opinion 22-FC-45. As a result, that case will not play a part in this analysis.

Instead, we turn to another opinion: 21-FC-169, which is more on point here. In that opinion, this office reasoned that a contract extension for a university president was so inextricably intertwined with the board of trustees' powers and duties that it would have been required to take final action before the agreement was legitimized. That opinion focused on both the board's duties as well as a delegation of authority.

So too is the case here. The HHC Board and the corporation has the power and duty to sue or be sued.⁷ Its own website states that: “An appointed seven-member Board of Trustees governs HHC.”⁸

While some executive, operational, and administrative duties will necessarily have to be delegated to staff, the volitional decision and act of pursuing further litigation with our country’s highest court is something else altogether.

Under the Indiana Business Corporation Law, all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors.⁹

While HHC is not a traditional business corporation, its corporate governance should be consistent with best practices and in the public interest.¹⁰

That stated, it would certainly be impractical for the Board to oversee every aspect of day-to-day operations, including the minutia of litigation management.

HHC, however, asserts the Board delegates its litigation responsibilities wholesale to the executive staff. Notably, HHC did not offer any resolution, policy, or ordinance verifying the Board’s delegation of authority to the executive staff to do anything, much less an action of this magnitude.

⁷ Ind. Code §§ 16-22-8-6, and -34(a)(1).

⁸ <https://hhcorp.org/about.html>

⁹ Ind. Code § 23-1-33-1.

¹⁰ Tax-supported hospitals are operated by public funds and in the public interest. *Porter Memorial Hospital v. Harvey*, 279 N.E.2d 583 (Ind. Ct. App.1972).

While delegation as a matter of course is certainly understandable for enforcement actions, administrative litigation, and routine negotiations, it strains credulity that a board of any organization would not feel it incumbent to weigh in on matters of substantial import such as filing a petition for certiorari with SCOTUS.

Of course, not every motion or pleading requires Board ratification or approval, but in most contexts, the decision to file a petition for certiorari with SCOTUS is a monumental undertaking.

It does not stand to reason that executive staff or general counsel of an organization, or both, would have carte blanche, blank check authority to act on the Board's behalf for a matter such as this. One wonders what the fallout would be if the Board had an adverse reaction to litigation strategy it did not approve.

As this office noted in 21-FC-169, under the ODL, final action by a governing body must mean *something*. If an act as momentous as petitioning SCOTUS to reverse the Seventh Circuit is treated as a rote, secretarial task, then a board simply becomes a performative, rubberstamp for executive staff.

That is neither the spirit of the Open Door Law nor—in the opinion of this office—the intent of the legislature.

It is unclear what judicial remedy—if any—is available to the complainant for an ODL violation in this context. Still, without more, the reasonable conclusion is the HHC Board took final action outside of a public meeting, or it abdicated

its duty to mind and oversee the prodigious act of filing a petition for certiorari with SCOTUS.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Open Door Law requires a governing body to take final action at a public meeting authorizing the agency to petition the Supreme Court of the United States for a writ of certiorari.



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