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November 22, 2011

Mr. Derek W. Conner
Wright, Shagley, and Lowery
500 Ohio Street
Terre Haute, Indiana 47807
Via email: dconner@wslfirm.com

Re: Informal Inquiry 11-INF-68; Open Door Law Inquiry

Dear Mr. Conner:

This is in response to your informal inquiry regarding the Open Door Law ("ODL") and its applicability to the Board of Director's ("Board") for a 501(c)(3) nonprofit corporation ("NPO"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Open Door Law ("ODL"), I.C. § 5-14-1.5-1 *et seq.*

Your specifically inquire the following as to the Board:

(1) Has the NPO bound itself to the requirements of the ODL by referencing the ODL provisions in its Bylaws?
(2) If the ODL is applicable
    a. Does the Search Committee constitute a "governing body" that is taking "official action" and therefore must give public notice even when holding an executive session?
    b. Are all "executive sessions" considered "meetings" and therefore, require public notice?
    c. Is the Search Committee's secret ballot vote impermissible?
    d. Is the Search Committee's secret ballot vote considered "final action"?
    e. If a court declares a policy, decision, or final action of a governing body of a public agency void, the court may enjoin the governing body from subsequently acting upon the subject matter of the voided act until it has been given "substantial reconsideration" at a meeting or meetings that comply with the ODL. In this instance, what would be deemed "substantial reconsideration."
    f. I.C. § 5-14-1.5-7(b) provides that any ODL action shall be commenced within thirty (30) days of either the date of the act or failure to act complained of; or the date the plaintiff knew of should have known

that the act or failure to act complained of had occurred, whichever is later. If the challenged policy, decision, or final action is recorded in the memoranda or minutes of the governing body, a plaintiff is considered to have known that the act or failure to act complained of had occurred not later than the date that the memoranda or minutes are first available for inspection. Does this mean the statute begins to run on all potential plaintiffs once memoranda or minutes are made available for public inspection?

g. How are memoranda/minutes are made available for public inspection.

BACKGROUND

The NPO's bylaws indicate that it is organized pursuant to section 501(c)(3) of the Internal Revenue Code. The Board consists of eighteen (18) members. The Search Committee is comprised of nine (9) members: five (5) Board members and four (4) members of the public.

The Access to Public Records Act ("APRA") and the ODL provide that a "public agency" means the following:

> (1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state.
> (2) Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.
> (3) Any entity which is subject to either:
>
> (A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or
>
> (B) audit by the state board of accounts that is required by statute, rule, or regulation.
>
> (4) Any building corporation of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities.
> (5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.
> (6) The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission.
> (7) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission.
> I.C. § 5-14-1.5-2(a), I.C. § 5-14-3-2(m).

The Board does not qualify as a "public agency" pursuant to the ODL or the APRA and is not audited by the State Board of Accounts.

Pursuant to NPO's bylaws, the annual meeting, regular meeting, and any special meetings of the Directors is conducted in accordance with the ODL. Notice of any such meeting is required to comply with the ODL. The Executive Committee meetings shall be conducted and public notices of said meetings shall be given in accordance with the ODL. The Bylaws are silent as to whether the meetings of the Search Committee must comply with the ODL.

The Board recently appointed a Search Committee to interview, assess, and recommend to the Board candidates for the position of CEO. During the search process, the Committee reviewed paper applications, from which seven (7) candidates were chosen to be interviewed by either phone or video. The Search Committee conducted a final meeting to vote on which candidates it would recommend to the Board. Prior to the vote, the Search Committee approved the procedure it would follow in making candidates recommendations to the Board. Each member voted, by secret paper ballot, either "yes" or "no" for each candidate. Each candidate receiving five (5) or more "yes" votes would be recommended to the Board. The Committee's professional search representative collected the ballots and the exact number of votes that each candidate received was not revealed. Only one candidate received the necessary five (5) votes, as such that candidate was recommended to the Board for final action. No public notice was given for the Search Committee meetings.

ANALYSIS

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. 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). I will address each of the issues identified in your informal inquiry separately.

(1) By referencing the ODL provisions found in its bylaws, has the NPO bound itself to comply with all ODL requirements.

The ODL was enacted to permit the public access to meetings held by public agencies. Generally, all meetings of the governing bodies of public agencies must be open at all times so members of the public agency may observe and record them. *See* I.C. § 5-14-1.5-1. The ODL is applicable to those entities considered to be a governing body of a public agency. *See* I.C. § 5-14-1.502(a) and 5-14-1.5-2(b).

The NPO is not considered to be a "public agency" pursuant to the ODL. As the ODL does not apply to the NPO, a formal complaint filed against it with the Public Access Counselor's Office would be rejected. Further, it would logically follow that litigation could not be commenced in a court of law against the NPO pursuant to I.C. § 5-14-1.5-1 *et seq.* or § 5-14-3-1 *et seq.* The Public Access Counselor's office serves as a

resource for members of the public and public officials and their employees regarding Indiana's laws governing access to meetings of public bodies and to the records of public agencies. Accordingly, your inquiry is outside the purview of this office as the NPO is not a public agency. However, in an effort to provide assistance in response to your inquiry, I will provide general observations in regards to the issues that you have identified.

In its bylaws, the NPO has specifically designated that certain meetings of the Board, including the annual, regular, special, and executive committee meetings, are to be conducted pursuant to the ODL. The bylaws only cite to the ODL in certain specific instances and do not include a general statement that the ODL is applicable to all functions of the NPO. There is no mention of the applicability of the ODL to the standing or special committees of the NPO, which would include the Search Committee. I would also note certain areas where the NPO has indicated that it would comply with the ODL, but thereafter outlines requirements that exceed or are contrary to those provided in the ODL. For example, the ODL requires 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). However, the NPO's bylaws dictate that written notice must be given to each Director seventy-two hours before the date of the meeting. The notice must also include the purpose of the meeting and requires personalized notification, which is not required of a public agency in issuing notice pursuant to the ODL. Based on a plain reading of the bylaws, I do not believe that they provide that the NPO is required to comply with all facets of the ODL and would only be applicable to those instances that have been specifically noted.

(2) If the ODL is applicable, would the Search Committee be required to post public notice and whether a secret ballot was permissible since final action was required by the full Board[1]

Selection of the CEO is governed by Article VII, Section 2 of the NPO's bylaws, which provide that a Selection Committee, consisting of the officers of the Board and chaired by the Board President, shall direct recruitment and review of candidates for the position. I am assuming that the Search Committee was appointed by the Selection Committee, to carryout the purpose of recommending to the Board candidate(s) for the CEO position pursuant to Section 2. I am making this assumption due to members of the public have been appointed to the Search Committee, whereas the bylaws specifically provide the membership of the Selection Committee, which does not include members of the public. The Search Committee is comprised of nine members: five members of the Board and four members of the public. If the Search Committee would be considered a governing body of the NPO, then it would be required to post notice of its meetings and comply with all other requirements of the ODL.

[1] I will respond to the remaining inquiries relying on the assumption that the NPO is a "public agency" pursuant to the ODL. Assuming otherwise, my response to your informal inquiries would be complete after responding to (1).

The ODL defines a governing body 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)

"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). The action of receiving and/or reviewing paper applications by the Search Committee would be considered "official action." "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). The NPO is empowered to select and employ a CEO pursuant to Article VII of its bylaws. The Search Committee was formed to assist the NPO in selection process.

Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff, would be considered a public agency pursuant to the ODL. *See* I.C. § 5-14-1.5-2(a)(5). Here, the Selection Committee was created by the NPO's bylaws, which I equate with being created by statute, ordinance, or executive order. However, the Search Committee is not referenced in the bylaws. As such, the Selection Committee, but not the Search Committee, would be considered a governing body pursuant to subsection (1).

Subsection (2) provides that a governing body is any "board, commission, council, or other body of a public agency which takes official action upon public business. . ." *See* I.C. § 5-14-1.5-2(b)(2). The Search Committee was not created by bylaw governing the NPO. *See Opinions of the Public Access Counselor 03-FC-87.* Therefore, it is my opinion that the subsection (2) would not be applicable to the Search Committee.

Subsection (3) provides that 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 would be considered a governing body. *See* I.C. § 5-14-1.5-2(b)(3). The Search Committee was appointed directly by the Board. Accordingly, it is my

opinion that it would be considered a governing body pursuant to the ODL and be required to comply with the requirements of the law, including posting notice of its meetings.

However, I would note that both the Selection and Search Committees, as governing bodies, would be allowed to meet in executive session. Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees and considering the appointment of a public official. I.C. §§ 5-14-1.5-6.1(b)(5); 5-14-1.5-6.1(b)(10). Both of the exceptions noted would likely be applicable here. I.C. § 5-14-1.5-6.1(b)(10) goes on to provide that an executive session may be held:

> (10) When considering the appointment of a public official, to do the following:
> (A) Develop a list of prospective appointees
> (B) Consider applications
> (C) Make one (1) initial exclusion of prospective appointees from further consideration.
>
> Notwithstanding IC 5-14-3-4(b)(12), a governing body may release and shall make available for inspection and copying in accordance with IC 5-14-3-3 identifying information concerning prospective appointees not initially excluded from further consideration. An initial exclusion of prospective appointees from further consideration may not reduce the number of prospective appointees to fewer than three (3) unless there are fewer than three (3) prospective appointees. Interviews of prospective appointees must be conducted at a meeting that is open to the public.

A "public official" means a person who is a member of a governing body of a public agency or whose tenure and compensation are fixed by law and who executes an oath. *See* I.C. § 5-14-1.5-6.1(a). What you refer to as a "secret ballot" conducted by the Search Committee could possibly be considered an "initial exclusion" as considered by the ODL in subsection (10). The ODL does not provide the process of how an "initial exclusion" of candidates shall be conducted. The ODL does provide that a secret ballot vote may not be taken at a meeting and that all final action (i.e. voting) must be taken at a meeting open to the public. *See* I.C. §§ 5-14-1.5-3(b); 5-14-1.5-6/1(c).

As to your inquiry whether a secret ballot was permissible since final action was required by the full Board, if the Search Committee considered the CEO position to be equivalent of that of a "public official" and met in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(10) and conducted an initial exclusion of candidates, it acted contrary to the ODL only by reducing the candidates to one. If it did not consider the CEO position to be equivalent to a "public official" it could have met in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(5) to receive information and interview prospective employees. If the

Search Committee met pursuant to (b)(5), it would not be allowed to conduct a vote on the candidates in executive session, but could do so in an open public meeting. A vote conducted in an open public meeting may not be carried out as you have described the process conducted by the Search Committee. The Search Committee would be required to conduct an open vote.

(3) Are all executive sessions considered meetings and therefore require public notice

Yes. Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). 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 notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2)

(3) Is the Search Committee's secret ballot vote impermissible

If the Search Committee considered the CEO position to be equivalent of that of a "public official" and met in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(10) and conducted an initial exclusion of candidates, it acted contrary to the ODL only by reducing the candidates to one. If it did not consider the CEO position to be equivalent to a "public official" it could have met in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(5) to receive information and interview prospective employees. If the Search Committee met pursuant to (b)(5), it would not be allowed to conduct a vote on the candidates in executive session, but could do so in an open public meeting. A vote conducted in an open public meeting may not be carried out as you have described the process conducted by the Search Committee and it would have been required to conduct an open vote.

(4) Is the Search Committee's secret ballot vote considered final action

"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). Any final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). The Search Committee would be considered a governing body pursuant to the ODL. As provided above, if the Search Committee met in executive session pursuant to I.C. § 5-14-1.5-6-1(b)(10), it could have conducted an initial exclusion of candidates, which would not have been considered final action. If it meet in executive session pursuant to (b)(5), the secret ballot would be considered final action by the Search Committee (not the NPO or the Board) as a vote was taken on which candidates to submit to the Board for hire.

(5) If a court declares a policy, decision, or final action of a governing body of a public agency void, the court may enjoin the governing body from subsequently acting upon the subject matter of the voided act until it has been given "substantial reconsideration" at a meeting or meetings that comply with the ODL. In this instance, what would be deemed "substantial reconsideration?"

In my opinion, if a court would declare the final action of the Search Committee void, a substantial reconsideration would require the Search Committee to reconvene and comply with all requirements of the ODL. I would note that a court, not the Public Access Counselor, would have final authority on this issue. Different courts hearing the identical issue may reach varying conclusions.

For example, if the Search Committee equated the CEO position with a public official, it could met in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(10) and make an initial exclusion of candidates to three. The Search Committee would be required to post public notice of the meeting that would comply with the requirements of the ODL as noted above. If the Search Committee did not equate the CEO position with that of a public official, it could meet in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(5) to receive information about and interview the candidates, but then would have to meet in an open public meeting to determine (i.e. vote) on which candidates to submit to the Board for hire. Again, both the executive session and the open meeting would be required to be properly noticed pursuant to the ODL.

After initially hearing the matter in the Selection and/or Search Committee, the NCO would be required to conduct an open vote on the selection of the CEO at an open public meeting. The meeting of the NCO must comply with all the requirements of the ODL, including providing notice and memoranda. There is no requirement in the ODL that a public agency discuss a matter prior to vote, but in light of the "substantial reconsideration" requirement imposed by law, the NCO would wise to discuss the selection of the CEO at the open meeting prior to the vote.

(6) I.C. § 5-14-1.5-7(b) provides that any ODL action shall be commenced within thirty (30) days of either the date of the act or failure to act complained of; or the date the plaintiff knew of should have known that the act or failure to act complained of had occurred, whichever is later. If the challenged policy, decision, or final action is recorded in the memoranda or minutes of the governing body, a plaintiff is considered to have known that the act or failure to act complained of had occurred not later than the date that the memoranda or minutes are first available for inspection. Does this mean the statute begins to run on all potential plaintiffs once memoranda or minutes are made available for public inspection?

Yes, if the challenged policy, decision, or final action is recorded in the memoranda or minutes of the governing body. If the governing body did not utilize minutes or memoranda, the plaintiff would have to demonstrate the date it became aware of the act or failure, which the defendant could provide evidence in rebuttal of the date the plaintiff should have know that the act or failure complained of had occurred. This answer also

assumes that the date of making the minutes available for public inspection occurs subsequent to the date of the act or failure complained of.

(7) How are memoranda/minutes are made available for public inspection

The ODL is silent on how memoranda/minutes are made available for public inspection. I.C. § 5-14-1.5-4(c) provides that the memoranda are to be available after the meeting for the purpose of informing the public of the governing body's proceedings. The minutes, if any, are to be open for public inspection and copying. The minutes/memoranda, prior to being approved by the governing body at the following meeting, would be considered in draft form. Accordingly, it my opinion they become available for inspection upon being approved by the governing body and are made available for production upon being able to be produced in response to a request made pursuant to the APRA.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Joseph B. Hoage
Public Access Counselor