



STATE OF INDIANA

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March 30, 2016

Mr. Paul Ogden
3525 West 55th Street
Indianapolis, Indiana 46228

Re: Informal Inquiry 16-INF-07; Indiana High School Athletic Association

Dear Mr. Ogden:

This is in response to your informal inquiry regarding whether the Indiana High School Athletic Association is subject to the Open Door Law. I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Open Door Law ("ODL"), Ind. Code § 5-14-1.5 and relevant case law.

BACKGROUND

You seek a determination as to whether the Indiana High School Athletic Association can bar members of the public from meetings of its governing body.

You note that under Ind. Code 5-14-1.5-2(a)(3)(B), a non-profit corporation such as the Indiana High School Athletic Association can be subject to the Open Door Law if the agency is subject to audit by the State Board of Accounts ("SBOA"). Under Ind. Code 5-11-1-9(b), "a non-for-profit entity is subject to audit by SBOA if it receives at least fifty percent but less than two hundred thousand dollars of its disbursements during the period subject to an examination from appropriations, public funds, taxes, and other sources of public expense."

ANALYSIS

According to the ODL, Ind. Code § 5-14-1.5-1, Indiana public policy provides that, "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."

You note several times in your memo to this office you feel previous Public Access Counselors have wrongly interpreted Ind. Code 5-14-1.5-2(a)(3)(B). While I agree with you the statute does allow for a more expansive view of monies provided to a nonprofit corporation than just tax dollars, you have not provided any documentation to support your assertion that IHSAA would be subject to audit by SBOA

(granted, in large part, this is due to the lack of documentation available from IHSAA). Without such documentation, I do not necessarily disagree with previous PACs in their analysis of the financial structure of the IHSAA and its subjection to audit by the State Board of Accounts. For a detailed analysis, see *Opinion of the Public Access Counselor 10-INF-32*.

That Opinion fails, however, to take into consideration Ind. Code § 5-14-1.5-2(a)(1). The determination of whether an entity is a government actor cannot be considered in the vacuum of solely whether they are subject to audit. There is also a functional equivalence analysis prior opinions have failed to consider. The IHSAA stands in the shoes of a regulatory authority as a state actor. Several Indiana courts have recognized this and consider ISHAA rulings judiciable.¹

Ind. Code § 5-14-1.5-2(a)(1):

(a) "Public agency", except as provided in section 2.1 of this chapter, 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.

High school athletics in the State of Indiana is under the exclusive dominion of ISHAA's procedures, rules and scrutiny. The State has outsourced the regulation of high school athletics to a non-profit entity. See *Ind. Code § 20-26-14*. When the State delegates one of its essential duties to a private entity, the private entity may become subject to the Open Door Law or Access to Public Records Act. While IHSAA is not directly established by statute, it has assumed the responsibility to enforce the state's power.

The Indiana Court of Appeals recently addressed a similar issue in *ESPN, Inc. v. Univ. of Notre Dame Sec. Police Dep't*. The Court held the Notre Dame's police department was subject to the APRA because the department "was acting as a governmental entity by exercising a governmental function."²

While police power and athletic oversight are mutually exclusive, the U.S. Supreme Court also determined the exercise of high school athletic regulation is akin to police power in *Brentwood Academy, v. Tennessee Secondary School Athletic Association*³. In that Opinion, Justice Souter stated:

The nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it.

¹ *Haas v. South Bend Community School Corp.*, 259 Ind. 515 (1972); *Indiana High Sch. Ath. Ass'n v. Reyes*, 694 N.E.2d 249 (1997); *Indiana High School Association, Inc. v. Carlsberg*, 694 N.E. 2d 222 (1997).

² *ESPN, Inc. v. Univ. of Notre Dame Sec. Police Dep't*, No. 71A05-1505-MI-381, 2016 Ind. App. LEXIS 74, at *21 (Ct. App. Mar. 15, 2016) *Case not yet certified.

³ *Brentwood Academy v. Tennessee Secondary Athletic Association*, 531 U.S. 288 (2001).

The same holds true in the instant case in applying Ind. Code § 5-14-1.5-2(a)(1). The Education Clause, Article 8, Section 1, of the Indiana Constitution, states:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

The Education Clause of the Indiana Constitution clearly shows it is the duty of the State to regulate education, up to a secondary school level, to its citizens. The act of *providing* education is not solely a state function – private school institutions would not be subject to the Open Door Law or Access to Public Records Act⁴ – however, the *regulation* of education is certainly a state function.

And so it is with high school athletic competition, which, by ISHAA’s own admission, is inextricably intertwined with education. By creating rules and enforcing its regulations, IHSAA acts as the administrative, executive, legislative and judicial authority. The ISHAA lists the following activities as part of its mission statement:

- Regulates, supervises and administers interschool athletic activities among its member high schools as an integral part of the secondary education program. A tournament series is sanctioned in 21 sports, 10 for girls, 10 for boys and one co-ed (unified track and field). This school year, more than 160,000 students will compete in IHSAA-sanctioned tournaments.
- Cooperates with all agencies vitally concerned with the health and educational welfare of secondary school students.
- Determines qualifications of individual contestants, coaches and officials.
- Provides written communications to facilitate athletic relations among member schools.
- Establishes standards for eligibility, competition and sportsmanship while providing protection against exploitation of schools or students.^{5,6}

⁴ Some exceptions may apply to certain private school functions, e.g. school resource officers enforcing criminal code, charter school accreditation, etc.

⁵ IHSAA.org

⁶ It should be noted that these activities go above and beyond a ‘provider of goods and services’ as contemplated by Ind. Code § 5-14-1.5-2.1 should IHSAA have chosen to make that argument.

Moreover, similar to the *Brentwood* case, the members of IHSAA's Board of Directors and Executive Committee are high school administrators, coaches and employees, the majority of them from public high schools ("The Association is not an organization of natural persons acting on their own, but of schools" *id.*).

But for IHSAA, the regulation of organized high school athletics would not exist. Its membership is voluntary in name only as the IHSAA procedurally works as a clearinghouse for all official high school athletic competition. It is likely IHSAA avoids audit as their revenues are mainly comprised of ticket sales from events as opposed to membership dues paid out of public money coffers. Nonetheless, scores of governing bodies statewide do not have budgets, expenditures or appropriations, yet they are subject to the Open Door Law because they exercise a government function.

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor that IHSAA exercises functions listed under Ind. Code § 5-14-1.5-2(a)(1) and should be considered a public entity subject to the Open Door Law.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor