



# STATE OF INDIANA

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August 10, 2012

David M. Mowery  
512 W. Washington Street  
Marion, Indiana 46952

*Re: Formal Complaint 12-FC-207; Alleged Violation of the Open Door Law by the City of Marion.*

Dear Mr. Mowery:

This advisory opinion is in response to your formal complaint alleging City of Marion ("City") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Don Gallaway, Corporate Counsel, responded on behalf of the City. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint you allege that a meeting was held with all taxing units of the City by Tammy Merriweather, Field Administrator with the Department of Local Government Finance ("DLGF"), on July 26, 2012. On June 11, 2012, you were sent an invitation via Joselyn Whitticker, Marion County City Council Representative, which was given to her by Ms. Merriweather. Ms. Merriweather specifically stated that no policy would be discussed, but general information that would apply to any elected official would be given. Ms. Whitticker and Mr. Tom Burns arrived at City Hall for the meeting on July 26, 2012. Ms. Merriweather introduced both parties and provided again that no policy would be discussed. Thereafter, Mayor Seybold arrived in the hallway outside the door. City Controller Cindy Wright and Deputy City Controller Linda Faw, both of whom were present at the meeting, excused themselves at that time. Mr. Faw then returned, and asked Ms. Merriweather to step outside. Ms. Merriweather then returned to the meeting, informed Representative Whitticker and Mr. Burns that they would be required to leave. You further allege that a similar incident occurred in the spring of 2012 in a meeting held with Lt. Governor Becky Skillman.

In response to your formal complaint, Mr. Gallaway advised that the DLGF conducts workshops on an annual basis for the purpose of assisting local government agencies with the budget process to ensure that the budgets are not rejected for non-compliance. For the City, the participants in this meeting have historically been the City Controller, her deputy, and a representative from the DLGF. At no time was a governing

body of the City or any local agency convened. As such, the requirements of the Open Door Law would not be applicable. In no way was the City or any of its employees responsible for removing Representative Whitticker or Mr. Burns from the meeting. In reference to the meeting previously held with the Lt. Governor, again this was a meeting not initiated by the City and did not include any local governing body.

## 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. Accordingly, 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).

A governing body is defined 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)

A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. *See* I.C. § 5-14-1.5-2(c). "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 Indiana Court of Appeals has analyzed these provisions of the ODL and determined that they do not apply to meetings of staff members of public agencies if the staff members themselves do not constitute a governing body:

As originally enacted, the Open Door Law applied only to meetings at which "a majority of the governing body" of a public agency was in attendance. The legislature never intended Sec. 3 to apply to gatherings of agency employees conducting the "internal staff operations of public

agencies.” See *The Open Door Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 Val.U.L.Rev. 295, 309 (1979-80). Gatherings of employees of public agencies were not then and are not now specifically mentioned as being covered by the Act.

*Indiana State Bd. of Health v. State Journal-Gazette Co.*, 608 N.E.2d 989, 991 (Ind. Ct. App. 1993). The Court of Appeals reasoned that if the result were otherwise, large state agencies would have to convene a majority of their staff members -- which would often number in the hundreds or even thousands -- in order to conduct a “meeting” under the ODL:

If the definitions [of “governing body” and “meeting”] were to be literally applied in the case before us, it would require the presence of 544 of the ISBH's 1,087 full time state employees to convene a “meeting” subject to the Open Door Law. Such an interpretation in this or any similar case is clearly absurd. The legislature did not intend such a result. . . . Clearly, the amendment is inartfully worded. Because the amendment is ambiguous and of doubtful meaning, we must construe it to give effect to the true intent of the legislature in this regard.

*Id.* at 993 (internal citations omitted); See also *Opinion of the Public Access Counselor 10-FC-254*. In *Indiana Department of Health* (“IDH”), two employees of the IDH gathered and engaged with other individuals while taking action upon public business. However, neither employee was a member of the 11 member Indiana State Board of Health, the governing body of the IDH, nor were they members of any advisory committee directly appointed by that board. *Id.* As a result, the Court of Appeals determined that the meeting was not one conducted by any “governing body”, nor was it a meeting of any advisory committee directly appointed by the Indiana State Board of Health. As a result, the meeting was not subject to the ODL. *Id.*

From what you have provided in your formal complaint and the City’s response, those in attendance at the July 26, 2012 meeting were the City’s Controller, the Deputy Controller, Representative Whitticker, Mr. Burns, and a representative from the DLGF. I am not aware, nor has it been alleged, of any governing body that is comprised of those who were in attendance at the July 26, 2012 meeting. If for example, a majority of the City Council was in attendance at the July 26, 2012 meeting, regardless of whether the DLGF actually convened the meeting, said gathering would be considered a meeting pursuant to the ODL as the Council would have been “receiving information.” However and as applicable here, since no governing body is alleged to have gathered, it is my opinion that a violation of the ODL has not occurred.

CONCLUSION

Based on the foregoing, it is my opinion that the City did not violate the ODL.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage  
Public Access Counselor

cc: Dan Gallaway