



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

September 24, 2012

Warren A. Auxier  
P.O. Box 215  
Hanover, Indiana 47243

*Re: Formal Complaint 12-FC-242; Alleged Violation of the Open Door Law by  
the City of Madison*

Dear Mr. Auxier:

This advisory opinion is in response to your formal complaint alleging City of Madison ("City") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Joe Jenner, Attorney, responded on behalf of the City.

## BACKGROUND

In your formal complaint you provide that in February 2012, Mayor Damon Welch formed the Economic Development Review Panel ("EDRP") and thereafter selected its members. On February 27, 2012, Mayor Welch convened an orientation of the EDRP, at which time the Mayor and Mr. Jenner introduced the EDRP to Indiana's Public Access Laws. The EDRP gave proper notice and held all of its meetings in public. You have included this information to demonstrate that the Mayor and Mr. Jenner were aware that a group formed by the Mayor would be required to comply with the ODL.

On August 5, 2012, the Mayor announced that "City and County elected officials have been getting together and looking at the EDRP recommendations as far as economic development is concerned and beginning to come up with some ideas on how to move forward as a city-county joint relationship." The Mayor further provided that "We plan on coming up with a joint statement probably within the next week, so be looking for that."

On August 21, 2012, the Mayor announced that he had been meeting with City and County elected officials regarding the EDRP report and to expect a joint statement shortly. The Mayor further provided that the joint statement would only contain recommendations to the Councils and would have to have full Council approval prior to implementation. You inquired with the Mayor how many times the group had met and who attended the meetings. The Mayor advised that the President of the Jefferson County Commissioners, Julie Berry, City Council President Laura Hodges, Jefferson

County Council President Bill Hensler, and the Mayor had attended the meetings (“Group”). The Mayor further advised that he had selected the invitees to the Group.

In light of these factors, you allege that the Group meets the definition of a “public agency pursuant to I.C. § 5-14-1.5(a)(3), as 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.” As the Group failed to provide the required public notice of the meetings, the public was denied access. The Mayor’s public statements make clear that he was the presiding officer who appointed the elected officials to the Group. Further, he delegated authority to the group to take official action upon public business when he assigned them the task of reviewing the EDRP’s report and making recommendations to the Councils via the release of a joint statement. It is your understanding the Mr. Jenner and City Council President Laura Hodges inquired with the Public Access Counselor’s Office regarding this issue and were informed such a meeting would not violate the ODL. Your discussions with the Public Access Counselor indicate that he was given misinformation about the Mayor’s formation of the group and that he had delegated authority to the committee to take official action on public business. The Public Access Counselor was asked only about one meeting of a group of elected officials to brainstorm, not a series of meetings with the purpose of making recommendations to the Councils.

In response to your formal complaint, Mr. Jenner advised that the key issue is not whether the Group met the definition of a “public agency”; rather the issue should be whether the Group is considered to be a governing body by I.C. § 5-14-1.5-2(b)(3). A governing body is defined as “any committee appointed directly by the governing body of its presiding officer to which authority to take official action upon public business has been delegated. *See* I.C. § 5-14-1.5-2(b)(3). The Group was not a committee appointed by a presiding officer. Mayor Welch never appointed any individuals to the Group. The term “appoint” means to “assign to a position, an office, or the like; designate. At no time did the Mayor state that he selected or appointed any members to the Group. He clearly stated in response to your public inquiries that he invited the individuals to meet.

In addition, the group of individuals had no authority delegated to them. Individually, each person had no power or authority to make any decisions or take action. To put in context, Mr. Jenner advised that if the Mayor wanted to invite a group of individuals to dinner to discuss public issues that involve the City or if the Mayor was invited to Hanover College and was told he could invite five individuals, would he be required to give public notice of such events? Can the Mayor not invite people to have coffee and discuss City issues without given notice to the public? You would claim that this situation is different because the group issued a joint statement and all are elected officials. However, Mr. Jenner would argue that the joint statement takes no official action outside of the general goals that all communities have and says nothing about the group being appointed to take action. The statement says nothing about the individuals taking recommendations to their respective bodies to take action. The City did not mislead the Public Access Counselor in prior conversations held prior to the meetings occurrence. Mr. Jenner did not inquire about the group making recommendations to their

respective councils because that was never the intent of the meetings, nor did such action ever occur.

This was merely an invited group of people who gathered to discuss a document regarding economic development. A joint statement was made. However, in order to meet a statutory definition, all the elements must be met. As the group was not appointed by the presiding officer, it does not meet the definition of a governing body; as such the ODL would not apply.

In reply to the City's response, Mr. Auxier advised that just because the Mayor did not publicly announce or state he appointed a person to a committee does not mean the Mayor, in fact did not appoint persons to a committee. Mr. Jenner admits that Mayor Welch invited a group to "gather and review an 80+ page document created by the EDRP" and maintains that there is a difference between the term "invite" and "appoint." However, for the purpose of the ODL there is no difference in the meaning or outcome regardless of whether the Mayor "invited" or "appointed" a committee, if the group had been delegated authority to take official action upon public business. Mr. Jenner has failed to sight to an applicable statute that provides an exception for an invited group to exclude the public from a meeting, when they have been delegated the authority to take official action on public business.

The definition of "official action" includes receiving information and deliberating upon that information." The Mayor publically indicated that the purpose of the meeting was to receive information and deliberate. He further advised that he had reviewed the recommendations and was beginning to come up with ideas on how to move forward. The Group's August 31, 2012 joint public statement documents that it took official action on public business by receiving information, deliberating, making recommendations, and making decisions. The statements establishes that a preferred policy as documented by the group's statements, ". . .we unanimously feel that workforce development should be one of our highest priorities as we move forward together."

## 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 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). "Public business" means to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. 5-14-3-2(e). Thus, in order for

the ODL to apply, the meeting must be held by a governing body of a public agency. 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)

You have alleged that the group qualifies as a governing body pursuant to I.C. § 5-14-1.5-2(b)(3). A committee that is not appointed directly by a governing body or its presiding officer does not constitute a governing body, under the plain language of the Open Door Law. *See Opinions of the Public Access Counselor 05-FC-219 & 09-INF-29.* The Indiana Court of Appeals addressed this issue in *Robinson v. Indiana University*, 638 N.E.2d. 435 (Ind. Ct. App. 1994). *Robinson* was decided after the General Assembly amended the definition of "governing body" to add the word "directly" after "any committee appointed." In *Robinson*, the Indiana University's Board of Trustees (a governing body for ODL purposes) delegated the authority to appoint a committee and subcommittee to the university president who, in turn, passed the duty on to an associate vice president for research. *Id.* at 437. The Court held that "the Committee and Subcommittee did not derive their authority *directly* from the governing body" because the board delegated its appointment authority to the university administration. *Id.* at 438. Consequently, the committee and subcommittee were not governing bodies under the ODL. *Id.* at 437-38; *See also Frye v. Vigo County*, 769 N.E. 2d 188, 196-196 (Ind. Ct. App. 2002). The Court in *Robinson* opined that

"It is apparent to us that the legislature's enactment of the amendment [adding the word "directly"] effectively limits the types of committees that are subject to the Open Door Law...The legislature has clearly narrowed the scope of the Open Door Law's effect as it applies to various committees." *Id.* at 438.

As applicable here, the application of the ODL to the group's meeting will turn directly on whether the Group was appointed directly by the Mayor and whether

authority had been delegated to take official action upon public business. You provide in your formal complaint that the Mayor's public statements make it evident that he was the presiding officer who appointed the members to the Group and that the Mayor and City were well aware of the requirements of the ODL as it related to committees, in light of the EDRP. You further allege that the Mayor delegated to the Group the authority to take official action on public business when he assigned them the task of reviewing the EDRP report. In response to the allegations, Mr. Jenner advised that the Mayor never appointed any of the individuals to a committee. Rather, he invited them to meet. Further, Mr. Jenner advised that the Mayor did not delegate any authority to the Group and the statement that had been issued made no reference to the individuals taking the recommendations back to their respective bodies to take action.

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. Accordingly, if the Group was appointed directly by the Mayor to which it was delegated the authority to take official action upon public business, the Group would qualify as a "governing body" under the ODL and the requirements of the law would attach. Alternatively, if the Group was not appointed directly or if it was not delegated the authority to take official action on public business, the Group would not be considered a "governing body" and no violation of the ODL would have occurred.

#### CONCLUSION

Based on the foregoing, it is my opinion *if* the Group was appointed the Mayor *and* delegated the authority to take official action on public business, the Group would be considered a "governing body" for the purposes of the ODL (emphasis added). Accordingly, it would have acted contrary to the ODL by failing to comply with the requirements of the law for the meetings of the Group that were held.

Best regards,

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

Joseph B. Hoage  
Public Access Counselor

cc: Joe Jenner