



# STATE OF INDIANA

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September 25, 2012

Elliot Tompkin  
310 Courier Square  
Madison, Indiana 47250

*Re: Formal Complaint 12-FC-248; Alleged Violation of the Open Door Law by  
the City of Madison*

Dear Mr. Tompkin:

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. His response is enclosed for your reference.

## BACKGROUND

Mayor Damon Welch of the City of Madison has called together on several occasions the presidents of the City Council, County Council, and Board of County Commissioners ("Group") to talk about a new approach to economic development. You provide that the Mayor does not have a vote on the City Council. You allege that the Mayor's Blue Ribbon Panel ("Panel") on economic development had recommended these four elected officials form a "super-council" to be in charge of economic development and to spend economic development funds. It is unknown if they have formed such a body. The meetings were not advertised or posted, nor were they announced so that the public and media could attend. You inquire if the group of elected officials is a public agency.<sup>1</sup>

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

<sup>1</sup> The factual allegations in your formal complaint are identical to those found in 12-FC-242, filed by Mr. Warren Auxier. I have enclosed a copy of advisory opinion 12-FC-242 as a reference.

time did the Mayor state that he selected or appointed any members to the Group. He clearly stated in response to 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? 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. 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.

#### 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)

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 ODL. *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 it was appointed directly by the Mayor or the Panel, and whether authority had been delegated to take official action upon public business. You provide in your formal complaint that the Panel had recommended that the four elected officials form a super-council to be in charge of economic development and spend economic development funds. You do admit that it is unknown if a super-council had actually been formed. 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 or the Panel, to which the Group 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 or the Panel, 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', written in a cursive style.

Joseph B. Hoage  
Public Access Counselor

cc: Joe Jenner