



STATE OF INDIANA

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June 10, 2013

Councilman Brian J. Dickerson
229 S. Second Street
Elkhart, Indiana 46516

*Re: Formal Complaint 13-FC-146; Alleged Violation of the Open Door Law by
the City of Elkhart*

Dear Councilman Dickerson:

This advisory opinion is in response to your formal complaint alleging that City of Elkhart ("City") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Margaret M. Marnocha, Attorney, responded on behalf of the City. Her responses are enclosed for your reference.

BACKGROUND

At the outset it should be noted that many of the pertinent facts relevant to the formal complaint are in dispute. In your formal complaint, you provide that on May 15, 2013, City Mayor Dick Moore convened a Task Force ("TF") formed by the Mayor at approximately 2 p.m. at the Greater Elkhart Chamber of Commerce. You allege that the TF is a governing body, thus notice was required to be posted pursuant to the requirements of the ODL. Although not in attendance, you allege that the TF discussed the formalization of its structure and the Mayor thereafter gave a presentation. The members of the TF then introduced themselves and provided insight as to why each party was there. In support of your belief that the TF is required to comply with the ODL you cite to the May 13, 2012 edition of *The Elkhart Truth*, where it was reported that recommendations from the TF will go to the Elkhart City Council ("Council") for final approval.

In response to your formal complaint, Ms. Marnocha advised that the City had previously agreed to provide utility services to certain customers located outside its corporate boundaries. The City required those customers to sign an agreement, pursuant to state law, which included a remonstrance waiver should the City decide to annex the real estate. The agreements were valid for the maximum allowed period of fifteen years. Those customers were required to pay a premium for the sewer service, generally three times the in-city usage rate. This was the policy of the City for many years.

In 1998, the City and the Council determined that the premium calculated based upon the customer's usage gave an unfair financial advantage to those customers outside the City's limits. Said customers received City services without paying any City taxes. Then Mayor Perron conferred with advisors and submitted a proposed ordinance, which the Council then passed. Pursuant to I.C. § 36-4-3-21, any new customers connecting to sewer mains constructed after 1998 would make a payment in lieu of taxes, a "compact fee", calculated at 75% of the City tax rate times the assessed value of the real estate. These funds supplement the budgetary needs of the civil city, not the utility.

In 2012, the Council passed two ordinances pertaining to the compact issue. The Wastewater Utility Rate Ordinance eliminated the multiplier rates for extraterritorial customers; the Amended Compact Ordinance required all customers receiving services under the expired three-time usage rate agreement to transition to a compact agreement. Both ordinances took effect on January 1, 2013. In response, Ms. Marnocha advised that many business owners came before the Council to voice their complaints. Mayor Moore thereafter proposed a reduction to the compact fee. Ms. Marnocha provides that after the proposal was submitted to the Council, but before the second reading, certain unhappy business owners sought out political and familial allies and the issue was eventually raised in the General Assembly. In order to maintain home rule, Mayor Moore agreed to form the TF to address this issue.

Although the TF is bipartisan, the majority of the members are not from the Mayor's own political party. Mayor Moore selected the members of the TF and extended invitations to serve on the committee. The TF is comprised of elected public officials, citizens, local business owners, land developers, and city employees. Mr. Marnocha maintains that the TF was charged with the purpose of trying to reach some consensus and make an equitable recommendation or suggestion for the Mayor to consider. Ms. Marnocha advised that *The Elkhart Truth* article referenced in your formal complaint Dickerson incorrectly provided that the TF would be advising the Council. The members of the TF are volunteers and desire to make informed suggestions without the threat of harassment and negative press that continues to follow those members of the City Administration involved in this issue. Mayor Moore is not bound by any suggestions or recommendations of the TF. You were not invited to be a member of the TF.

The City argues that the TF is not a public agency or a governing body under the ODL. Therefore, no violation of the ODL occurred. The TF was not created or appointed directly, or even indirectly, by the Council, as such it would not qualify as a governing body pursuant to I.C. § 5-14-1.5-2(b)(3). A similar issue was addressed in a recent advisory opinion of the Public Access Counselor, which provided that committees not appointed directly by the governing body or its presiding officer are not considered to be governing bodies under the ODL. Here, the Council is the governing body of the City. The presiding officer of the Council is Ron Troyer, Council President. The TF was not appointed by Council President Troyer or the Council itself. Further, the TF will not be exercising executive power, as it will not be enforcing ordinances, providing information or making a recommendation to the legislative body, calling special meetings of the legislative body, acting in a supervisory position, insuring efficient government, filling

vacancies, signing bonds, deeds, contracts, or licenses, or approving ordinances or resolutions. The Mayor can choose whether to act upon the recommendation that is submitted by the TF, but the executive and administrative authority rests solely with the Mayor.

Ms. Marnocha provides that two articles that appeared in *The Elkhart Truth* contained many inaccuracies. As noted *supra*, the statement from the May 13, 2013 article provides that “Recommendations from the TF would go to the Elkhart City Council for final approval.” Ms. Marnocha maintains that the statement is blatantly false. In addition, the statement from the same article that provides “The City’s existing commercial company policy charges sewer customers based on a formula involving assessed value and is much more expensive than the traditional sewer service agreement that charges customers outside of the city 300 percent of what would be paid if located in the city”, is again factually incorrect. Further, the article from the May 23, 2013 edition provides that TF had violated the ODL according to the state’s public access counselor. Ms. Marnocha provides that if the statement is factually correct, the counselor has already made a determination prior to the Mayor being allowed an opportunity to respond. The May 23, 2013 article further provides that “The closed meetings are viewed by the state as a violation because panels that provide recommendations to elected officials and are assembled by elected officials fall within the definition of the Open Door Law.” Mr. Marnocha argues that the ODL makes no mention of elected officials and again, if true, the City was not provided with adequate due process to address the issues presented.

Elkhart is a second-class city; thus the Mayor’s authority and power is restricted to the executive/administrative functions of government. Mayor Moore cannot legislate any changes to ordinances; he can only propose ordinances to the Council. Previous opinions that have addressed this issue by the Counselor dealt with situations that were solely before the Mayor, not the legislative body. Here, Mayor Moore has not given the TF authority to determine his ultimate decision; he is simply seeking suggestions. Ms. Marnocha further cites public policy concerns, including increased efficiency of government, the ability of the Mayor to consider the opinions of others, and the ultimate decision to act will be performed in an open, public meeting, as further reasoning that the TF should not qualify as a governing body under the ODL.

In reply to the City’s response, you cite to correspondence sent to all Utility Customers of the City on April 30, 2013 by Mayor Moore and Council President Troyer. In challenging the City’s arguments noted in its response to your formal complaint, you provide the April 30, 2013 correspondence informed the citizens that the Council agreed to suspend all action pending the outcome of the TF, the intent of the TF is to develop an ordinance, and that the goal of the TF is to give the Council, not the Mayor, additional insight and greater perspective when doing its job. You believe that this clearly shows that the intent and eventual outcome of the TF will be advising the governing body and in addition drafting and creating legislation that will be sent to the Council.

In response to your reply, Ms. Marnocha advised the April 30, 2013 correspondence contained a misstatement of the facts and contradicts all other statements made by the City and Mayor. In support, the City submitted written affidavits of Council President Troyer and Mayor Moore, the Mayor's letter to the General Assembly regarding the creation and purpose of the TF, the Mayor's opening statement to the TF, and a recent Elkhart Truth Point of View written by the Mayor. Further, your reply is merely an attempt to rebut the Mayor's response and you were well aware that the TF was created by the Mayor dating back to a May 15, 2013 email that you sent to the Mayor. Lastly, Ms. Marnocha advised that the TF has completed its work and forwarded its recommendations to the Mayor.

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).

Your initial formal complaint filed with our office advised that, "On May 15, 2013, the City of Elkhart Mayor Dick Moore convened a task force formed by him at approximately 2 p.m. at the Greater Elkhart Chamber of Commerce." In a separate email dated May 15, 2013 that you sent to the Mayor, you provided that "The task force that has been charged by your administration to address the compact fees does not meet the requirements of the open door law and is an illegal meeting." In your reply to the City's response, you indicate based on the Council President and Mayor Moore's April 30, 2013 correspondence to Utility customers, it is clear that the TF will be advising the Council, not the Mayor. To properly address what I ascertain to be all issues that have been raised in your formal complaint, I will address the TF in terms of whether it is my opinion that it is a public agency and separately, whether the TF is a considered to be a governing body under the ODL.

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*. All advisory opinions issued, either in response to a formal complaint or a request for an informal opinion, are on the agency's letterhead and signed by the public access counselor. Prior to this opinion, an advisory opinion has not been issued by our office addressing the facts presented. That being said, our agency does not refuse to provide assistance to the public, media, public employees, or public officials unless a formal complaint or request for an advisory opinion is submitted. In the last fiscal year, our office assisted in responding to 1580 general inquiries submitted via email, phone, facsimile, U.S. Mail, etc...Based on the facts presented in the general inquiry, which may not always be in agreement with the opposing party, our agency provides guidance and assistance. However, an advisory opinion is not issued until both parties to the dispute

have had the opportunity to provide background and analysis regarding the specific issue or incident.

A “meeting” is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on 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 any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14-1.5-2(e). “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). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). Regardless of the TF’s status under the ODL, there has been no allegation that the TF has taken final action or that it is the ultimate decision maker on any issue.

Under the APRA, the Indiana Supreme Court has held that the party seeking to inspect and copy records has the burden of proving that the entity in possession of the records is a public agency within the meaning of the APRA. *Indianapolis Convention & Visitors Ass’n, Inc. v. Indianapolis Newspapers, Inc.* 577 N.E.2d 208, 212 (Ind. 1991). A similar burden would apply to a person seeking admission to a meeting of an entity that it believes to be a governing body of a public agency under the ODL. *Id.*; *See Opinions of the Public Access Counselor 11-FC-95; 12-INF-07.* Once the complainant has met his burden, the burden would shift to the entity to establish that it complied with the requirements of the law. Accordingly, you will have the burden to demonstrate that the TF is a governing body of a public agency.

The ODL provides that a “public agency” is:

- “(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 medicals staffs or the committees of any such staff.

- (6) The Indiana Gaming Commission established by I.C. 4-33, including any department, division, or office of the commission.
- (7) The Indiana Horse Racing Commission established by I.C. 4-31, including any department, division, or office of the commission.” I.C. § 5-14-1.5-2(a).

Further, certain providers are exempt from the definition of a public agency under the ODL. Specifically:

“Sec. 2.1. “Public agency”, for the purposes of this chapter, does not mean a provider of goods, services, or other benefits that meets the following requirements:

- (1)The provider receives public funds through an agreement with the state, a county, or a municipality that meets the following requirements:
 - (A)The agreement provides for the payment of fees to the entity in exchange for services, good, or other benefits.
 - (B)The amount of fees received by the entity under the agreement is not based upon or does not involve a consideration of the tax revenues or receipts of the state, county, or municipality.
 - (C)The amount of fees are negotiated by the entity and the state, county, or municipality.
 - (D)The state, county, or municipality is billed for fees by the entity for the services, good, or other benefits actually provided by the entity.
- (2) The provider is not required by statute, rule, or regulation to be audited by the state board of accounts.” I.C. 5-14-1.5-2.1.

For the purpose of your formal complaint, the applicable provisions of I.C. § 5-14-1.5-2(a) to be addressed are subdivisions are 2(a)(2) and 2(a)(5). There has been no allegation that the TF is exercising a portion of the executive, administrative, or legislative power of the state, that it is subject to budget review by the Department of Local Government Finance, or that it is subject to audit by the State Board of Accounts by statute, rule or regulation. Further, (2)(a)(6) and (2)(a)(7) are facially invalid.

I.C. § 5-14-1.5-2(a)(2) provides that a public agency is 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 a delegated local governmental power. Your initial formal complaint that was filed alleged that the TF was formed by the Mayor and charged by the City’s administration to address the compact fees. I interpret your initial argument to be that the Mayor formed the TF and delegated his authority to address the compact fees, thus making the TF a public agency pursuant to 2(a)(2). I.C. § 36-4-5-3 states that the executive of a second class city shall:

- “(1) enforce the ordinances of the city and the statutes of the state;
- (2) provide a statement of finances and general condition of the city to the city legislative body at least once a year;
- (3) provide any information regarding city affairs that the legislative body requests;
- (4) recommend, in writing, to the legislative body actions that the executive considers proper;
- (5) call special meetings of the legislative body when necessary;
- (6) supervise subordinate officers;
- (7) insure efficient government of the city;
- (8) fill vacancies in city offices when required by I.C. 3-13-8;
- (9) sign all bonds, deeds, and contracts of the city and all licenses issued by the city;
- (10) approve or veto ordinances, orders, and resolutions of the legislative body under I.C. 36-4-6-15.”

In response to your initial formal complaint, the City provides that the TF is not an extension of the executive branch and has no authority to exercise any of the listed executive functions. Specifically, the TF will not be enforcing ordinances, providing information or making a recommendation to the legislative body, calling special meetings of the legislative body, acting in a supervisory position, insuring efficient government, filling vacancies, signing bonds, deeds, contracts, or licenses, or approving or vetoing ordinances, orders, or resolution. Further, just because the TF was comprised partly of elected officials does not qualify it as a public agency. “Moreover, the fact that PCDC’s fifteen person board of directors includes twelve public agencies does not compel the conclusion that the PCDC is itself a public agency. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020, 1024-25 (Ind. Ct. App. 1999); *see also State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 345 (Ind. Ct. App. 1995). In your replies to the City’s response, you challenge the City’s position that the TF was solely the Mayor’s creation and you argue that the TF is advising the Mayor and the Council. The parties disagree whether the TF was created by the Mayor or Council and in addition, whether the TF’s role is to advise the Mayor or to advise the Council. The City maintains that the TF is the creation of the Mayor and reports to the Mayor; the TF has not been delegated any authority to submit recommendation in writing to the Council on behalf of the Mayor. From all that has been provided, it is my opinion that you have not met your burden to demonstrate that the TF would qualify as a public agency pursuant to I.C. § 5-14-1.5-2(a)(2).

I.C. § 5-14-1.5-2(a)(5) provides that any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medicals staffs or the committees of any such staff. As applicable here, the two key inquiries are whether the TF was created by statute, ordinance, or executive order and whether the intent of the TF was to advise a governing body of a public agency. There has been no showing that the TF was created by statute, ordinance, or executive order, but the City has advised that TF was formed by the Mayor. Neither

party advised how specifically the TF was formed. Further the April 30, 2013 correspondence from the Mayor and Council President to the City's utility customers indicates that ". . .the goal of this Task Force is to give the common council additional insight and greater perspective when doing its job." The Mayor and Council President now indicate the statement was inaccurate, and should have stated that "the work of the Task Force may result in the Mayor giving the Council additional insight." It is my opinion if the Task Force was created by statute, ordinance, or executive order to advise the Council, then the TF is a public agency under the ODL pursuant to section 2(a)(5) of the ODL. Under such a scenario, the members of the TF would be a governing body pursuant to I.C. § 5-14-1.5-2(b)(1)(A) in light of the broad definition of official action under the ODL. The version of the facts that you have presented would support such a finding; however the City version of the events that led to the creation and action of the TF would not. Alternatively, it is my opinion if the TF was created by statute, ordinance, or executive order to advise the Mayor, then the TF would not be considered a public agency pursuant to 2(a)(5).

If the TF is considered to be a governing body of the City, it would be required to comply with the requirements of the ODL. 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)

In order to qualify as a governing body pursuant to subdivision (2)(b)(3), a committee must be appointed directly by the governing body or its president officer. *Id.* 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, 13-FC-97.* 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* held:

“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.

Thus, if the TF was appointed directly by the Council or its presiding officer, Council President Troyer, it would be considered a governing body of the City. Alternatively, if the Council was appointed directly by the Mayor, the TF would not be considered a governing body and no violation of the ODL would have occurred. The reason for the discrepancy is that the City is considered to be a second-class city pursuant to I.C. § 36-4-1-1. As opposed to third class cities, the legislative body of a second class City chooses from its members a president or vice-president.

You maintain, as provided in your replies to the City’s response to your formal complaint, that the April 30, 2013 correspondence from the Mayor and Council President demonstrates that the intent and eventual actions of the TF will be advising the Council, as the TF will be drafting and creating legislation to be sent to the Council. You note that the Council President agreed to suspend all action pending the outcome of the TF, that the intent of the TF is to develop an ordinance, the TF will provide a draft to the Council, and lastly it is the goal of the TF to give the Council additional insight. The City has adamantly denied your allegations and provides that the Mayor, not the Council, appointed the TF; the TF does not answer or report to the Council; and that the April 30, 2013 correspondence contained a misstatement regarding the Mayor’s and Council President’s position. If the TF was appointed directly by the Council, it would be considered an governing body under the ODL pursuant to 2(b)(3) and be required to comply with all such requirements; alternatively, if the TF was appointed by the Mayor, it would not be considered a governing body and the requirements of the law would not apply.

Lastly, although not directly raised in your formal complaint or reply, I.C. 5-14-1.5-2(b)(2) provides that a governing body is the board, commission, council, or other body of a public agency which takes official action on public business. 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 is defined as any function upon which the public agency is empowered to take official action. *See* I.C. 5-14-1.5-2(e). There is no dispute that the TF will be receiving information, deliberating,

and/or making recommendations. The definition of “official action” is defined broadly under the ODL; therefore it is my opinion that the TF would be taking “official action” when meeting because at a minimum it would be either receiving information, deliberating, or making recommendations. The remaining question as to 2(b)(2), is whether the TF would qualify as the “board, commission, council, or other body of a public agency.” Although it may be possible for such a showing to be made, it is my opinion that you have not met that burden here.

CONCLUSION

Based on the foregoing, it is my opinion you have not met your burden to demonstrate that the TF would qualify as a public agency pursuant to I.C. § 5-14-1.5-2(a)(2) or a governing body pursuant to I.C. § 5-14-1.5-2(b)(2). Further, it is my opinion that from the facts you have presented and allege to be true, the TF would be considered a public agency pursuant to I.C. § 5-14-1.5-2(a)(5) and a governing body pursuant to I.C. § 5-14-1.5-2(b)(1)(A) in light of the broad definition of official action under the ODL. Alternatively, it is my opinion that the facts presented by the City and alleged to be true would demonstrate that the TF would not qualify as a public agency pursuant to 2(a)(5). Lastly, it is my opinion if the TF was appointed directly by the Mayor, it would not be considered a governing body pursuant to 2(a)(3) (emphasis added).

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: Margaret M. Marnocha