



# STATE OF INDIANA

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July 10, 2013

Dr. Norma J. Kreilein  
1366 Altmeyer Road  
Jasper, Indiana 47546

*Re: Formal Complaint 13-FC-168; Alleged Violation of the Open Door Law by the City of Jasper Common Council and Utility Service Board*

Dear Dr. Kreilein:

This advisory opinion is in response to your formal complaint alleging the City of Jasper Common Council ("Council") and Utility Service Board ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* William J. Kaiser, Attorney, responded on behalf of the Board and Council to your formal complaint. His response is enclosed for your reference.

## BACKGROUND

You provide that on April 15, 2013, Healthy Dubois County, Inc., ("HDC") issued a press release and recently published article ("Article") regarding the Jasper Biomass Proposal. The HDC provided copies to Jasper Mayor Terry Seitz and Bud Hauersperger, general manager of the Jasper City Utilities. On May 15, 2013, Mr. Hauersperger commented to the *Dubois County Herald* that, "We've discussed it with each other off and on" and "But we are waiting to talk to our attorneys to see if it would be in our best interest to make a response to it."

On May 20, 2013, Board Chairman Schuetter stated during a public Board meeting that after the Article was released the City of Jasper reviewed it as part of its ongoing due diligence. The City identified several concerns with the Article and issued an official statement of the Board and Council. You allege that is no mention of the Council or Board meeting minutes of a lone official or any or all officials being appointed, ordered, or volunteering to review the article to identify merits and/or concerns. Even if such delegation had been made, you argue the City would have had to discuss, agree, and vote upon a statement prior to release. You believe that such discussions conducted by the Council and or Board should have occurred in an open, public meeting. You provide that Michael Kreilein has attended all Board and Council meetings during the time period since the Article became available and no discussion of the Article occurred at any Board or Council meeting.

You allege that an unknown but significant number of Jasper County officials violated the ODL by discussing the Article and making decisions in meetings that were not open to the public. Said meetings were not properly noticed and since the Article contains no private or proprietary information or a discussion of the Article would not be related to any ongoing litigation, such discussions could not be conducted in executive session. You allege that the Article was discussed by the Board outside of the public realm so that it could discredit and dismiss the Article's validity.

In response to your formal complaint, Mr. Kaiser advised that the formal complaint filed is without merit and no violation of the ODL has occurred. The formal complaint that has been filed is vague, unsupported, and contains no evidence that an illegal meeting was conducted by either the Board or the Council.

On or about April 15, 2013, you forwarded a copy of the Article to Mr. Hauersperger, which as noted in your formal complaint was publicly available. Upon receipt, Mr. Hauersperger reviewed the Article and observed that it made multiple characterizations regarding the research and analysis provided by other scientists. Mr. Hauersperger contacted those scientists whose research was reviewed in the Article for their comments on the research methods utilized and whether the Article was accurate. Mr. Hauersperger performed this research and conducted said communications independent of any other City of Jasper public official. From his research, Mr. Hauersperger concluded that the Article contained many mischaracterizations or inaccuracies.

Mr. Hauersperger then contacted Mr. Schuetter, the Board's chairman and discussed his findings. As there was only one member of the Board present, this would not constitute a meeting under the ODL. A second discussion occurred thereafter between Mr. Hauersperger and Mr. Schuetter that also included the Board's outside legal counsel. Again, only one member of the Board was present, a meeting under the ODL would not have occurred. After meeting with counsel, Mr. Schuetter, Mr. Hauersperger, Board counsel, and Ken Sendelweck, the Board's Electric Commissioner, held a discussion regarding Mr. Hauersperger's findings. Again, a majority of the Board was not present, thus a meeting under the ODL did not occur. Further, the discussions as a whole would not violate the serial meeting prohibition.

After the meeting with Mr. Sendelweck, as described *supra*, Mr. Schuetter, as Chairman of the Board, independently put together the public statement that was read at the May 20, 2013 Board meeting. The public statement was made pursuant to Mr. Hauersperger's research findings and Mr. Schuetter's prior discussions with both Mr. Hauersperger and Mr. Sendelweck. Mr. Schuetter has stated that he did not work with any other member of the Board in drafting the statement, nor was any working draft circulated amongst the Board for comment or revision. Mr. Schuetter presented the statement to the members of the Board at the May 20, 2013 meeting. He asked the members of the Board to read the statement during the meeting and to entertain a motion to read the statement into the meeting record. The Board unanimously voted, during the

meeting, to read the statement into the record and Mr. Schuetter thereafter read the statement. No vote was taken on the statement prior to the May 20, 2013 meeting, nor was any advance vote or deliberation required under the ODL.

## 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 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). A vote is not required to take place in order for a “meeting” of a governing body to occur. “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).

The ODL requires that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notice, generally nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

The ODL prohibits governing bodies from conducting serial meetings. *See* I.C. § 5-14-1.5-3.1. Specifically:

Sec. 3.1. (a) Except as provided in subsection (b), the governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.

(2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the

governing body.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business. For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(b) This subsection applies only to the city-county council of a consolidated city or county having a consolidated city. The city-county council violates this chapter if its members participate in a series of at least two (2) gatherings of members of the city-county council and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least five (5) members of the city-county council and the other gatherings include at least three (3) members of the city-county council.

(2) The sum of the number of different members of the city-county council attending any of the gatherings at least equals a quorum of the city-county council.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business. For purposes of this subsection, a member of the city-county council attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(c) A gathering under subsection (a) or (b) does not include:

(1) a social or chance gathering not intended by any member of the governing body to avoid the requirements of this chapter;

(2) an onsite inspection of any:

(A) project;

(B) program; or

(C) facilities of applicants for incentives or assistance from the governing body;

(3) traveling to and attending meetings of organizations devoted to the betterment of government;

(4) a caucus;

(5) a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;

(6) an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action;

(7) a gathering for the sole purpose of administering an oath of office to an individual; or

(8) a gathering between less than a quorum of the members of the

governing body intended solely for members to receive information and deliberate on whether a member or members may be inclined to support a member's proposal or a particular piece of legislation and at which no other official action will occur.

(d) A violation described in subsection (a) or (b) is subject to section 7 of this chapter.

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*. The trial court would retain authority to make factual determinations regarding the incidents that have been alleged to have occurred in the formal complaint that was filed. The basis of your formal complaint is that prior to the Board's May 20, 2013 public meeting, a majority of the Board, and possibly the Council, conducted private meetings discussing the Article, notice was not provided for such meetings, and private votes were conducted by the bodies. You have not cited to any specific occurrence when the alleged actions occurred. In response, the Council and Board have adamantly denied all allegations contained in your formal complaint. Mr. Kaiser provided a timeline for Mr. Hauersperger's and Mr. Schuetter's actions following the receipt of the Article up to the reading of the statement at the May 20, 2013 meeting, which occurred after a vote was conducted by the Board during the meeting. It is my opinion that the actions taken by the Board, Mr. Hauersperger, and Mr. Schuetter, as described in the Board's response to your formal complaint, complied with the requirements of the ODL as a majority of the Board never gathered to discuss the Article and the prohibition against serial meeting was not violated. Alternatively, as provided in your formal complaint, if a majority of the Board and/or Council did meet secretly to discuss the issues outlined in the Article without providing notice and thereafter voted in private regarding the statement that was issued at the May 20, 2013 public meeting, a violation of the ODL would have occurred.

## CONCLUSION

Based on the foregoing, it is my opinion that the actions taken by the Board, Mr. Hauerperger, and Mr. Schuetter, as described in the Board's response to your formal complaint, complied with the requirements of the ODL as a majority of the Board never gathered to discuss the Article and the prohibition against serial meeting was not violated. Alternatively, as provided in your formal complaint, if a majority of the Board and/or Council did meet secretly to discuss the issues outlined in the Article without providing notice and thereafter voted in private regarding the statement that was issued at the May 20, 2013 public meeting, a violation of the ODL would have occurred.

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: William J. Kaiser