



STATE OF INDIANA

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May 17, 2013

Mr. Robert A. Hansen
406 N. Central Avenue
Connersville, Indiana 47331

Re: Formal Complaint 13-FC-122; Alleged Violation of the Open Door Law by the Fayette County Board of Commissioners, Fayette County Council, Connersville City Council, and the Connersville Board of Public Works and Safety

Dear Mr. Hansen:

This advisory opinion is in response to your formal complaint alleging the Fayette County Board of Commissioners ("Commissioners"), the Fayette County Council ("County Council"), the Connersville City Council ("City Council"), and the Connersville Board of Public Works and Safety ("Board") violated the ODL. Andrew J. Bryson, Attorney for the Commissioners and County Council, and Jon D. Baker, Connersville City Attorney, responded in writing to your formal complaint. Their responses are enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on April 11, 2013 the Commissioners, the County Council, the City Council, and the Board held a joint executive session pursuant to I.C. § 5-14-1.5-6.1(b)(4), which allows certain governing bodies to hold an executive session to conduct interviews and negotiations with industrial or commercial prospects or their agents. You provide that during the executive session the bodies also discussed the budget for the Economic Development Group ("EDG") and the fact that the EDG was looking for a new executive director. In response to your inquiry regarding the appropriateness of such discussions, the county attorney advised that the EDG was an agent for the industrial or commercial prospects. You do not believe that the ODL was meant to be interpreted in that fashion. You maintain, if anything, that the EDG is an agent of the city and county, as the EDG receives funds from the city and county via the Economic Development Income Tax ("Tax").

In response to your formal complaint, Mr. Baker advised that the newly elected President of the EDG asked to speak to the governing bodies of the city and county regarding his philosophy and strategy for economic development and to address certain

industries who have expressed interest in locating to the area and working with the EDG. Mr. Baker was of the opinion that said discussions would not be construed as a “meeting” pursuant to I.C. § 5-14-1.5-2(c)(5), as it was a gathering to discuss an industrial and commercial prospects, that did 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.

Mr. Baker provided that it was determined in conjunction with the County Attorney that notice should be provided, for an executive session, that would be held pursuant to I.C. § 5-14-1.5-6.1(b)(4). At the gathering, the EDG President explained his strategy for economic development, discussed certain potential industrial prospects that had requested confidentiality, and the need for the EDG to hire an executive director. No decision was made or votes taken on any matter by any of the bodies in attendance.

Mr. Bryson advised that the executive session was called at the request of the EDG President to introduce himself to the leadership bodies of the city and county. It was also presumed that the President would use the opportunity to explain to the bodies his planned vision of the EDG, business leads of an undisclosed nature that he had previously met with and had disclosed interest in Fayette County, and his recommendations regarding the need for an executive director. It was originally determined that notice would not be required as the meeting fit within the exception provided under I.C. § 5-14-1.5-2(c)(5). Later, Mr. Bryson discouraged this route in light of the presence of quorums of various city and county governing bodies. As such, approval was made to conduct the gathering as an executive session. Proper notice of the executive session was provided by the County Auditor. EDG, as an agent of the industrial and commercial prospects, would be allowed to attend the executive session to discuss future policy decisions, ongoing leads, negotiations and current work with industrial and commercial prospects that required confidentiality. Further, the President of the EDG emphasized the need to hire an executive director.

Mr. Bryson provided that the decision to treat the EDG as an agent of the industrial and commercial prospects for the purposes of I.C. § 5-14-1.5-6.1(b)(4) appeared uncontroversial. The EDG has had prior agency relationships with business in Fayette County; more specifically representing a large employer in the county during contract negotiations with the Commissioners and County Council. To not treat EDG as an agent of the industrial and commercial prospect would ignore the EDG’s purpose and Mr. Bryson’s past personal experience with the entity. The decision was not made carelessly and balanced the actual obligations and functions of the EDG and 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).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). A governing holding an executive session may admit those persons necessary to carry out its purpose. *See* I.C. § 5-14-1.5-2(f). The ODL does not prohibit governing bodies from holding a joint executive session as long as the subject matter was proper for each governing body in attendance. *See Opinions of the Public Access Counselor 00-FC-33; 06-FC-195*. The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). "Final action" is defined as 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).

Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, "To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)" would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39*. There has been no allegation that the notice provided by the governing bodies for the April 11, 2013 executive session was improper.

As to the discussions held by the those in attendance at the April 11, 2013 executive session, the executive session was held pursuant to I.C. § 5-14-1.5-6.1(b)(4), which allows an executive session to be held to conduct interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects by the Indiana economic development corporation, the office of tourism development, the Indiana finance authority, the ports of Indiana, an economic development commission, a local economic development organization (as defined in I.C. 5-28-11-2(3)), or a governing body of a political subdivision. The parties do not dispute that the discussions that occurred during the April 11, 2013 executive session consisted of the following:

- The newly elected EDG President introduced himself to the bodies;
- The EDG President provided insight regarding his vision for the EDG;
- The EDG President spoke regarding certain industries that have expressed interest in locating in Connersville and Fayette County; and
- The EDG President recommended that the EDG hire an executive director.

It is my opinion that the topics of discussion that dealt with the President of the EDG introducing himself to those in attendance, his vision regarding the future of the EDG, and his desire that the EDG hire an executive director were improper for an executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(4). The exception provides that an executive session may be held pursuant to (b)(4) for “interviews and negotiations with industrial or commercial prospects” or their agents. The EDG is not an industrial or commercial prospect for the city and county. As discussed further *infra*, even if it can be argued that the EDG can act as an agent for an industrial or commercial prospect, the EDG President’s personal background, his vision for the EDG, and his desire that the EDG hire an executive director are issues unrelated to any interview or negotiation conducted by a governing body with the agent of an industrial or commercial prospect. These are issues of the alleged agent, not the industrial or commercial prospect. As such, it is my opinion that the Commissioners, County Council, City Council, and Board violated the ODL by discussing said issues during an executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(4).¹

The remaining topic discussed during the executive session concerned prior discussions conducted by the EDG President with certain industries who had expressed an interest in locating in Connersville and Fayette County. Again, the EDG is not an industrial or commercial prospect for the City or County. The issue that arises is whether the EDG may act as an agent for an industrial or commercial prospect in an executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(4). You maintain that the EDG is financially supported by city and county via the Tax and that if anything, the EDG acts as an agent of the city and county in attracting businesses to the area. In response, Mr. Bryson notes that the EDG has had prior agency relationships with businesses in Fayette County, specifically in representing a large employer during contract negotiations with the Commissioners and City Council.

The ODL does not define who may serve as an agent of an industrial or commercial prospect in an executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(4). Nor has either party cited to a holding from the Indiana Supreme Court, Court of Appeals, or a previous advisory opinion of the Public Access Counselor to support its position. Executive session exceptions are to be construed narrowly in light of the public policy of the ODL that the workings of government should be conducted openly except where specifically authorized by statute. *Common Council of the City of Peru v. Peru Daily Tribune, Inc.*, 440 N.E.2d 726, 729 (Ind. App. 1982). “Agency is a relationship resulting from the manifestation of consent by one party to another that the latter will act

¹ If the bodies had decided to gather pursuant to I.C. § 5-14-1.5-2(c)(5), a discussion of the EDG’s President’s background, his vision for the entity, and his desire that the EDG hire an executive director would have been improper as said topics are unrelated to an industrial or commercial prospect. The EDG is not an industrial or commercial prospect of the city and county; as such a discussion regarding the EDG’s priorities and goals would have been improper pursuant to I.C. § 5-14-1.5-2(c)(5). Said discussions could have been conducted at a properly noticed, public meeting. Alternatively, it is my opinion that a gathering held pursuant to I.C. § 5-14-1.5-2(c)(5) to discuss those business’s who had expressed interest with the EDG about locating to the area would be proper as long as the discussions did 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.

as an agent for the former.” *Meridian Sec. Ins. Co. v. Hoffman Adjustment Co.*, 933 N.E.2d 7, 12 (Ind. Ct. App. 2010) (quoting *Smith v. Brown*, 778 N.E.2d 490, 495 (Ind. Ct. App. 2002)), trans. denied. The Indiana Court of Appeals provided the following in *Quality Foods Inc. v. Holloway Assocs.*:

“In determining whether a person is acting as an agent, the court has recognized three classifications of authority: (1) actual authority; (2) apparent authority; and (3) inherent authority. *Gallant Ins. Co. v. Isaac*, 751 N.E.2d 672, 675 (Ind. 2001). Actual authority is created "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." *Id.* Apparent authority "refers to a third party's reasonable belief that the principal has authorized the acts of its agent; it arises from the principal's indirect or direct manifestations to a third party and not from the representations or acts of the agent." *Id.* Inherent authority, "which is grounded in neither the principal's conduct toward the agent nor the principal's representation to a third party but rather in the very status of the agent[,] . . . originates from the customary authority of a person in the particular type of agency relationship." *Id.* *Quality Foods, Inc. v. Holloway Assocs. Prof'l Eng'rs & Land Surveyors, Inc.*, 852 N.E.2d 27, 31-32 (Ind. Ct. App. 2006)”

In *Demming*, the Court of Appeals held:

“To establish an actual agency relationship, three elements must be shown: (1) manifestation of consent by the principal, (2) acceptance of authority by the agent, and (3) control exerted by the principal over the agent. *Douglas v. Monroe*, 743 N.E.2d 1181, 1186 (Ind. Ct. App. 2001). These elements may be proven by circumstantial evidence, and there is no requirement that the agent's authority to act be in writing. *Dep't of Treasury v. Ice Serv., Inc.*, 220 Ind. 64, 67-68, 41 N.E.2d 201, 203 (1942). Whether an agency relationship exists is generally a question of fact, but if the evidence is undisputed, summary judgment may be appropriate. *Douglas*, 742 N.E.2d at 1187.”” *Demming v. Underwood*, 943 N.E.2d 878, 883 (Ind. Ct. App. 2011)

Neither part has cited to statutory authority that would create a principle-agent relationship between the EDG and the industrial or commercial prospect, or alternatively between the EDG and the respective city and county governing bodies.

It is impossible for me to determine from a one-page formal complaint and a combined three page response whether the EDG has established the necessary factors to form an agency relationship with the prospective industrial or business prospects discussed during the April 11, 2013 executive session. Further questions that remain include if the EDG is an agent of the industrial or commercial prospect, then what is the relationship between the EDG and the various city and county governing bodies that

conducted the executive session, especially in light of the funding provided to the EDG via the Tax? How can the EDG serve as an agent for both the governing bodies *and* the industrial or commercial prospect without a conflict of interest arising? Mr. Bryson had advised that to not treat the EDG as an agent of the industrial or commercial prospect appears to ignore the EDG's purpose. Therein lies the answer too many of the questions and issues posed and presented, what is the EDG's purpose? The burden to demonstrate compliance with the requirements of the ODL lies with the respective governing bodies. From what has been provided here, it is my opinion that the governing bodies have failed to meet their burden to demonstrate that an agency relationship existed between the EDG and the respective industrial and commercial prospects that were the subject of discussions at the April 11, 2013 executive session. As such, it is my opinion that discussions concerning the industrial or commercial prospects who had been in contact with the President of the EDG, held at the April 11, 2013 executive session pursuant to I.C. § 5-14-1.5-6.1(b)(4), were improper.

CONCLUSION

Based on the foregoing, it is my opinion that the Commissioners, County Council, City Council, and Board violated the ODL by discussing the EDG President's background, his vision for the future of the EDG, and his desire that the EDG hire an executive director during the April 11, 2013 executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(4). Further, it is my opinion that the governing bodies have failed to meet their burden to demonstrate that an agency relationship existed between the EDG and the respective industrial and commercial prospects that were the subject of discussions at the April 11, 2013 executive session. As such, it is my opinion that discussions concerning industrial or commercial prospects who had been in contact with the President of the EDG, held at the April 11, 2013 executive session pursuant to I.C. § 5-14-1.5-6.1(b)(4) were improper.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Jon D. Baker, Andrew J. Bryson