



STATE OF INDIANA

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March 6, 2013

Ms. Kimberly A. Burtsfield
Indiana State Board of Accounts
302 W. Washington, E418
Indianapolis, Indiana 46204

Re: Informal Inquiry 13-INF-09; Elkhart Common Council

Dear Ms. Burtsfield:

This is in response to your informal inquiry regarding the actions of the Elkhart Common Council ("Council") and its compliance with the Open Door Law ("ODL"), Ind. Code 5-14-1.5 *et. seq.* Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. Councilman David Henke and Councilwoman Tonda Hines responded in writing to your inquiry. A copy of each response is enclosed for your reference.

BACKGROUND

You provide that you are an auditor for the Indiana State Board of Accounts ("SBOA") and are currently auditing the City of Elkhart. You have provided a copy of a newspaper article from *The Elkhart Truth* that was issued on September 14, 2012. The article detailed a news conference held by five members of the Council that dealt with alternative budget cutting ideas to the proposed 2013 budget and criticism for Mayor Dick Moore's proposed cuts. After the start of the press conference, argument ensued between the members of the Council whether the gathering was an illegal meeting under the ODL as proper notice had not been provided.

The group that called the press conference, which consisted of four Republicans and one Democrat, were all members of the Council. Both the Mayor and City's attorney had suggested to the group that the gathering would be considered a meeting under the ODL. The news article details that Councilman Hannon conceded this point, after speaking with a public access attorney in Indianapolis. In an effort to avoid a quorum, one of the members of the group stepped aside and sat in the audience as the four others addressed the media. The remaining four members of the group then addressed those in attendance regarding their budgetary concerns of the City. During the press conference members of the group were asked questions submitted by other members of the Council,

including Councilman Dave Osborne and Brent Curry. You inquire whether the Council's actions were contrary to the requirements of the ODL.

In response to your inquiry, Councilman David Henke provided the following:

“The press announcement mentioned was not Council actionable meaning the County had no ability to act or vote nor put on the agenda, anything mentioned. It was to provide information to the public that Elkhart was not poor and had opportunities to improve efficiencies and cost savings as well as enhance review to collections. It was not actionable as the administration (Executive Body) would need to take action, investigate, and add Ordinances and place them on the Council agenda. None were placed on the agenda, none were voted on, none were implemented even as of today. The Mayor stated he was already doing the things mentioned. Though there were more Council members in the room, four stood at the podium, Councilwoman Olson sat down as the City's General Counsel requested secondary to open door concerns he had. The other two Council persons in attendance, Councilmen Osborne and Curry, sat in the audience and had been invited by the Mayor. They did shout actionable questions during the presentation and were asked not to do so. Again, this was a press announcement not actionable items nor anything that was placed on the agenda.”

Councilwoman Hines provided the following:

“Through word of mouth, I was made aware of a press conference to be held by the five Elkhart City Council Members mentioned in the *Elkhart Truth's* article dated September 14, 2012 to address their differences in opinion on the upcoming budget and other issues. It is my opinion that the press conference was not necessary nor did I attend and I did think it would violate the Open Door Law. As you know, we have regular scheduled council meeting and other scheduled meetings (and in this case, budget hearings were going to take place just days later), that would have allowed those council persons to express those same differences and they did during the budget hearings as well.

It is very unfortunate that those council person's felt the need to go to such measures to stress their differences of opinion on the budget and other issues concerning our City.”

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).

The two points of inquiry are whether the conduct of the Council at the press conference amounted to a “meeting” under the ODL and if so, did the Council provide proper notice for the meeting. 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).

There are nine members on the Council. As provided in your inquiry, five of the nine members of the Council called for a press conference. All five members of the Council that called for the press conference were in attendance. I do not understand the significance that placing only four of the five members at the podium would alter the determination of whether a majority of the members of the Council had intended to gather. Regardless of the placement of the members of the Council in the room where the press conference was conducted, a majority of the Council still intended to gather at a specific place and time. Thus it is my opinion that the majority component of the “meeting” definition was met in regards to the Council’s conduct of calling and gathering at the press conference.

As to whether “official action” was conducted at the press conference, Councilman Henke advised that the Council did not have the ability to act or vote on any issue discussed at the press conference nor was any matter placed on an agenda. No vote was taken at the press conference and none of the actions recommended were ever implemented. Initially I would note that the ODL does not require that a governing body use an agenda. *See* I.C. § 5-14-1.5-4. If a governing body chooses to utilize an agenda, it must be posted at the entrance to the location of the meeting prior to the meeting. *Id.* The utilization of an agenda is not determinative on whether a “meeting” is held by a governing body. In addition, just because a governing body does not vote or have the ability to vote on an issue at a gathering is not relevant to the analysis of whether a “meeting” has been held. The issue that must be analyzed is whether the governing body took “official action” which is broadly defined under the ODL. *See* I.C. § 5-14-1.5-2(e). Here, a majority of the Council gathered to make recommendations regarding the proposed 2013 City Budget; making recommendations is a type of conduct that is considered “official action” under the ODL. *See* I.C. § 5-14-1.5-2(d). As such, it is my opinion that the Council took “official action” at the press conference.

The last component to analyze is whether is whether the topic of consideration would be considered “public business.” I do not think it can be argued that the City’s proposed 2013 budget would not be considered “public business” of the Council. As such, it is my opinion that a “meeting” of the Council occurred when a majority of the

Council intended to gather in order to make recommendations regarding the proposed 2013 City Budget.

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 notices nothing, requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2). I.C. § 5-14-1.5-5(b)(2) provides that the governing body of a public agency shall provide public notice by delivering notice to all “news media” which deliver annual written request for the notices not later than December 31 for the next succeeding calendar year to the governing body of the public agency. The governing body shall give notice, at its election, either via U.S. Mail, email, or facsimile. *See* I.C. § 5-14-1.5-5(b)(2)(A)-(C).

It is my opinion that the Council acted contrary to the requirements of section 5 of the ODL by failing to provide notice of the meeting that was held (i.e. press conference). I would note that by the very nature of the meeting conducted by the Council, a press conference cannot be described as an attempt by a governing body to meet in secret or discuss issues behind closed doors. The press conference was called to inform the media and the public of the recommendations made by a majority of the Council regarding the proposed 2013 City Budget. Members of the media were invited and covered the press conference, with an article appearing in *The Elkhart Truth*. I do not consider the actions of the Council to be a blatant or intentional violation of the ODL but think it can be more accurately described as a failure to understand the broad definition of “official action” as defined under the ODL and the definition’s impact of whether a governing body has conducted a “meeting” pursuant to I.C. § 5-14-1.5-2(c).

Please let me know if I can be of any further assistance.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor