



STATE OF INDIANA

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February 25, 2013

Mr. David Henke
1752 Crabtree Lane
Elkhart, Indiana 46514

Re: Informal Opinion 13-INF-11; Meeting in Caucus pursuant to the Open Door Law

Dear Mr. Henke:

This informal opinion is in response to your inquiry regarding certain caucuses being held under the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Mayor Dick Moore responded in writing to your inquiry. His response is enclosed for your reference.

BACKGROUND

In your informal inquiry you allege that on an unspecified date, a Democratic caucus was held in Councilman Dave Osborne's place of business. You further allege that Mayor Moore, Arvis Dawson, Councilman Osborne, Councilman Brent Curry, Councilman Ron Troyer, Councilman Rod Roberson, and Councilwoman Tonda Hines were in attendance. You provide that a friend of Councilwoman Hines' mother, who I assume to be Ms. Vernice Moore-Gore by Mayor Moore's response, made a presentation regarding the upcoming election of membership to the Lerner Board. Ms. Moore-Gore allegedly asked for those in attendance at the caucus for their vote in support. Thereafter, Ms. Moore-Gore was nominated at the next Common Council ("Council") meeting and elected by the Democratic majority.

You also note that it has been customary for Mayor Moore to hold Democratic caucuses in the Mayor's conference room. At said caucuses, you allege that Mayor Moore would inform those in attendance how they were expected to vote which caused decisions to be made prior to the actual Council meeting, as the Democrats currently hold a majority of the Council seats. You further provide that after several complaints were received, the location of the caucuses shifted to the Mayor's house or Councilman Osborne's place of business. If the members of the caucus do not vote according to Mayor Moore's wishes, you maintain that they are scolded at the next caucus. You have been informed that unnamed Democrat Council members complain about the Mayor's tactics, but have stated that it is easier to give in than to fight it.

In response to your inquiry, Mayor Moore advised that members of the Lerner Board are not elected by the Council. The City of Elkhart Municipal Code § 36.167(A)(1)(b) states that “[o]ne member shall be selected by the Common Council and appointed by the Mayor.” Mayor Moore has heard that Ms. Moore-Gore was in attendance at a caucus, but neither he nor his executive assistant, Arvis Dawson, were present. Further, Mayor Moore denies that the official action is taking place at the caucuses that are held. As Mayor Moore was not in attendance, he provides that he would have been unable to pressure the council members that were in attendance. At the time of the caucus, Ms. Moore-Gore was the only remaining candidate for the position. Ms. Moore-Gore was ultimately selected by the Council with bi-partisan support. Mayor Moore notes that Ms. Moore-Gore was not your choice for the Lerner Board. Regardless, all official action regarding Ms. Moore-Gore selection was made at the regular open, public meeting of the Council.

Mayor Moore advised when the Democrats meet in caucus, they are mindful of the requirements of the ODL and the Indiana Supreme Court’s decision in *Evansville Courier v. Willner, et al*, 563 N.E.2d 1269 (Ind. 1990). The caucuses do include sharing information, deliberating expected issues, and holding discussions concerning anticipated official action and public business, which pursuant to *Willner* is not in violation of the ODL.

As to your allegation that certain members of the Council are being strong armed, Mayor Moore advised that said members, who were not identified, are free to inform the Mayor if they are uncomfortable, or alternatively, decide not to attend future caucuses. Any alleged discomfort by a member of a governing body would not violate the ODL. Lastly, the issues that you have raised in your inquiry allegedly occurred in May of 2012; thus your complaint is untimely pursuant to I.C. § 5-14-5-7(a)(2).

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).

I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the Public Access Counselor must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. You filed your informal inquiry on February 13, 2013. The alleged violations of the ODL generally occur in May of 2012. Had you chosen to file a formal complaint, you would not have had standing as more than thirty days had elapsed between the date of the alleged violations and the date your formal complaint was filed. Alternatively, the ODL does not

provide for a statute of limitations as to informal inquiries filed with the Public Access Counselor. I would note that pursuant to section 7(b) of the ODL, regardless of whether a formal complaint or informal inquiry is pending before the Public Access Counselor, any legal action to declare any policy, decision, or final action of a governing body void based must be filed within thirty days of the date of the alleged act or failure or the date the plaintiff knew or should have known that the act or failure occurred, whichever is later. *See* I.C. § 5-14-1.5-7(b). If the challenged policy, decision, final action is recorded in the memoranda of the governing body, a plaintiff is considered to have known of the act or failure complained of not later than the date that the memoranda was made available for public inspection. *Id.* From my review of the information that has been presented, you would not have standing to file a lawsuit in the local circuit or superior court pursuant to section 7 of the ODL in light of the requirements of subdivision (b). Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry.

The ODL defines a “meeting” as gathering of the 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). A “caucus” means a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members to take official action. *See* I.C. § 5-14-1.5-2(h). “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). The ODL expressly provides that a “caucus” is not a “meeting.” *See* I.C. § 5-14-1.5-2(c)(4).

The Indiana Supreme Court has provided the following analysis regarding caucuses:

Under the Indiana Open Door Law, "caucus" is defined as "a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action." I.C. § 5-14-1.5-2(h). The nature of such political meetings will often necessarily involve receiving information, deliberating expected issues, and holding discussions concerning anticipated official action and public business. If the persons attending such meetings happen to constitute a majority of a governing body, such a caucus is not thereby transformed into a meeting subject to full public scrutiny under the Open Door Law. It is the taking of official action which changes the character of a majority political party strategy meeting from a private caucus to a public meeting. *Evansville Courier v. Willner*, 563 N.E.2d 1269, 1271 (Ind. 1990).

In *Willner*, the Court found the caucus exemption inapplicable where a majority of the governing body met in caucus prior to the official meeting, deliberated and decided on the selection of a new superintendent at the caucus, held a subsequent press conference prior to the official meeting of the governing body, and had all of the appointment

paperwork prepared for signatures prior to the official meeting. *Willner*, 563 N.E.2d at 1270; *see also Evansville Courier v. Willner*, 553 N.E.2d 1386 (Ind. Ct. App. 1990).

In a previous informal opinion regarding caucuses, I opined that:

“Official action may not take place at a caucus. Members of a governing body in a caucus can hold discussions preparing them to take official action, but may not actually take official action. Undoubtedly, there is a fine line between taking “official action”, which can be as little as receiving information, and holding discussions designed to prepare members for taking official action. I would caution those members of a governing body planning to hold a caucus to keep in mind that transparency and accessibility are the hallmarks of the ODL, and to be mindful of the definition of “official action” when holding a caucus. . .

The ODL is silent as to the frequency of which a caucus may be held. As long as the political party or coalition was not taking official action in the caucus, it would not be violating the ODL.” *See Informal Opinion of the Public Access Counselor 12-INF-03*.

The ODL does not provide that caucuses are prohibited from being held in certain locations; thus no violation of the ODL would have occurred when a caucus was held at a councilman’s place of business or within a government building. I was not in attendance at any of the alleged caucuses. Further, 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*. Mayor Moore disputes many of the factual allegations that formed the basis of your inquiry. In essence, you allege that the caucuses were held in violation of the ODL as official action is being conducted by the Council, specifically the selection of Ms. Moore-Gore to the Lerner Board. In response, Mayor Moore advised that neither he nor his assistant was in attendance at the alleged caucus; Ms. Moore-Gore was selected to the Lerner Board with bi-partisan support at an open, public meeting of the Council on May 7, 2012; memoranda from the May 7, 2012 Council meeting has been submitted to provide further evidence to this issue; and Mayor Moore advised that caucuses attended are mindful to the requirements of the ODL and prior decisions of the Indiana Supreme Court. Accordingly, it is my opinion that *if* the actions of the members of the caucus are limited to sharing information, deliberating expected issues, and holding discussions concerning anticipated official action and public business, then no violation of the ODL has occurred (emphasis added).

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 distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Mayor Dick Moore