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8 November 2021

Mr. Luke H. Britt, Esq.
Office of the Public Access Counselor
Indiana Government Center South
402 W. Washington St., Room W470
Indianapolis, IN 46204

Re: Formal Complaint 21-FC-169

Dear Mr. Britt:

Please accept this reply to Indiana University's response to the Complaint in 21-FC-169. I apologize for burdening your office with an additional filing, but unfortunately it is made ***imperative*** by IU's misrepresentations of facts and law.

I explain that 1) the Complaint is not time-barred, because it was triggered by events that occurred the same day it was filed; 2) IU's theory that the chair of the Board of Trustees exercised "delegated authority" to enter into a new $582,000 contract with former President McRobbie not only is legally unsupported, it brazenly misrepresents the facts behind the trustee's approval of the contract; and 3) the trustees' decision to merely report the existence of the contract after the fact does not satisfy the Open Door Law ("ODL").

The Complaint is not time-barred

The Complaint was submitted October 8, 2021, the same day that information was revealed for the first time (by the *Indianapolis Business Journal, see* Ex. 1 to Complaint) that the IU Board of Trustees had, according to its spokesman, 1) discussed and approved a major personnel contract involving IU's former president in executive session at its August 13, 2021 meeting, then 2) voted on the matter "in the administrative action section" of that day's public meeting. Neither the agenda nor anything that transpired at the August meeting would have alerted a member of the public to any of this, and so the denial of access did not become known until the spokesman's statements were published. The Complaint was triggered by these revelations and directly addressed them. It noted that 1) per the Public Access Counselor's guidance, contracts may not be discussed and approved in executive session, and 2) the record clearly showed *there was no* "administrative action section" of the August meeting. Thus, the Complaint is timely.

The secret approval the trustees gave to the McRobbie contract in May 2021 is an important fact underlying IU's violation, but it provides no basis for holding the Complaint time-barred. Nor is the Complaint time barred because it discusses events the trustees supposedly took at their August meeting, because no information about those events came to anyone's attention until October 8. Finally, even if the Complaint were untimely, the Public Access Counselor could and should still address it for educational purposes. *See Opinion of the Public Access Counselor 14-FC-44.*

IU fails to address its admissions about misuse of executive sessions

Asked to explain how the McRobbie contract was approved, IU's spokesman told the *IBJ* that the trustees had discussed and approved it in executive session on August 13: "As is standard procedure, personnel decisions involving contracts are discussed in executive session, if they are discussed at all…," he said. Ex. 1 to Complaint.

As the Public Access Counselor advised Complainant in an email on October 1,

> [A] new contract with a former employee containing new terms and an extension of funds would need to be discussed and ratified by the full board. *There is no executive session provision for these matters either.* Contracts by governing bodies are always to be discussed and vetted in public, regardless of subject matter or contractor. (Emphasis added.)

Apparently recognizing there was no way to rehabilitate its spokesman's admission, IU's response simply ignores it. Instead, IU has decided to abandon that explanation and instead invents a new theory of "delegated authority."

There could not have been any delegation of authority to the board chair

As the Public Access Counselor has explained, the ODL requires that "a new contract with a former employee containing new terms and an extension of funds … be discussed and ratified by the full board." IU's sole defense to the Complaint is its theory that the McRobbie contract did not require public action by the full board because the trustees had "delegated" their authority to their chair, Michael Mirro. IU never cites any board resolution doing so or explains when or where such authority was delegated, other than citing a generic provision of the trustees' bylaws that allows the chair to "execute … instruments and documents."

In other words, IU asserts that a public agency's governing body may "delegate" any or all of its authority *to one of its own members*, then claim that that person is empowered to take – outside of public view – any action that the governing body normally would be required to perform in public. But if this were true, the ODL would be rendered meaningless, because a governing body could always circumvent

it by "delegating" one of its own members to act on its behalf in secret. Simply to restate IU's argument is to understand its absurdity and why it fails.

The authorities IU cites do not support its position, because they involve governing bodies delegating authority to *subordinate administrative employees. Dillman v. Trustees of Indiana University* involved delegation by the IU board to its principal employee, the president. And *Opinion of the Public Access Counselor 12-FC-114* involved delegation by a municipal board to the agency's "management team." *Of course* governing bodies delegate signature authority on routine matters to executives they employ. But there is no support, and IU cites none, for the proposition a governing body may "delegate" authority to *one of its own members,* who is then free to secretly enter into a contract on the governing body's behalf. A "board can act legally only by consensus … and only at a duly constituted and conducted meeting…. An individual board member has no individual management authority simply by virtue of being a member of the board."[1]

Nor is this a situation where an ODL problem could be cured by later public ratification, as in 12-FC-114. In that case, the earlier action had been taken by a properly authorized subordinate, then ratified in a public meeting by the agency's governing body. In any event, the trustees have never publicly ratified the McRobbie contract, they have merely published a letter *describing it* after the fact.

In sum, while a governing body may delegate authority to subordinate administrative officers, there is no support for the idea that it can "delegate" undefined authority *to one of its own members* and thereby avoid the requirement of public action by the full board.

IU misrepresents how the McRobbie contract was approved

In any event, the University's description of the facts behind the McRobbie contract is false and misleading. As demonstrated by exhibits Complainant has supplied, no one involved in the McRobbie contract believed that any final decision making authority had been delegated to Mirro, as IU claims. Mirro had been instructed only to approach McRobbie and negotiate the terms of a contract extension when the trustees thought McRobbie's continued services as president would be needed. *See* Ex. 3 (Morris memo). *But the trustees plainly knew that any new contract with McRobbie would need to be ratified at a public meeting* – as evidenced by the fact (as IU acknowledges at pp. 4-5) they scheduled, then canceled, such a meeting in March 2021.

It was only when they converted the contract extension into a "consulting" arrangement two months later that the trustees decided to forego any public action.

[1] George E. Constantine, *et al.*, "Legal Duties of Association Board Members," https://www.venable.com/insights/publications/1999/11/legal-duties-of-association-board-members.

IU's response (at p. 5) claims, "Chair Mirro thought it was prudent to assure a smooth transition from President McRobbie to President Whitten and to provide some financial recompense" to McRobbie for rescheduling his sabbatical. But in fact, as shown in IU's own documents, what actually happened was that the trustees acquiesced in the recommendation of a *different* trustee, Jim Morris, not Mirro, that the contract extension be converted into a "consulting" arrangement. *See Ex. 3 (Morris memo).* Morris wrote, "I intend to advise John Whelan and Jackie Simmons to make sure these payments are made…. This will uphold the integrity of *the board's* commitments to Michael…." (Emphasis added.) IU's response also misrepresents the value of the new McRobbie consulting contract. [2]

Chair Mirro and another trustee later signed a letter to McRobbie *memorializing* the decision the trustees had made. *See* Ex. 2. But that letter made perfectly clear that the *trustees had made a collective decision* on the underlying "consulting" agreement. The letter states: *"the trustees have agreed to compensate you* as set forth in the Addendum to Employment Agreement signed by you and the Chair of the Board of Trustees…." (Emphasis added.) Mirro may have signed the earlier promise to McRobbie, but it was acted on by the full board outside public view.

In sum, IU's story about Mirro's "delegated authority" is a fabrication, and IU misrepresents critical facts in its attempt to advance it.

Where a contract requires public approval by a governing body, simply reporting it as "administrative action" does not suffice under the ODL

As evidenced by the coverage in the *IBJ* and other media, the $582,000 McRobbie contract was a significant matter of public concern. The trustees have never publicly ratified the McRobbie contract, they have merely published a letter *describing it* after the fact.

The trustees append something called an "Administrative Action Report" to the minutes of a meeting, minutes they then approve at a subsequent meeting. The trustees' letter to McRobbie confirming the "consulting" arrangement is included in such an Administrative Action Report dated August 5, 2021, but not made public

[2] IU's response at p. 2 n. 5 says, "McRobbie was entitled to his base salary during the period of July 1, 2021-December 31, 2021," and thus, "the 'new compensation' for consulting services is $260,000, not $580,000." The same claim is made on page 10. But that is untrue. The base salary that would have been paid July 1, 2021-December 31, 2021 was for the first half of a sabbatical. As part of the consulting arrangement, McRobbie's fully paid one-year sabbatical was deferred until January 2022. Thus, as a result of the consulting arrangement, McRobbie received an additional six months of base salary he would not otherwise have received. The $582,000 figure has been reported by news media, and IU has never before disputed it.

until after the trustees had approved those minutes on October 8.[3] The McRobbie contract is the last item in a long list of mundane things such as routine faculty title changes and seal coating for a parking garage.

While a letter memorializing the McRobbie agreement was *reported* in this Administrative Action Report, it was never actually *voted on* by the trustees. Minutes are a record of actions taken at a meeting; adding an appendix to "minutes" *post hoc* does not prove the appendix items were ever properly approved. As documented by the transcript Complainant provided, *see* Ex. 5, as well as the video of the public meeting,[4] neither the Administrative Action Report nor any item within it was ever placed on the August 13 agenda or called for a vote.[5]

Apparently, the purpose of the "Administrative Action Report" is for the trustees to *report after the fact*, but *not actually vote on or ratify at a public meeting*, actions taken by subordinates, such as vice presidents and campus chief academic officers. IU argues the "Administrative Action Report" is necessary because it would be impossible to discuss and vote on thousands of contracts every year. But unlike a contract to reseal a parking lot which could be approved by the vice president for facilities, here there was no administrative functionary who could have exercised delegated authority, because the other contracting party was the sitting president.

In sum, under the ODL, contracts "are always to be discussed and vetted in public, regardless of subject matter or contractor." Even if, as IU says, "there was nothing for the trustees to discuss" – because the discussions had already occurred in secret – the ODL required the McRobbie contract to be placed on an agenda, called for a vote, and approved by the full board in public. None of this was done.

IU's attack on Complainant further demonstrates its bad faith

IU's response launches a strange, ad hominem attack against the Complainant for his work on a separate matter from IU's ODL violation. The attack has no basis, but it demonstrates IU's anger at being held accountable to Indiana law.

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[3] *See* https://webapp1.dlib.indiana.edu/iubot/view?docId=2021-08-13&chunk.id=d1e653&toc.depth=1&toc.id=d1e653&brand=iubot

[4] *See* https://iu.mediaspace.kaltura.com/media/t/1_y40o6h9u.

[5] IU says the decision was made to include the McRobbie letter in the "Administrative Action Report" "[a]fter Professor Sanders argued in his various online articles that the trustees should have voted on the McRobbie consulting letter in a public session." But the articles IU refers to were not published online until October 4 and 6 – only days before the trustees adopted "minutes" approving administrative action items that are dated August 5 and purportedly were before the trustees on August 8. Nothing about IU's version of the timing here makes any sense.

In the same piece of journalism where Complainant described IU's ODL violation, he also documented the search process for IU's new president.[6] IU officials were given opportunities to contest any aspect of the story, and they did not. The accuracy and credibility of Complainant's work has never been questioned, and the *IBJ* relied heavily on it in its own story.

Although the process by which the new president was chosen has nothing to do with the ODL violations at issue here, IU's response imputes motives to Complainant with no factual basis, alleges various forms of misconduct, and ends with a gratuitous and unprofessional personal attack.

For the first time in its response letter (which IU did not even serve on Complainant), IU accuses Complainant of purported violations of two IU policies, "DM-01" and "DM-02." "DM" stands for "data management." Even a cursory examination of these policies reveals they are information-technology policies that govern access to such things as institutional databases, data from web forms, and financial transactions. Complainant has no access to any such data systems, and none of his reporting about the presidential search involved him (or anyone else) using a computer to access institutional data of any kind.

IU plainly is outraged by Complainant's efforts to hold it accountable, and so it misrepresents its own policies to allege he violated some duty of confidentiality. But Complainant's IU responsibilities give him no duty to safeguard the trustees' secrets. His journalistic work was an example of a faculty member illuminating matters of public concern in a way that is protected by academic freedom and the First Amendment. The policies cited by the General Counsel have no applicability to Complainant, and it is unfortunate she would seek to misinform the Public Access Counselor with this sort of spleen-venting.

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In summary, IU fails to establish the trustees complied with the ODL when IU reported the McRobbie contract for the first time on October 8 as "administrative action" without it ever having been discussed or voted on in public.

Thank you for your time and consideration.

Yours sincerely,

Steve Sanders

[6] *See* https://medium.com/@stevesan