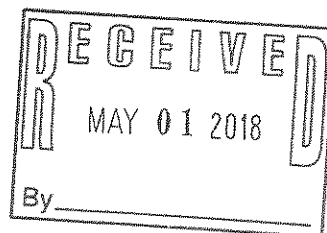




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April 30, 2018

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**VIA ELECTRONIC MAIL**  
**(DeYoung1@opac.in.gov)**

Luke H. Britt  
Office of the Public Access Counselor  
402 West Washington Street  
Indianapolis, IN 46204

RE: Formal Complaint 18-FC-55  
School City of Hammond

Dear Mr. Britt:

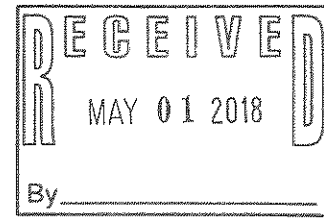
Please be advised that this firm and the undersigned will be representing the Respondent, School City of Hammond (the "School"), in the above captioned matter. In a letter from you dated April 11, 2018, the School was notified of the formal complaint filed by Ken Davidson ("Complainant" or Mr. Davidson) and was directed to file its response to the complaint on or before April 25, 2018. Please be advised that this letter serves as the School's response and is based upon the facts available to counsel at this time.

The Complainant alleges that the contracts listed on the consent agenda on the School's March 20, 2018 School Board meeting violated the Open Door Law ("ODL").

**Background:**

School City of Hammond is planning to build a new Middle/High School. The School went through the referendum process and held a special election on November 7, 2017, in which the public voted to approve the referendum in order to build the new school and improve other buildings owned by the School.

On March 20, 2018, the School City of Hammond School Board (the "Board") held a regular meeting. As the Board utilizes an agenda, a copy of the agenda was located at the Board room entrance. The consent agenda for the March 20, 2018 meeting contained the following items:



- A. Personnel Report
- B. Accounts Payable
- C. Approval of Payroll Schedule and Voucher
- D. Board Approval of Donations
- E. Board Approval of Extra-Curricular Purchases
- F. Approval of Clark/MTI Contract
- G. Approval of Hammond High/Six Flags Agreement
- H. Approval of Hilliard Lyons as Underwriter for the Referendum Bond Sales
- I. Approval of the Contract for Architect Services for the new Middle/High School Hammond project to Schmidt Associates
- J. Approval of the New Middle/High School for Hammond Construction Manager Contract to the Skillman Corp.
- K. Approval of the Construction Contract for the final phase of improvements at Gavit Middle/High School to Larson Danielson Construction
- L. Approval of Contract with GrapeCity, Inc. at Hess ES
- M. Approval of Contract with GrapeCity, Inc. at Harding ES
- N. Approval of Contract with National Training Network, Inc. and Hammond HS
- O. Technology Department: Disposal of Non-functioning Equipment
- P. Approval of Revised 2018-2019 SCH School Calendar

As stated on the School's website under Board Meetings and Procedures, a "consent agenda" is described in the following manner:

Many routine items that require Board approval may be placed on the consent agenda. The Board may approve or disapprove these items by considering them as a whole rather than acting on each item individually. If a Board member feels that any item on the consent agenda needs further discussion, the member may request that the item be removed from the consent agenda and be considered separately.<sup>1</sup>

### **Response to Complaint**

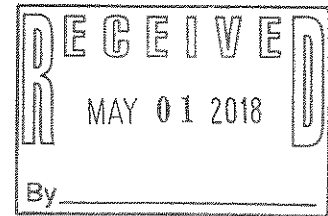
Complainant alleges that the consent agenda used by the Board during the March 20, 2018 meeting violated the ODL. Specifically, Complainant alleges that:

1. No items can be placed on a consent agenda;
2. Items H-N were not "routine" items that should be placed on a consent agenda;
3. Items H-N on the consent agenda listed above violate the ODL as they, "by their nature require deliberation and forethought;"

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<sup>1</sup> [http://www.hammond.k12.in.us/district\\_info/school\\_board/board\\_meetings\\_and\\_procedures](http://www.hammond.k12.in.us/district_info/school_board/board_meetings_and_procedures)

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4. "There can be no other explanation for the inclusion of [items H-N on the consent agenda] other than the Board 'met' in an electronic or other meeting at which the public was not involved and for which there was no notice."

The Complainant's allegations are without merit and are unsupported in fact or law.

**Consent Agendas May Be Used by the Board.**

Schools are not required to use any kind of agenda. *Opinion of Public Access Counselor 13-FC-275; 12-FC-209; 08-FC-17; 04-FC-02.* As the ODL provides no guidelines for the content or structure of a meeting agenda, the Public Access Counselor has determined that an agenda can take essentially any form. *Opinion of Public Access Counselor 04-FC-02 and 08-FC-17.*

The only requirements of the form of agendas in the ODL is located in Indiana Code § 5-14-1.5-4(a) and does not require the use of an agenda; however, if a public agency does utilize an agenda, that agenda must be made available to the public at the meeting. The School posted the agenda, with the consent agenda, at the entrance of the Board meeting room. The Complainant does not allege that an agenda was not made available.

The Complainant also does not allege that the Board took action by voting on an agenda item by reference in violation of Indiana Code § 5-14-1.5-4(a). The Board did not take action by stating only that they were voting on "Agenda Item 6." Instead, the Board referred to another document, as listed on the consent agenda, which is a public record and disclosable to any requestor.

The Public Access Counselor has upheld the use of consent agendas. The Public Access Counselor has described consent agendas as a list of documents or materials contained in a Board packet and are disclosable to a requestor. *Opinion of Public Access Counselor 08-FC-17.* The Public Access Counselor also drew similarities between motions to approve minutes from a previous Board meeting and motions to approve consent agendas. *Id.* As with motions to approve minutes, the Board does not violate ODL when it does not read the entirety of a document aloud during the meeting or indicate the substance of the document before voting on its approval. *Id.*

The Board followed ODL by posting its discretionary agenda at the entrance of the meeting, listing the documents contained in the consent agenda, and not voting by reference. If Mr. Davidson requires additional information regarding an item listed on the consent agenda, he is welcome to make a public records request for the listed item or make a public comment during the meeting. Though Mr. Davidson is of the opinion that consent agendas should not be used, he cites no authority supporting that consent agendas are in violation of the ODL. Therefore, the School and the Board did not violate ODL by using a consent agenda.

**Contracts are Routine Items Requiring Board Approval.**

Mr. Davidson contends that items H-N are not routine matters of business and should not be considered on the consent agenda. The Board's website describes consent agenda items as those

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requiring routine approval by the Board. As items H-N are contracts and agreements requiring Board approval, they are routine items.

The consent agenda at the March 20, 2018 Board meeting contained, among other things, all contracts and agreements requiring the Board's approval. In fact, almost every contract or agreement the Board approves in any meeting is contained on the consent agenda. Though the Complainant alleges that consent agenda items H-N only violate the ODL, there were several other contracts listed on the consent agenda, such as "F. Approval of Clark/MTI Contract" and "G. Approval of Hammond High/Six Flags Agreement." As the approval of contracts and agreements are routine items of business by the Board, they are listed under the consent agenda for every Board meeting.

Because the Board's typical procedure for the approval of contracts and agreements is through the consent agenda, Board members are well aware of procedures to use if they feel a consent agenda item requires additional discussion. A Board member may move to take any consent agenda item off of the consent agenda to be considered individually. Though Mr. Davidson felt as though items H-N were not routine, no Board member moved to discuss these items individually, likely due to the fact that approving contracts were routine business for them during a Board meeting.

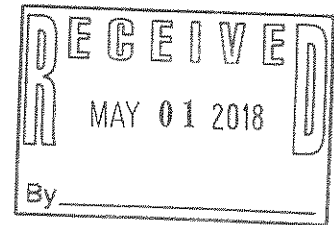
As the ODL does not define what is "routine" and Mr. Davidson has cited no legal authority stating that construction contracts are inherently different than the other contracts that the Board considers, the Board did not violate the ODL by listing the contracts in items H-N on the consent agenda.

**Board Members are Not Required to Deliberate Before Taking Final Action.**

Mr. Davidson alleges that items H-N on the consent agenda, "by their nature require deliberation and forethought." Mr. Davidson does not cite any reason why these items require any more deliberation or forethought than any other item on the consent agenda. As stated above, a Board does not inherently violate the ODL when it does not read a document aloud or reiterate the substance of the document before taking a final action. *Opinion of Public Access Counselor 08-FC-17.*

The Board also does not violate ODL when it does not deliberate prior to taking final action. *Opinion of Public Access Counselor 12-FC-209.* Nowhere in the ODL does it require the Board to deliberate or discuss items before voting or taking any other final action. Though Mr. Davidson contends that items H-N on the consent agenda required deliberation and forethought during the Board meeting, his opinion is not supported by law or previous Public Access Counselor Opinions. As there is "no requirement that deliberation occur prior to final action being taken," the Board did not violate the ODL by not deliberating on consent agenda items H-N. *Id.*

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**No Final Action was Taken Outside of Properly Noticed Public Meetings**

Mr. Davidson also alleges that “there can be no other explanation for the inclusion of the items in a consent agenda other than the Board ‘met’ in an electronic or other meeting at which the public was not involved and for which there was no notice.” Mr. Davidson does not cite any fact, direct or indirect knowledge, or even rumor as a basis for this accusation.

The consent agenda items with which Mr. Davidson takes issue involve the approval of contracts for an Underwriter, Architect and Construction Manager for the new Middle/High School, as well as the Construction Contract for Gavit Middle/High School, contract with GrapeCity at Hess and Harding Elementary School, and the National Training Network with Hammond High School. The majority of these contracts involve services related to the referendum.

The contracts for Underwriter, Architect, and Construction Manager in the consent agenda are professional services that do not require a public bidding process. Indiana Code § 5-16-10 and Indiana Code § 5-16-11.1. The School’s current construction project is in its beginning stages. The School will still need to bid out many additional contracts for services, such as construction, before ground is ever broken on the new school. The majority of these contracts will go through the competitive bidding process, in compliance with Indiana Code § 5-22-7, and invitations for bids will be publically opened in accordance with Indiana Code § 36-1-12.

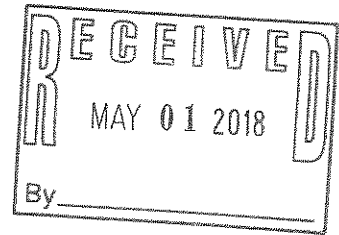
The School’s administration reviewed the qualifications and interviewed potential candidates for the consent agenda items before the sending contracts to the Board for approval. The School’s administration weighs options and then makes a recommendation to the Board. The Board delegates these and many other day-to-day operations to the administration as part of the bureaucratic decision making process. The Board did not interview or have any meeting regarding the candidates or entities recommended by the administration to be awarded a contract.

The Board receives a Board packet, assembled by the administration, with all documents to be discussed or approved at the Board meeting. The Board receives this packet a week in advance of the Board meeting. Board members are then instructed to review these documents in order to make informed decisions during the Board meetings. If a Board member requires more information, they are welcome to individually contact administration in order to ask questions about the recommendation. *Opinion of Public Access Counselor 14-FC-42*. Based on this information, Board members vote to approve the consent agenda items or remove them from the consent agenda for additional discussion. There is no other explanation and no other meeting, electronic or otherwise, of which the public was not notified.

**Conclusion**

For all of the foregoing reasons, the Respondent, School City of Hammond, respectfully requests that the Public Access Counselor find and conclude that the Respondent did not violate Indiana Code 5-14-1.5 et. seq. during its March 20, 2018 Board meeting.

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Public Access Counselor  
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Sincerely,

**LEWIS & KAPPES, P.C.**

A handwritten signature in cursive script, appearing to read "Emma Jay".

Emma Jay, Esq.

cc: Dr. Walter Watkins, Superintendent  
School City of Hammond