



STATE OF INDIANA

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November 3, 2010

Hon. Rogelio Dominguez
2293 N. Main St.
Crown Point, IN 46307

Mr. William E. Nangle
The Times of Northwest Indiana
601 45th Ave.
Munster, IN 46321

*Re: Consolidated Formal Complaints 10-FC-236 and 10-FC-241;
Alleged Violations of the Open Door Law by the Lake County Solid
Waste Management District*

Dear Sheriff Dominguez and Mr. Nangle:

This advisory opinion is in response to your formal complaints alleging the Lake County Solid Waste Management District ("District") violated the Open Door Law ("ODL") I.C. § 5-14-1.5-1 *et seq.* Due to the similarity of allegations in your complaints, I have consolidated your complaints into this advisory opinion. A copy of the District's response to the complaints is enclosed for your reference.¹

BACKGROUND

You allege that on September 23, 2010, the District conducted an executive session of its governing body that was closed to the public. The District provided notice as required by statute. The notice stated that the executive session was to involve discussion of threatened litigation. However, Sheriff Dominguez questions whether it was appropriate for the District to hold an executive session "without stating/listing any subject matter purpose nor describing any litigation, pending, threatened, nor initiation." He adds that the District "held an executive session to receive legal advice concerning the constitutionality of their actions and/or contracts." Further, he questions whether the

¹ When combined with the associated attachments, the District's complete response to your complaints is quite lengthy. As a result, I have attached only the response itself, which contains a listing of the attachments included with the response. If you would like to receive a copy of any of the attachments, please contact my office and we will be happy to provide them to you.

District's actions taken at its September 30th regular meeting are valid if they resulted from illegal actions taken at the September 23rd executive session.

Mr. Nangle notes that "the *Times [of Northwest Indiana]* believes that the matter discussed [at the executive session] was not, in fact, based on a threat of litigation as required by statute and that the District . . . should have conducted the public's business in an open atmosphere" Mr. Nangle claims that the actual topic of discussion at the executive session was a legal opinion provided by a law firm in response to the District's query regarding ownership of a waste-to-ethanol plant in Lake County. On October 1st, the District's attorney, Clifford Duggan, told a staff writer for *The Times* that the meeting was closed as a result of comments made by a representative of the National Solid Wastes [sic] Management Association. The District board later met with Mr. Duggan and announced that the District had been advised that Lake County could serve as owner of the plant. *The Times* believes that because there was no written threat of litigation against the District, the District's executive session was not appropriately held under the "threat of litigation" provision in the ODL.

Attorney Clifford Duggan, Jr. responded to your complaints on behalf of the District. Mr. Duggan argues that no violation of the ODL occurred because the September 23rd executive session was not attended by a majority of the District's board members. Attached to Mr. Duggan's response is an affidavit from District Board Vice-Chairman Phillip Kuiper, who avers that only 10 members of the board attended the executive session and that 14 members are needed for a quorum. Mr. Duggan also states that the District called the executive session while under the impression that litigation had been threatened in writing. Specifically, *The Times* published an article on April 11, 2010, which was titled, "Plant could face legal challenges," and noted that "a national trade group is considering legal action against Lake County government." In response to a question from Sheriff Dominguez regarding the propriety of the September 23rd session, counsel for the District read the following statement prior to commencing the executive session:

This Executive Session is being called pursuant to appropriate notice under Indiana state law. This session is to discuss the initiation of potential litigation by the District to declare its contract . . . valid, and to discuss strategy regarding the threatened litigation evidenced in writing in the *Times* article . . . dated April 11, 2010.

After the reading of this statement, the 10 members of the District's board met in executive session. No documents were distributed. The members in attendance certified that the executive session was conducted for the purposes stated in the notice and for no other reason. Mr. Duggan adds that no subsequent meetings of different members of the board occurred regarding the same subject matter.

ANALYSIS

It is the intent of the Open Door Law 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. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, 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. I.C. § 5-14-1.5-3(a). The District concedes that it is a public agency subject to the ODL.

Sheriff Dominguez questions whether or not the District's notice was sufficient under the ODL. Regarding notices, the ODL provides the following:

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 (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. . .

* * *

Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). . .

I.C. §§ 5-14-1.5-5(a); 5-14-1.5-6.1(d). The District's notice for its September 23rd executive session reads,

Executive Session Notice & Agenda

The Lake County Solid Waste Management District, hereinafter District, shall hold an Executive Session, as allowed under I.C. 5-14-1.5-6.1(b)(2)(B), on Thursday, September 23, 2010 at 6:00 p.m. (local time) at the Lake County Government Center - Auditorium, 2293 North Main Street, Crown Point, Indiana for the following purpose:

For discussion of strategy with respect to the following:

The initiation of litigation or litigation that is either pending or threatened specifically in writing.

The above notice contains all elements required by the ODL. It does not contain details regarding the strategy discussions, but the ODL does not require any additional details beyond those listed in subsections 5(a) and 6.1(d). The District could certainly include additional information in the notice if it chose to do so, but requiring the District to release more information would defeat the purpose of the ODL's provision allowing governing bodies to conduct non-public strategy sessions. In my opinion, the District's notice for its September 23rd meeting complied with the ODL.

As to the allegation that the executive session itself violated the ODL, I agree with Mr. Duggan that the September 23rd executive session could not have violated the ODL if less than a majority of the board members were present. Under the ODL, an executive session is defined as “a *meeting* from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.” I.C. § 5-14-1.5-2(f) (emphasis added). Further, a meeting is defined as “a gathering of a *majority* of the governing body of a public agency for the purpose of taking official action upon public business.” I.C. § 5-14-1.5-2(c). If less than a majority of the District’s board members gathered on September 23rd, the gathering was neither a “meeting” nor an “executive session” subject to the ODL. Consequently, no violation of the ODL could have occurred. *See Opinion of the Public Access Counselor 10-FC-80.*

As Mr. Duggan notes, the ODL does prohibit what the General Assembly termed “serial meetings,” which are a series of smaller meetings within a seven-day period concerning the same subject matter. I.C. § 5-14-1.5-3.1. Prior to the enactment of the serial meetings prohibition, some governing bodies would avoid various ODL requirements by conducting meetings with less than a majority of the governing bodies’ members. Here, however, there is no evidence that “at least two (2) gatherings of members of the governing body . . .” occurred regarding the same subject matter. *See* I.C. § 5-14-1.5-3.1(a). Moreover, it is apparent to me that the District had no intention of attempting to avoid the ODL by conducting a gathering with less than a majority of its members. If it had, there would be no reason to have posted the notice in the first place or to have read the District’s statement outlining the reasons for the executive session to the members of the public who were excluded from the meeting. There is no evidence before that the District conducted serial meetings in violation of the ODL.

Because it is my opinion that the District did not violate the ODL with respect to its September 23rd executive session, it is unnecessary for me to address whether such alleged violations affected the validity of actions taken at the District’s September 30th regular meeting.

CONCLUSION

For the foregoing reasons, it is my opinion that the District did not violate the ODL.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: Clifford E. Duggan, Jr.