

May 12, 2000

Mr. Gerhard J. Weber
7464 Ginko Drive
Ninevah, IN. 46164

Re: Advisory Opinion 00-FC-12 *Executive Session held by the Board of the Cordry Sweetwater Conservancy District.*

Dear Mr. Weber:

You filed a formal complaint with this office concerning the legality of an executive session called by the Cordry Sweetwater Conservancy District Board ("CSCD" and "Board") on February 23, 2000. Specifically, you have asked whether action taken during that executive session was permissible under the Indiana Open Door Law, Indiana Code 5-14-1.5-1 et. seq. Your complaint was received on April 25, 2000. Mr. Brian Deppe, attorney for the Board, filed a response on behalf of the Board and its President, Debra Wencka, on May 1, 2000.¹ For the following reasons, it is my opinion that the meeting held by the CSCD Board on February 23, 2000, did not qualify as an executive session under Indiana Code section 5-14-1.5-6.1(b) and that the resulting discussions and actions taken at that meeting violated the Open Door Law.

BACKGROUND

The CSCD entered into a contract with Tennant's Industrial Dredging, Inc. ("Tennant") for the dredging of Sweetwater Lake. The Board was responsible for negotiating the contract and was to oversee the execution of Tennant's dredging responsibilities. Problems with Tennant ensued and the Board called an executive session on February 23, 2000, to discuss its options regarding the contract. The minutes of the meeting reflect that the Board called an "Emergency Meeting," but in his response, Mr. Deppe does not dispute that an executive session was called. For the purpose of your inquiry, it will be assumed that the Board called an executive session. As of the date of filing of this formal complaint, no litigation had begun against Tennant concerning the contract on behalf of the Board or the CSCD. According to the minutes of the February 23rd executive session, the following actions were taken:

1. Mr. Ralph Nicolosi was sworn in as a Board member;
2. There was discussion of the dredging project; and
3. Two motions were made and voted upon.

Mr. Deppe responded that the executive session was proper because the Board discussed strategy with

respect to the initiation of litigation, which is permissible under Indiana Code section 5-14-1.5-6.1(b)(2)(B).² The question raised by your complaint is whether the Board met improperly in executive session or participated in improper discussions during its February 23rd meeting.

ANALYSIS

The intent and purpose of the Open Door Law is that the "official action of public agencies be conducted and taken openly, unless otherwise expressly permitted by statute, in order that the people may be fully informed." Ind. Code §5-14-1.5-1. The provisions are to be "liberally construed with the view of carrying out its policy." Id. Indiana Code section 5-14-1.5-3 provides that "all meetings of the governing bodies of public agencies must be open at all times." (Emphasis added.)

There are exceptions to this general rule of openness, which are known as "executive sessions." Ind. Code §5-14-1.5-6.1. 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." Ind. Code §5-14-1.5-2(f). A "meeting" is a gathering of the majority of the members of a particular governing body - in this case, the CSCD Board - who met for the purpose of "taking official action on public business." Ind. Code §5-14-1.5-2(c). An executive session, therefore, constitutes an exception to the general rule granting a right of public access to meetings of governing bodies of public agencies. The governing body of a public agency bears the burden of showing that its gathering is an executive session within one of several strict statutory exceptions. One of these is "(f)or discussion of strategy with respect to initiation of litigation or litigation that is either pending or threatened specifically in writing." Ind. Code §5-14-1.5-6(b)(2)(B). Mr. Deppe has stated that this was the basis for the February 23rd executive session.³ Assuming that proper notice was posted of the February 23rd executive session, the issue remains as to whether this executive session qualified as such, given the actual content of the meeting, and whether the discussions that took place were permissible.

As mentioned above, the CSCD encountered contractual difficulties with Tennant, but these troubles were not yet the subject of litigation. The minutes of the February 23rd executive session reflect, in fact, that *arbitration proceedings* were authorized to begin shortly thereafter between the Board and Tennant. Mr. Deppe has claimed that the February 23rd meeting was an executive session called under Indiana Code section 5-14-1.5-6.1(b)(2)(B) for the discussion of strategy with respect to the initiation of litigation.

The documentation provided to this Office, however, indicates that the discussion and eventual action taken at the February 23rd executive session concerned the initiation of arbitration, not the initiation of litigation. Arbitration and litigation are distinct legal processes involving different tribunals, time frames and formalities.⁴ As a practical matter, arbitration would begin and conclude prior to the filing of a lawsuit and frequently, no lawsuit would be necessary. The question remains, then, as to whether a meeting during which "arbitration" is discussed may be classified as an executive session discussing "litigation."

In interpreting a statute, a court must determine the intent of the General Assembly when the

statute was enacted. For effective interpretation of the phrase "initiation of litigation," a court would review the Open Door Law as a whole and rely upon the common principle of statutory construction that the enumeration of certain things in a statute necessarily implies the exclusion of all others. *Simon v. City of Auburn*, 519 N.E.2d 205 (Ind. App. 1988); *see also, Brandmaier v. Metropolitan Dev. Comm'n of Marion County*, 714 N.E.2d 179 (Ind. App. 1999).⁵ As stated above, the policy of the Open Door Law favors "the official action of public agencies (to) be conducted and taken openly." Ind. Code §5-14-1.5-1.

Executive sessions are exceptions to the general rule of openness under the Open Door Law. "Any exceptions to the statute must be strictly construed . . . (t)hus, all doubts must be resolved in favor of requiring a public meeting and all exceptions to the rule requiring open meetings must be narrowly construed." *Evansville Courier v. Willner*, 553 N.E.2d 1386, 1388 (Ind. App. 1990), *vacated in part and adopted in part*, 563 N.E.2d 1269 (Ind. 1990). The Open Door Law does not provide an exception to the open meeting requirement for discussions concerning the initiation of arbitration proceedings. The arbitration process is not mentioned in the Open Door Law and thus should be excluded from the exceptions under the Law, according to the principles of statutory construction. In my opinion, a governing body may not rely upon Indiana Code section 5-14-1.5-6.1(b)(2)(B) to discuss strategy with respect to the initiation of arbitration. Based upon the minutes and other documents provided to this Office, the Board was not authorized to conduct its business on February 23rd in an executive session. It is my opinion, therefore, that the February 23, 2000, executive session was called in violation of the Open Door Law.

Further, during that February 23rd executive session, the Board did take some actions that were clearly impermissible actions for an executive session. The Open Door Law states that any "final action" by a public agency must occur during a public meeting. Ind. Code §5-14-1.5-6.1(c). Final action includes "a vote by the governing body on any motion." Ind. Code §5-14-1.5-2(g). First, Mr. Nicolosi was sworn in as a member of the Board, which is final action that should have taken place at a meeting open to the public to observe and record. The Board also erred in its February 23rd executive session when two motions were made and votes were taken to permit Mr. Deppe to move forward with respect to arbitrating the contract dispute. The minutes of the February 23rd executive session clearly indicate that motions were made and carried-proving that the Board took final action on those motions.⁶ Ind. Code § 5-14-1.5-6.1(c). It is my opinion that the Board violated the Open Door Law on February 23rd by administering the oath of office to a board member during an executive session and by taking final action on two motions during that executive session.

CONCLUSION

It is my opinion that the meeting held by the Cordry Sweetwater Conservancy District Board on February 23, 2000, did not qualify as an executive session under Indiana Code section 5-14-1.5-6.1(b) and that the resulting discussions and actions taken at that meeting violated the Open Door Law.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Mr. Brian Deppe, Attorney
CSCD

¹ Mr. Deppe raised the issue of whether you have standing under Indiana Code section 5-14-5-6 to file a complaint since more than 30 days had passed since the alleged violation occurred. A complaint was filed in a timely manner by Mr. Ralph Nicolosi, a member of the Board, but he lacked standing to challenge the alleged violation through the formal complaint process. See, Advisory Opinion of the PAC 00-FC-11. In your complaint, you state that Mr. Nicolosi had filed the original complaint on your behalf, and Mr. Deppe disputes this in his response to your complaint. I have no basis for investigating the facts of this dispute, but have decided to issue this formal advisory opinion in response to your complaint, albeit untimely, only because an identical complaint was filed within that time period.

² Mr. Deppe responded to a formal complaint filed by Mr. Ralph Nicolosi on March 24, 2000. That response, which addressed the legality of the February 23, 2000, executive session, has been incorporated by reference by Mr. Deppe in his response to your formal complaint and this opinion.

³ Public notice of executive sessions must state the subject matter of the meeting by specific statutory reference to one of the exceptions permitting an executive session. Ind. Code §5-14-1.5-6.1(d).

⁴ "Litigation" means "legal action, (a) contest in a court of law for the purpose of enforcing a right or seeking a remedy." The definition of "arbitration," in contrast, is defined as "the reference of a dispute to an impartial third party...intended to avoid the formalities, the expense and vexation or ordinary litigation." Black's Law Dictionary, (West Publishing, 1979).

⁵ Several Indiana cases involving issues of local government have invoked this principle. For example, in Brandmaier, the court ruled that since a zoning ordinance specifically listed a certain category of property use, the ordinance implied that the use was for that specific category and no other. 714 N.E.2d 179, 180.

⁶ The Open Door Law does not prescribe a certain method of voting, only that a secret ballot cannot be taken. Ind. Code §5-14-1.5-3(b).
