



# STATE OF INDIANA

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June 29, 2016

Mr. John Janson  
830 West High Street  
South Hill, Virginia 23970

*Re: Formal Complaint 16-FC-118; Alleged Violation of the Open Door Law by the Big Cicero Creek Joint Drainage Board and the Tipton County Drainage Board (Consolidated)*

Dear Mr. Janson:

This advisory opinion is in response to your formal complaint(s) alleging the Big Cicero Creek Joint Drainage Board and the Tipton County Drainage Board violated the Open Door Law (“ODL”), Indiana Code § 5-14-1.5-1 et. seq. The Big Cicero Creek Joint Drainage Board has responded to your complaint via Mark Heirbrandt, president of the Board. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on May 27, 2016.

## BACKGROUND

Your complaints dated May 27, 2016 alleges the Big Cicero Creek Joint Drainage Board and the Tipton County Drainage Board violated the Open Door Law by passing an ordinance without proper notice and public comment.

On May 3, 2015, the Big Cicero Creek Joint Drainage Board adopted the Big Cicero Creek Joint Drainage Board Stormwater Technical Standards Manual (“Manual”). You contend this manual is an ordinance and must be adopted after public comment and sufficiently notice in the local newspaper. You note the powers of a drainage board are limited under Indiana Code and do not allow the unilateral adoption of an ordinance.

The Big Cicero Creek Joint Drainage Board responded on June 21, 2016. The Board states the action taken was the adoption of technical standards.

## ANALYSIS

It is the intent of the Open Door Law (“ODL”) that 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 Indiana Code § 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 Indiana Code § 5-14-1.5-3(a)*.

A “meeting” is defined as a gathering of a majority of the governing body for the purpose of taking official action on business. *See Indiana Code § 5-14-1.5-2(c)*. “Official action” is very broadly defined by our state legislature to include everything from merely “receiving information” and “deliberating” (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. *See Indiana Code § 5-14-1.5-2(d)*.

The public access counselor has the authority to opine on an alleged violation of Indiana Code § 36-6-6 pursuant to Indiana Code § 5-14-5-6, which authorizes the filing of a formal complaint where “[a] person or a public agency denied: (1) the right to inspect or copy records under Indiana Code 5-14-3; (2) the right to attend any public meeting of a public agency in violation of Indiana Code 5-14-1.5; or (3) **any other . . . state statute or rule governing access to public meetings or public records.**” (Emphasis added).

You allege the Board(s) improperly passed an ordinance when they adopted the Manual, because you contend there was no proper notification, public comment, or review. Public comment is required in certain circumstances under the Drainage Board statutes, which do not apply here. It is not, however, required under the Open Door Law.

While the Manual states it is intended to apply to areas within the Big Cicero Creek Watershed and mentions there are various applicable Stormwater Runoff Ordinances to which it is intended to apply, it does not, itself, purport to have the effect of an ordinance. Section 101.01 of the Manual reads in part:

This Manual is organized to present the technical and engineering procedures and criteria needed to comply with the land areas under the stormwater regulations of each jurisdiction within the Big Cicero Creek Watershed.

Each chapter of this Manual contains an initial section that presents all of the policies and procedures that must be satisfied for approval. These policies and procedures shall be considered as design criteria that are unique for approval within the jurisdiction of this Manual.

While Section 102 lists permit requirements and procedures, this is consistent with the purpose of a manual, which is to provide instructions for how to comply with the existing statutes and regulations. From the materials provided to this Office, it does not appear the Manual falls within the definition of an ordinance, but is merely a set of technical standards to be used by the Board.

The ODL does not apply to the adoption of technical standards of the Board. Indiana Code § 36-9-27-29 states, “the county surveyor is the technical authority on construction, reconstruction, and maintenance of all regulated or proposed drains in the county and he shall... (2) prepare and make public standards of design, construction, and maintenance.” In *Smith v. Miller Builders, Inc.*, 741 N.E.2d 731 (Ind. Ct. App. 2000), the Indiana Court of Appeals considered the duties of the county surveyor and his role on the drainage board. The Court found, while a county surveyor is an ex officio member of the drainage

board, he does not act on behalf of the board when he performs his statutory duties nor is he subject to the board's control in the performance of those duties. *Id.* at 740. Based on Indiana Code § 36-9-27-29 and the finding of the Indiana Court of Appeals, it is my understanding the adoption of technical standards is the responsibility of the county surveyor in his individual capacity and does not require the ratification of the Board. This is likely because the standards do not have the effect and force of law, but are rather guidelines for the enforcement of existing statutes. Actions taken under the auspices of the standards may be appealed, but not in this forum as the Public Access Counselor does not adjudicate drainage issues.

Therefore it is the Opinion of the Public Access Counselor the adoption of the Technical Standards Manual is not subject to heightened notice requirements under Ind. Code § 5-3-1 et. al.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline that extends to the left and then curves back under the main signature.

Luke H. Britt  
Public Access Counselor