



STATE OF INDIANA

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October 16, 2008

Cory A Kuhlenschmidt
for Environmental Management Corporation
1001 Boardwalk Springs Place
O'Fallon, Missouri 63366

*Re: Formal Complaint 08-FC-217; Alleged Violation of the Open Door Law
by the City of Jeffersonville and the City of Jeffersonville Sanitary Sewer
Board*

Dear Mr. Kuhlenschmidt:

This advisory opinion is in response to your formal complaint alleging the City of Jeffersonville and City of Jeffersonville Sanitary Sewer Board (hereinafter collectively referred to as "City") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) by taking final action during executive session. A copy of the City's response to the complaint is enclosed for your reference. In my opinion I am precluded from issuing an advisory opinion in response to this complaint because it concerns a specific matter with respect to which a lawsuit has been filed under I.C. 5-14-1.5.

You filed a complaint on October 9, 2008, alleging that two letters sent to Environmental Management Corporation ("EMC") by the City were authorized at two separate executive sessions. The letters were dated April 18, 2008 and August 7, 2008. You contend that EMC did not learn until a September 19 deposition that the two letters were authorized to be sent during executive sessions. You requested priority status for the complaint, pursuant to 62 IAC 1-1-3, but you did not allege one of the conditions for priority status, so priority status should not have been granted. In what I believe to be an oversight, my office granted priority status and requested a response from the City on an expedited timeline. As such, I now issue the opinion even though the complaint should not have received priority status.

The City responded to the complaint by letter dated October 14. The City disputes some of the facts EMC presented, specifically contending that proper notice was posted for both executive sessions. Further, the City contends EMC was in attendance at the public meeting following each of the two executive sessions where the letters were discussed. Since each of the meetings started late because the executive sessions lasted longer than scheduled, the City contends EMC cannot state a claim based on improper

notice for the executive sessions. Further, the City contends no final action was taken during the executive sessions.

The City further contends that I am precluded from issuing an advisory opinion in response to this complaint because it concerns a specific matter with respect to which a lawsuit has been filed under I.C. 5-14-1.5. The City provides a copy of EMC's complaint filed in the Clark County Superior Court on August 18, 2008, item 26 under Count II of which refers specifically to the action by the City, through the Sewer Board, taken during any regular or special meeting of the Sewer Board. It is my understanding this is a reference to the Board's direction to counsel to send the April and August letters to EMC. Because this complaint concerns a specific matter with respect to which a lawsuit has been filed, it is my opinion I am precluded by I.C. 5-14-1.5 from issuing an advisory opinion on the substantive issue presented by this complaint.

I would note, for your reference, that I have previously addressed a similar issue related to final action of a governing body in *Opinion of the Public Access Counselor 08-FC-208*. Further, the Indiana Court of Appeals has ruled that a governing body may take official action during executive session, including making decisions. See *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001).

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: R. Scott Lewis