

October 18, 2000

Mr. Thomas T. Dye  
609 North 13th  
Vincennes, Indiana 47591

Re: Advisory Opinion 00-FC-33 *Alleged Violations of the Indiana Open Door Law by the Vincennes Board of Public Works, Vincennes City Council, and Vincennes Redevelopment Commission.*

Dear Mr. Dye:

This is in response to your formal complaint, which was received on September 20, 2000. You have alleged that the Vincennes Board of Public Works ("Board"), the Vincennes City Council ("Council"), and the Vincennes Redevelopment Commission ("Commission") (collectively "Agencies") have violated the Indiana Open Door Law, Indiana Code chapter 5-14-1.5. Specifically, you claim that the Agencies did not provide proper notice of and they did not keep adequate memoranda of joint executive sessions held on April 25 and June 1, 2000. In addition, you allege that the Council did not provide proper notice of an executive session conducted on June 12, 2000 and did not prepare adequate memoranda of that meeting. Mr. Rabb Emison, City Attorney, responded to your complaint in a letter dated October 5, 2000. A copy of his response is enclosed for your reference.

From the information provided in your complaint and in Mr. Emison's response, it is my opinion that it appears that notice was not properly posted of the three executive sessions held in April and June, 2000 under Indiana Code section 5-14-1.5-5. In addition, while it appears that there were memoranda prepared for each of these meetings, the memoranda do not satisfy all of the requirements of the Open Door Law, specifically Indiana Code sections 5-14-1.5-4(b) and 5-14-1.5-6.1(d).

### BACKGROUND

According to your complaint, the Agencies failed to comply with the Open Door Law in the posting of notice and preparation of memoranda of three separate executive sessions. The following is a list of the alleged defects you noted as to each of these meetings:

<u>Date of Meeting</u>	<u>Type of Meeting</u>	<u>Alleged Violations</u>
April 25, 2000	Joint Executive Session (all three Agencies)	Notice not posted; Memoranda prepared by Board and Commission only; memoranda referred to reason as for "potential litigation" and this is not explicit; and no certification that no other matter was discussed.

June 1, 2000	Joint Executive Session (all three Agencies)	Notice not posted; Memoranda prepared by Council and Commission only; memoranda referred to reasons as "potential litigation" and "acquisition of property" which are not explicit; and no certification that no other matter was discussed.
June 12, 2000	Executive Session	Notice not posted; Memoranda (Council only) referred to reason as "pending litigation" which is not explicit; and no certification that no other matter was discussed.

As a result of your review of the records of the Agencies, you also inquired<sup>1</sup> whether separate notices and memoranda were required for the joint executive sessions conducted on April 25<sup>th</sup> and June 1<sup>st</sup>.

In his response to your complaint, Mr. Emison stated that he believes that all of the Agencies were not required to prepare separate notice and memoranda for a joint executive session if joint notices and joint memoranda were produced and copies are made available to the public. Mr. Emison also stated that he personally ensured that the notice of the first executive session held in April was delivered to the media via telephone, but there was no mention of notice being posted either outside of the principal office of the agency or the meeting room. With respect to the other two executive sessions, there was no response as to whether the Agencies posted notice of these meetings or provided any notice to the media.

With respect to the stated purpose of the April 25<sup>th</sup> joint executive session, Mr. Emison indicated in his response that the purpose of the meeting was to "discuss potential litigation," but he did not specifically address the purposes for the other two executive sessions. According to the memoranda prepared and provided with your complaint, the June 1<sup>st</sup> joint executive session was allegedly held to again discuss potential litigation and also the acquisition of property. The June 12<sup>th</sup> executive session by the Council was allegedly held to discuss "pending litigation." According to Mr. Emison he knows of no requirement that the memoranda required any more specific reference to the purpose for the executive sessions. As far as certification is concerned, Mr. Emison suggested that the declaration of the subject of the meetings served to notify the public that discussion was limited to the subject announced in the notices. Mr. Emison did not provide any specific response as to memoranda prepared for the June 12<sup>th</sup> executive session of the Council.

## ANALYSIS

The intent and purpose of the Indiana Open Door Law is 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." Ind. Code § 5-14-1.5-1. The provisions of the Open Door Law are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Board, Council and Commission are clearly public agencies and governing bodies subject to the requirements

of the Open Door Law. Ind. Code § 5-14-1.5-2.

The general rule of the Open Door Law is that all meetings of the governing body of a public agency are to be conducted openly for the purpose of permitting the public to attend and observe them. Ind. Code § 5-14-1.5-3(a). The exception to this rule is an executive session, defined as a meeting from which the public is excluded, which may be held under Indiana Code section 5-14-1.5-6.1(b). Ind. Code § 5-14-1.5-2(f). In the following paragraphs, I have addressed your specific questions about notice and memoranda requirements under the Open Door Law as they apply to the April 25th, June 1st and June 12th executive sessions.

*Notice of Executive Session-Providing Notice to the Public and the Media*

The Open Door Law requires public agencies to provide notice of public meetings and executive sessions. Specifically, Indiana Code section 5-14-1.5-5(a) provides that:

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.

(Emphasis added). Public notice of the date, time, and place of an executive session, therefore, must be provided at least forty-eight (48) hours in advance of the executive session. The public agency is required to:

1. (post) a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and
2. (deposit) in the United States mail with postage prepaid or by delivering notice to all news media which deliver by January 1 an annual written request for such notices of the next succeeding calendar year to the governing body of the public agency.

Indiana Code § 5-14-1.5-5(b).

There is an additional requirement for notices of executive sessions. An executive session notice must, in addition to the requirements of Indiana Code section 5-14-1.5-5(a), state the "*subject matter by specific reference to the enumerated instance or instances*" for which executive sessions may be held under Indiana Code section 5-14-1.5-6.1(b). Ind. Code § 5-14-1.5-6.1(d). (Emphasis added). Based upon the information provided in the memoranda of the three executive sessions at issue, the exceptions that might have been the subject of those meetings are:

(2) For discussion of strategy with respect to any of the following:

\* \* \*

(B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing.

(D) The purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

Indiana Code § 5-14-1.5-6.1(b) (Emphasis added).

In your complaint, you also questioned whether public agencies conducting joint executive sessions may legally provide one joint notice of executive sessions. Mr. Emison responded that he thought that joint notice would be appropriate so long as all of the governing bodies meeting are identified. It is also my opinion that Indiana Code section 5-14-1.5-5(a) would not prohibit one notice for all governing bodies meeting jointly. Such notice, however, must clearly indicate what governing bodies are meeting, and the date, time and place of that meeting and, in the case of an executive session, the subject matter of the executive session was specified under Indiana Code section 5-14-1.5-6.1(b).

Unfortunately, it is difficult to ascertain just what kind of notice was provided, if at all, for the three executive sessions in question. The only information provided by Mr. Emison concerned the April 25th joint executive session that notice was verbally given to the media. Even if we assume that this verbal notice was provided at least forty-eight (48) hours prior to the executive session, there is no indication that a written notice, either separate or joint, was prepared or posted as required under Indiana Code sections 5-14-1.5-5(a) and (b). Mr. Emison did not address whether a notice had been posted forty-eight (48) hours in advance at either the principal office of any of the three governing bodies conducting that meeting or outside of the room where the meeting was to take place. While the media may have been verbally notified forty-eight (48) hours in advance of the executive session of April 25th, the Open Door Law contemplates written notice to the media. Further, there is no requirement that the media print or report the meeting date, time, and location for the public, so the only way that the public would be notified is by the posting of the notice under Indiana Code section 5-14-1.5-5(b)(1). Mr. Emison provided no response as to the notice of the two later executive sessions held on June 1st and June 12th, other than to state that he did not have time to interview the local officials regarding these matters.<sup>2</sup>

It is my opinion, therefore, that the Agencies did not comply with the requirements of Indiana Code section 5-14-1.5-5 with respect to providing notice to the public and media for the three executive sessions at issue. With respect to the April 25th meeting, it appears that telephone calls were made to the media, but this does not satisfy the requirements of Indiana Code section 5-14-1.5-5(b). There was no evidence that any notices were prepared or posted of the June 1st and June 12th executive sessions, which certainly violates the requirements of Indiana Code sections 5-14-1.5-5(a) and (b).

The other issue raised concerning notice was whether the Agencies were required to state the specific subject matters or purposes for the three executive sessions. The Open Door Law does require the specific enumerated instance or instances under Indiana Code section 5-14-1.5-6.1(b) for which the meeting is to be set forth in the notice. According to Mr. Emison, he believed the purposes of these executive sessions were adequately stated in the various memoranda prepared. He also indicated that he believed that as long as the subject of the meeting was stated, the governing body had complied with the Open Door Law. As noted above, it is my opinion that the Agencies failed to provide notice under

Indiana Code section 5-14-1.5-5, and that includes the failure to state the specific enumerated instance under Indiana Code section 5-14-1.5-6.1(b) that would have permitted the executive session. In the following two paragraphs, however, I have analyzed the reasons cited for the three executive sessions<sup>3</sup> and whether those would have been appropriate under the Open Door Law.

The purposes cited for the April 25<sup>th</sup> and June 1<sup>st</sup> joint executive sessions were the discussion of "potential" or "possible" against the City. However, there was no mention that the potential litigation had been threatened in writing, which is required under Indiana Code section 5-14-1.5-6.1(2)(B). Mr. Emison responded that he considered this discussion appropriate for executive session so long as the threatened litigation is likely to take place or presents a risk and that no written threat is necessary. I disagree with Mr. Emison's position. It is clear that the General Assembly placed limitations on strategy discussions concerning litigation. Any "potential" or "possible" litigation must be threatened in writing to permit a governing body to meet privately to discuss it under the plain language of Indiana Code section 5-14-1.5-6.1(b)(2)(B). It is my opinion that the joint executive sessions held to discuss potential litigation, where no written threat of litigation had been received by the City, were held in violation of Indiana Code section 5-14-1.5-6.1(b)(2)(B). The memoranda for the Council's executive session of June 12<sup>th</sup> did reference discussion of pending litigation. It is my opinion that this discussion would fall within the boundaries of Indiana Code section 5-14-1.5-6.1(b)(2)(B) because it concerns litigation filed in court.

The other reason cited for the joint executive session held on June 1<sup>st</sup> was to discuss the acquisition of property. There is an exception under Indiana Code section 5-14-1.5-6.1(b)(2)(D) that would permit the Agencies to discuss strategy with respect to the purchase or lease of real property up until the time that a contract or option to purchase is executed. Since the memoranda for this meeting merely referred to the acquisition of property, it is unclear whether the Agencies were discussing only the strategy related to the property purchase in question, but if so, that would have been a legitimate reason for an executive session.

### *Memoranda of Executive Sessions*

Under the Open Door Law, public agencies that conduct meetings are required to keep memoranda.

As the meeting progresses, the following memoranda shall be kept:

1. The date, time, and place of the meeting.
2. The members of the governing body recorded as either present or absent
3. The general substance of all matters proposed, discussed, or decided.
4. A record of all votes taken, by individual members if there is a roll call.
5. Any additional information required under Indiana Code 5-1.5-2-2.5 or Indiana Code 20-12-63-7

Indiana Code section 5-14-1.5-4(b). These memoranda are to be available within a "reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings." Ind.

Code § 5-14-5.1-4(c). Minutes, if any are prepared, are required to be open for public inspection and copying. Id.

In addition, since these are memoranda of executive sessions, they must also conform to the requirements under Indiana Code section 5-14-1.5-6.1(d), which provides that memoranda from an executive session must:

identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda . . . that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

Indiana Code § 5-14-1.5-6.1(d).

You have provided copies of the memoranda from the three executive sessions held in April and June. Mr. Emison responded that he considered one set of memoranda or minutes to be appropriate for joint executive sessions, and I would agree with that so long as the memoranda identified all of the governing bodies present and otherwise conformed to the requirements of the Open Door Law. In each case, two of the three Agencies were preparing separate memoranda of the joint executive session, so there appeared to be no intention to prepare one memoranda for all three Agencies, except with respect to the joint memoranda of the Commission and Council of the June 1st executive session. It is my opinion, that the Council should have prepared separate memoranda of the April 25th joint executive session and that the Board should have prepared separate memoranda of the June 1st joint executive session.

With respect to the substance of the memoranda prepared for the executive sessions, it is my opinion that these do not fully comply with the requirements set forth in the Open Door Law. My analysis of each of these memoranda follows:

1. April 25<sup>th</sup> memoranda of the Commission--As noted above, the reason stated for this executive session, " to discuss potential litigation" is not appropriate under Indiana Code section 5-14-1.5-6.1(b) and the governing body failed to certify that no other subject matter was discussed other than that specified in the public notice<sup>4</sup> .
2. April 25<sup>th</sup> memoranda of the Board-- As noted above, the reason stated for this executive session, " to discuss potential litigation" is not appropriate under Indiana Code section 5-14-1.5-6.1(b) and the governing body failed to certify that no other subject matter was discussed other than that specified in the public notice.
3. June 1<sup>st</sup> memoranda of the Commission and Council-- As noted above, one of the reasons stated for this executive session, " to discuss possible litigation" is not appropriate under Indiana Code section 5-14-1.5-6.1(b) and the governing bodies failed to certify that no other subject matter was discussed other than that specified in the public notice.

4. June 12<sup>th</sup> memoranda of the Council-The reason for the executive session may have been appropriate, " to discuss pending litigation," but a more explicit reference to the statutory exception at Indiana Code section 5-14-1.5-6.1(b)(2)(B) was required under Indiana Code section 5-14-1.5-6.1(d) and the governing body failed to certify by a statement in these memoranda that no other subject matter other than that provided in the public notice was discussed.

While each of the memoranda contained some of the information required under sections 5-14-1.5-4 and 5-14-1.5-6.1, it is my opinion that none of the memoranda fully conform to the requirements of the Open Door Law.

## CONCLUSION

It is my opinion that it appears that notice was not properly posted of the three executive sessions held by the Vincennes Board of Public Works, City Council and Redevelopment Commission on April 25, June 1, and June 12th, 2000 under Indiana Code section 5-14-1.5-5. In addition, while it appears that there were memoranda prepared for each of these meetings, the memoranda do not satisfy all of the requirements of the Open Door Law, specifically Indiana Code sections 5-14-1.5-4(b) and 5-14-1.5-6.1 (d).

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Rabb Emison  
City Attorney

1 You asked a number of questions about these meetings and I have incorporated all of those questions into the listing of alleged violations and this sentence.

2 For the purposes of the formal complaint process, I do rely upon the public agency, which is given an opportunity to respond to all allegations, to respond fully. Absent that response, I will rely solely upon the facts as presented in the formal complaint.

3 For each of the executive sessions, the only basis for knowing the purpose(s) is by referencing the memoranda, copies of which were provided with your complaint.

<sup>4</sup> For the purposes of analyzing the memoranda requirements of the Open Door Law under Indiana Code section 5-14-1.5-6.1(d), it is assumed that the notice requirements of the Law were met.

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