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**OFFICE OF THE ARIZONA ATTORNEY GENERAL**  
**CHILD AND FAMILY PROTECTION DIVISION**  
**CIVIL AND CRIMINAL LITIGATION AND ADVICE SECTION**

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August 8, 2013

(Via Mail and E-mail: [William.Whittington@azbar.org](mailto:William.Whittington@azbar.org))

William R. Whittington  
Boyle, Pecharich, Cline, Whittington & Stallings, P.L.L.C.  
125 North Granite Street  
Prescott, Arizona 86301

RE: Inscription Canyon Ranch Sanitary District Board Open Meeting Law Complaints

Dear Mr. Whittington:

Based upon our discussions, I have revised my June 13, 2013 Letter in regards to the determinations made about the June 9, 2011 meeting's executive session. I have also changed the date for the Board's response to this letter to August 31, 2013. The rest of the letter remains the same.

On behalf of the Arizona Attorney General's Office's Open Meeting Law Enforcement Team (OMLET), I am notifying you that the review of the information provided by both the complainant and by you on behalf of the Inscription Canyon Ranch Sanitary District Board ("Board") in your December 28, 2012, letter and its accompanying attachments, has been completed. As I mentioned in my previous letter, OMLET does not have authority to review any of the allegations made by the complainant that did not relate to the Open Meeting Law and therefore those allegations are not part of this review. This letter should not be construed in any way as a determination regarding any of those allegations. In terms of the allegations that did relate to the Open Meeting Law, it is our determination that some violations did occur and there were also some areas of concern, which are noted below.

### Violations

#### 1. Executive Session Held in Violation of Open Meeting Law

After reviewing the information, including the executive session minutes of the Board which you provided, several violations of the Open Meeting Law were found. These violations involved misuse of the attorney advice and consultation provisions of A.R.S. § 38-431.03(a)(3) and (4) as well as making decisions during an executive session. The violations found include the following:

6/8/2011 - decisions were made in executive session instead of in open session regarding the retention of Act III as a consultant for the district, and a decision to hire a website designer for the district.

6/9/2011 – an executive session was held for the purpose of legal advice with Board counsel. Opposing counsel was present during this executive session. It also appears that a decision was made in the executive session regarding “user” versus “effluent” fees though the members agreed the official decision could not be made until the budget hearing was held.

7/12/2011 – The Notice of Meeting showed the sole purpose of the meeting was for going into executive session to discuss and evaluate proposals for accounting services under A.R.S. § 38-431.03(a)(1). However the executive session began with discussion of a possible open meeting law violation before discussing the accounting services proposals. Then the executive session ended with a discussion of Insurance Counsel and the status of litigation. Neither of which were noticed and therefore were not appropriate for discussion.

8/12/2011 - – The Notice of Meeting showed the sole purpose of the meeting was for going into executive session to discuss and evaluate proposals for legal counsel under A.R.S. § 38-431.03(a)(1). However, during the executive session the members also delved into 1) the status of accounting services negotiations; 2) missing documents/records from the previous Board; and 3) a discussion of lawsuit settlement negotiations. Again, because these additional issues were not noticed, they should not have been discussed.

### Areas of Concern:

In addition to the violations noted above, certain other circumstances were noted as an area of concern. These circumstances raise issues which should be addressed so that the public will have greater access to and confidence in the Board’s governance.

The complainant alleged that a "de facto" committee was/is operating on behalf of the Board, and also alleged that this de facto committee was/is in fact controlling the Board. The complainant identified various people whom the complainant believes are serving as a "kitchen cabinet" controlling the Board.

From the records provided and reviewed by our office, it appears that Board Member Robbins was tasked with reviewing other sanitary districts' policies and procedures. During this process he consulted and worked with a particular group of people, as evidenced by various e-mail communications.

A.R.S. § 38-431.01(A) states that all meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. It also states that all legal action of public bodies shall occur during a public meeting. "Public body" includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body. A.R.S. § 38-431(6).

"Advisory committee" and "subcommittee" are defined as any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body. A.R.S. § 38-431(1).

Based upon the information reviewed and the statutes listed above, it could not be definitively established that the group involved constituted an "advisory committee" subject to the Open Meeting Laws, especially since the group was never officially established by the board on motion or order of the Board. But such a practice causes us concern and is potentially ripe for abuse. As a best practice, we strongly recommend that in the future, to the extent a Board Member is going to rely on the aid of small group to assist them in such an endeavor, we recommend that the Board formally appoint an advisory or special committee and proceed through open meetings. This will help instill confidence in the public in the Board's actions and will also help to insure that no inappropriate activity is occurring.

### Remedy

The Open Meeting Law provides recourse through the courts to address violations of its provisions, but our Office practice is to only pursue action through the courts in extreme cases. Our Office views it's main objective as ensuring that public bodies that we determine have violated the Open Meeting Law receive appropriate training and monitoring so that future violations of the Open Meeting Law do not occur. Accordingly, we try to resolve violations through a mutual agreement with the public bodies involved which will address the issues that have lead to the violations and prevent their recurrence.

In deciding what recourse to take in this case, the nature and circumstances of the violations that occurred were considered. It was noted that at the time the Board took office, there seemed to be a state of flux in terms of the Board's legal representation. During June, July and much of August 2011 the Board did not have consistent legal counsel. We also noted that soon after the Board obtained consistent legal counsel, around the end of August 2011, the violations in regards to executive sessions appear to have ceased. The Board's relative inexperience and lack of consistent legal guidance at the times when many of the violations above occurred were taken into account in deciding upon the Remedy set forth in this letter. Furthermore, we considered the fact that the Board took steps to ratify the actions they had previously made in violation of the open meeting law in a subsequent properly noticed public meeting.

Based upon all of the circumstances, our Office proposes the following settlement agreement:

- All members of the Board are to receive training on the requirements of Open Meeting Law with a special emphasis on executive sessions and the use of committees. The training is to be provided by a provider approved by our Office. We will approve training by you Mr. Whittington, as we are aware of your knowledge of the Open Meeting Law from previous dealings with our Office. The Ombudsman's Office is also acceptable. Documentation of the dates of training and those attending should be sent to our Office.
- The Attorney General's Office will monitor and review Board meeting notices, agendas and minutes for a period of 3 months. If any concerns are found we will address those with the Board through the Board's Counsel;
- The Board will have legal counsel versed in Open Meeting Law present at all regular and special Board meetings for 3 months following execution of the settlement agreement to insure compliance with the Open Meeting Law;
- That this letter and the proposed settlement shall be appropriately noticed on the agenda of the next regular Board meeting. The letter will be read aloud, discussed, and copies of the letter shall be made available to members of the public. The letter shall also be approved and/or appropriately ratified at the next regular Board meeting. A copy of the notice and agenda for that Board meeting shall be sent to me at the Attorney General's Office.

If the proposed agreement is acceptable to your client, please so indicate by having you and the Board members countersign this letter where indicated and returning it to me on or before August 31, 2013. If this agreement is not acceptable, the Attorney General's Office will move forward to enforce the Open Meeting Law and seek appropriate further remedies.

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If you have any questions please feel free to telephone me at the number listed above.

Sincerely,



Kevin R. Smith  
Assistant Attorney General

Cc: Complainant

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We, the Members of the \_\_\_\_\_  
agree to the settlement terms set forth in this letter; and we are authorized to enter into this letter  
agreement:

By \_\_\_\_\_  
Legal Counsel Date

\_\_\_\_\_  
Chairman Date

\_\_\_\_\_  
Member Date

\_\_\_\_\_  
Member Date

HDM #3504067