



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WARDEN

January 13, 2006

VIA HAND DELIVERY

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE

RE: Certificate of Review
Proposed Initiative to Amend Idaho Code §§ 67-2342 and 67-2347
Relating to the Open Meeting Law

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on December 19, 2005. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, this office's review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only". The petitioners are free to "accept or reject them in whole or in part". The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While this office prepares the ballot titles, if petitioners wish to propose language with these standards in mind, we recommend that they do so. Their proposed language will be considered in our preparation of the ballot titles.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative seeks to amend two code sections of the Idaho Open Meeting Law: Idaho Code §§ 67-2342 and 67-2347. With respect to the proposed change to Idaho Code § 67-2342, the initiative petition states, in relevant part:

Add to the definition- Any committee, commission; etc that operates under any public agency, whether it receives funding from said agency or not is subject to the open meeting law.

This language would be better put into a legislative format. In other words, the petitioners might wish to consider restating Idaho Code § 67-2342(1) and showing precisely how the initiative would change that subsection. If any language is to be removed from that subsection, it should be shown as stricken, and added language should be shown as underscored.

As an alternative to amending Idaho Code § 67-2342, the petitioners should amend Idaho Code § 67-2341(4) or Idaho Code § 67-2341(5). The changes the petitioners are proposing better fit in the context of Idaho Code § 67-2341.

Notwithstanding the above concerns, the petitioners might wish to consider additional language to make the definition they intend more precise. For instance, a more precise description than “[a]ny committee, commission; etc” should be considered to provide some level of clarity and notice to those entities that are covered by the proposed initiative, should the initiative become law. The lack of this clarity could affect the ability to enforce the proposed code section, as members of such “committee, commission; etc” might argue that they did not have notice that they were covered by the law.

The proposed changes to Idaho Code § 67-2347(1) should, likewise, be put into a legislative format in which the petitioners set forth that subsection in its entirety and show which words are being deleted and which words are being added by the proposed initiative. By following such practice, the petitioners will ensure that the initiative petition that is being signed and the initiative that is being voted upon will be the law placed into the Idaho Code, should this initiative make it onto the ballot and be passed into law. Failure to do so means that, should the initiative pass, codifiers, or perhaps the legislature, may be called upon to put the language of the proposed initiative into a legislative or code format.

The petitioners propose changes to Idaho Code § 67-2347(1). This code section does not appear to be the code section the petitioners meant to cite. The “fine” provision of Idaho Code § 67-2347 is found in subsection 2, not in subsection 1. Therefore, the amendment to Idaho law should be an amendment to Idaho Code § 67-2347(2) and not to Idaho Code § 67-2347(1).

There is a more significant potential problem with the changes proposed to Idaho Code § 67-2347, and that has to do with the nature of the penalty proposed. At present, Idaho Code § 67-2347(2) provides for a monetary civil fine of not more than \$150 on any member of a governing body who participates in a meeting in violation of the Open Meeting Law. Subsequent violations are penalized in an amount not to exceed \$300.

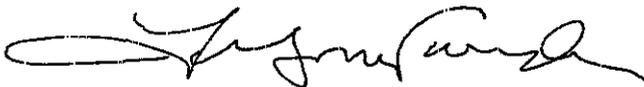
Petitioners, through this initiative, are seeking to increase the amount of the penalty. Under the proposed initiative petition, the penalty would be a minimum of \$500 for the first violation and \$1,000 for any subsequent violation. There is no maximum fine or penalty. These penalties would be against the individual members of the governing body. The potential exists that these provisions might cause a court to construe the penalty provisions of this act to be criminal in nature rather than civil. Enforcement might then be governed by the criminal law, and members of governing bodies accused of violating the provisions of the Open Meeting Law might be entitled to all of the protection afforded them under the state and federal constitutions and rules of criminal procedure. Since the present statute does not state that Open Meeting Law violations are criminal in nature, and since the initiative does not include a maximum penalty, a court potentially could even strike down the very penalty provisions the petitioners are proposing.

The petitioners may wish to review Idaho Code § 34-1801A and use it to draft their petition so that it is substantially in the form prescribed by law. This statute prescribes the form that an initiative petition must substantially follow. The form contains a warning that it is a felony for anyone to knowingly sign the petition more than once or just once if the signor is not a qualified elector. There is a section titled "INITIATIVE PETITION" that includes a demand from the petitioners that their proposed law be submitted to voters at a regular general election and a certification of petitioners' status as qualified electors. Petitioners have not included these items in their petition.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import and that the recommendations set forth above have been communicated to the petitioner via a copy of this certificate of review, deposited in the U.S. Mail to L. Roger Falen, 516 N. Laurel, Genesee, Idaho 83832.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

William A. von Tagen
Deputy Attorney General