



STATE OF INDIANA

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OPINION OF THE PUBLIC ACCESS COUNSELOR

PHILIP GORDON,

Complainant

v.

RUSH COUNTY BOARD OF COMMISSIONERS

Respondent

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17-FC-60

ADVISORY OPINION

April 17, 2017

This advisory opinion is in response to a formal complaint alleging the Rush County Board of Commissioners (“Board”) violated the Open Door Law (“ODL”), Indiana Code § 5-14-1.5-1 et. seq. The Board has responded via Ms. Leigh Morning, Esq., on March 27, 2017. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on March 6, 2017.¹

BACKGROUND

The formal complaint dated March 6, 2017, alleges the Rush County Board of Commissioners violated the Open Door Law by holding an executive session to discuss impending litigation in which adversaries were present. West Fort Wind, LLC filed litigation against the Rush County

¹ Respondent is advised it was given the same amount of time to respond – 15 days – as every other public agency has been given since the inception of this Office. The Office of the Public Access Counselor has only thirty (30) business days, by statute, to draft and publish an opinion. Nevertheless, requests for extensions of time are nearly universally granted.



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Board of Zoning Appeals related to a proposed wind farm. On January 31, 2017, the Board posted notice of executive session for February 6, 2017. Upon reviewing the minutes of the Board meeting, those in attendance included representatives from both sides. The Complainant argues the executive session violated the Open Door Law as adversaries are prohibited from being present in an executive session pursuant to Indiana Code § 5-14-1.5-6.1(b)(2)(B).

Respondents argue the purpose of the meeting was to save taxpayers funds, believing it would be prudent to meet with representatives of West Fork Wind to determine if there would be an opportunity to resolve the issues. No final decisions were made during the meeting and the County rationalized it was more efficient to conduct business in this manner.

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.*

The exception to the Open Door Law is an executive session, which are meetings of governing bodies that are closed to the public and may be held only for one or more of the instances listed in Indiana Code § 5-14-1.5-6.1(b). Indiana Code § 5-14-1.5-6.1(b)(2)(B) provides that:

(b) Executive sessions may be hold only in the following instances:

(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 in writing.

However, all such strategy discussions must be necessary for competitive or bargaining reasons **and may not include competitive or bargaining adversaries.**

Emphasis added.

The Complainant also cites this Office’s Handbook on Indiana’s Public Access Laws which provides that a closed-door settlement conference by a majority of a town board would violate the Open Door Law under Indiana Code § 5-14-1.5-6.1(b)(2)(B) if an opposing party or its representative were present. The Respondent takes exception with this interpretation of the law.



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Executive sessions are to be held for strategic purposes only. Clearly, the logic behind holding a strategy session behind closed doors is to prevent an opposing party from being tipped off as to the governing body's litigation strategy. The General Assembly recognized the need to hold strategic discussions behind closed doors to protect a course of action as it relates to pending lawsuits. A worthwhile stratagem generally does not involve communicating tactics to the opposition.

The Respondent argues that if the law were to be interpreted plainly, on its face that all lawsuits involving public agencies would inevitably go straight to trial with no hope of mediation or settlement. This absurd result is in no danger of coming to fruition, however, as there are a myriad of ways to settle a pending lawsuit without involving a majority of a governing body in an executive session with an adversary.

Subsequent to holding an executive session to discuss strategy, for example, a board's attorney will communicate terms of a proposed settlement to an opposing party without a majority of a board physically present. Alternatively, a non-majority delegation of a governing body may explore settlement options behind closed doors with an adversary without notice. Terms of a settlement should be ratified publicly, but there is no statute, rule or regulation to prevent settlement negotiations behind closed doors *as long as a majority of a governing body are not present*. Similarly, there is no statute, rule or regulation preventing the negotiation of a settlement with an adversary in a regularly noticed open meeting.

Public administration is mutually exclusive from private business and therefore certain matters must be handled differently by a public agency than by its private sector counterparts. It is true transparency comes at the expense of convenience relative to a private board room. The purpose of the law - and the Handbook - is not to prevent business from being done efficiently; only that public officials must adapt to the kind of efficiency consistent with good governance and stewardship of public resources.

The guidance in *The Indiana Handbook on Public Records Laws* concerning this matter has been published and is well-known (and well-received) by public agencies for over a decade. Its contents are vetted through, and approved by, several attorneys and public officials, including the Indiana Attorney General. To suggest the Handbook "promotes litigations and trials, and thwarts attempts at settlement between parties" demonstrates a gross misunderstanding of the purpose of public access laws, this Office, and the Handbook itself.



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CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Rush County Board of Commissioners have violated the Open Door Law.

A handwritten signature in black ink, appearing to read "LHB".

Luke H. Britt
Public Access Counselor

Cc: Leigh S. Morning, Esq.