



# STATE OF INDIANA

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## OPINION OF THE PUBLIC ACCESS COUNSELOR

**ANTHONY S. LONG**

**Complainant**

v.

**WARRICK COUNTY  
BOARD OF ZONING APPEALS**

**Respondent**

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**17-FC-01**

### **ADVISORY OPINION FEBRUARY 24, 2017**

This advisory opinion is in response to a formal complaint alleging the Warrick County Board of Zoning Appeals (“BZA”) violated the Open Door Law (“ODL”), Indiana Code § 5-14-1.5-1 et. seq. The BZA responded January 23, 2017 via Mr. Maurice Doll, Esq. The response is enclosed for your review. 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 January 4, 2017.

### **BACKGROUND**

The complaint dated December 28, 2016, alleges the BZA has violated the ODL by holding an executive session for a non-statutorily justified purpose.

For the purposes of brevity and clarity, the facts are distilled as follows: On November 10, 2016, the BZA held an executive session noted as a meeting to discuss strategy threatened specifically in writing. The executive session was subsequent to a meeting held to hear an application for a special use variance for a CAFO. See *Opinion of the Public Access Counselor 16-FC-296* for additional background.



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The BZA originally planned to call the executive session to discuss procedural matters related to the special use application. As this is not an authorized justification for an executive session, the purpose was changed to litigation strategy. The facts are not entirely in dispute – both parties generally agree that the “threatened specifically in writing” element was based upon statements in the local newspaper’s coverage of the special use application meeting. That threat did eventually become reality, but the question becomes whether the totality of circumstances would lead a reasonable person to believe the threat of litigation was credible enough to justify an executive session to discuss litigation strategy.

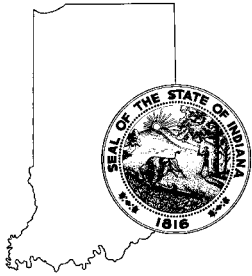
## ANALYSIS

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*. Section 6.1 provides an exception, allowing public agencies to conduct executive sessions which are closed to the public in order to discuss strategies with respect to certain specified topics.

Indiana Code § 5-14-1.5-6.1(b)(4) states an executive session may be held for discussion of strategy with respect to initiation of litigation or litigation that is either pending or has been threatened specifically in writing. As used in the statute, “litigation” includes any judicial action or administrative law proceeding under federal or state law.

Based on the information provided, a reasonable person could foresee this matter would end up in litigation no matter the decision of the BZA. The law does not define “writing” as it relates to a threat of litigation. Comments published in the newspaper clearly indicated the remonstrators’ intent. The law does appear to contemplate pre-litigation strategy. It does not say there has to be an official notice or letter from an attorney for a litigation threat to be credible. Nor does it say how that writing is communicated. These were not flippant off-the-cuff comments of the public nor was it mere puffery. While the statements in the paper alone may not alone be proof-positive of a litigation threat, the totality of the circumstances certainly are. The opposition group had hired an attorney to represent them at meetings, assembled itself under the banner of Warrick RUINED, Inc., had hundreds of supporters, and appeared en masse at the special use hearing.

Those in protest to the special use application was not merely a loosely coordinated group of community members. From the information provided, it was a well-organized purposeful demonstration of opposition. It stands to reason the BZA would want to meet behind closed doors to discuss how to mitigate fallout in the likely scenario court action would be taken. I believe it is the intent of the statute to allow such discussions in circumstances such as these.



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The email trail clearly indicates the executive session notice was clumsily handled. But I do not believe there was any intent to deceive or mislead the public. The BZA attests the only matter discussed was the (pre)litigation strategy. If that is the case, then it is my opinion there is no harm to the public. If more matters were discussed behind closed doors, that would be an issue, however, there is no way for my office to determine what took place.

## CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Warrick County Board of Zoning Appeals did not violate the Open Door Law.

A handwritten signature in black ink, appearing to read "LHB", written in a cursive style.

Luke H. Britt  
Public Access Counselor

Distribution:

Mr. Marurice Doll, Esq.