

**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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RONALD W. ADAMS,  
*Complainant,*

v.

NEW PALESTINE BD. OF ZONING APPEALS,  
*Respondent.*

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Formal Complaint No.  
20-FC-156

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Luke H. Britt  
Public Access Counselor

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This advisory opinion is in response to a formal complaint alleging the New Palestine Board of Zoning Appeals violated the Open Door Law.<sup>1</sup> Attorney Gregg H. Morelock filed an answer on behalf of the BZA. In accordance with 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 November 10, 2020.

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<sup>1</sup> Ind. Code § 5-14-1.5-1-8.

## **BACKGROUND**

This case involves a dispute about whether the New Palestine Board of Zoning Appeals (“BZA”) violated the Open Door Law (“ODL”) by concluding a hearing before properly reading each ballot out loud.

Ronald Adams (“Complainant”) alleges that on October 21, 2020, the BZA held a hearing to consider a petition for special exception. At the end of this hearing the BZA Chairman announced that the board denied the petition by a vote of 4 to 1. The BZA then adjourned the proceedings without announcing how each member of the BZA voted on the matter. Adams acknowledges that copies of the signed ballots were made available the next day, however, he asserts that no one present was able to observe how BZA members voted at the actual meeting.

On November 19, 2020, attorney Gregg Morelock submitted the BZA’s response. According to the letter, the fact that the BZA concluded the hearing without first announcing how each member voted was an inadvertent mistake rather than a conscious decision to avoid being transparent. Morelock explains that the hearing had been scheduled for October 21, 2020 at 6:30, and the BZA had their regular monthly meeting scheduled for the same evening at 7:00 pm. Therefore, by the time the BZA had finished voting on the Adams’ petition they were late for the next meeting. So, in their haste to open the following meeting, the BZA prematurely adjourned the hearing.

Morelock acknowledges that this was a mistake, but points out that Adams and his legal counsel were informed that the

ballots were available for inspection and that they could receive copies of the ballots upon request. Morelock contends that Adams never made a request for copies or to inspect the ballots.

Furthermore, the BZA contends that Adams did not request a copy of meeting memorandum, which details how each member voted. The BZA concludes that if there was a violation of the Open Door Law, it was inadvertent and of no consequence since Adams' legal counsel was advised the ballots were immediately available and the vote of each individual member was recorded in the minutes.

## **ANALYSIS**

### **1. The Open Door Law**

The Open Door Law (ODL) requires public agencies to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. Ind. Code § 5-14-1.5-1. As a result, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. *See* Ind. Code § 5-14-1.5-3(a).

The Town of New Palestine is a public agency for purposes of the ODL; and thus, subject to the law's requirements. Ind. Code § 5-14-1.5-2. The New Palestine Board of Zoning Appeals ("BZA") is a governing body of the town for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). As a result, unless an exception applies, all meetings of the BZA must be open at all times to allow members of the public to observe and record.

### **1.1 Meeting**

Under the ODL, a meeting is “a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.” Ind. Code § 5-14-1.5-2(c). “Official action” means to: (1) receive information; (2) deliberate; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action. Ind. Code § 5-14-1.5-2(d).

Moreover, “public business” means “any function upon which the public agency is empowered or authorized to take official action.” Ind. Code § 5-14-1.5-2(e).

### **1.2 Public hearings**

This office does not have exclusive jurisdiction over hearings or BZA procedures as a matter of law. The public access counselor’s enabling statute only grants the office jurisdiction over meetings and public records. *See* Ind. Code § 5-14-5-6. While some hearings are also meetings, not all meetings are hearings.

Procedurally, BZA conclusions are subject to judicial review and this office is not the administrative agency for BZA grievances. BZA hearings, however, are also public meetings. Any final action taken during a public meeting is subject to the Open Door Law. Therefore the procedure in question may fit within the ODL, and this office’s purview. To that end, this analysis will be framed in that light.

Indiana Code section 36-7-4-919 states a decision must be made:

- (1) at the meeting at which that matter is first presented; or
- (2) at the conclusion of the hearing on that matter, if it is continued.

This statute, however, is silent on the method of voting.

The ODL prohibits secret ballot votes. Ind. Code § 5-14-1.5-3(b). The term “secret ballots” is not defined by statute, but this office interprets the term to mean any vote where the audience is not immediately privy during a public meeting.

A final action omitting the identification of individual board member voters on a particular item is a secret ballot vote unless the consensus is by unanimous consent.

In the instant matter, the blow is softened by the availability of ballots after-the-fact and the minutes enumerating the specific votes. Even so, real-time observation of voting members casting yeas or nays is critical.

It appears as if the omission was inadvertent and the non-compliance was unintentional. It is unlikely the deviation from the Open Door Law would be enough to overturn a vote or mandate a do-over, but it does rise above a mere technicality. The public’s right to know was prejudiced in the moment, even if that moment was temporary.

## **CONCLUSION**

Based on the foregoing, it is the opinion of the public access counselor that the Town of New Palestine Board of Zoning Appeals violated the Open Door Law but subsequently remedied the secrecy of a vote by documenting the vote in subsequent meeting minutes and making the ballots available. Nonetheless, these remedial measures do not justify future similar practices.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt  
Public Access Counselor