STATE OF INDIANA

MICHAEL PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac
Via email transmission

October 12, 2016

Longwood Partners
C/o Michael Knight, Esq.
700 1st Source Bank Center
100 North Michigan
South Bend, Indiana 46601

Re: Informal Inquiry 16-INF-27; Open Door Violation

Dear Mr. Knight:

This is in response to your informal inquiry regarding whether the Town of Long Beach Advisory Board of Zoning Appeals ("Town") has violated the Open Door Law by having confidential conversations with the Town's Attorney during meetings, as well as a secret ballot cast outside of the public meeting. Initially, you had filed a formal complaint with this Office, however, you had also filed a concurrent lawsuit in LaPorte County Superior County (Cause No. 46D01-1609-PL-1453). Indiana Code § 5-14-4-10(6) prohibits the State Public Access Counselor from issuing a formal advisory opinion in regard to a matter in which a lawsuit has been filed. Please accept this informal inquiry response as a substitute for a formal advisory opinion.

BACKGROUND

Longwood Partners, LLC ("Longwood") is the owner of three lots in Long Beach, Indiana. Longwood was issued various permits to erect a sea wall on a property. On or about March 24, 2016, the Town's Building Commissioner issued a stop work order. Longwood appealed the stop work order to the Town of Long Beach Board of Zoning Appeals ("BZA").

Over the course of 2016, three (3) hearings were held regarding Longwood's appeal. During the July 12, 2016 meeting the Town's attorney passed a document to a member of the BZA. Longwood requested the document, but the BZA and Town attorney claims the document was privileged. On August 9, 2016, the official determination of the BZA was to deny a permit to build the sea wall.

Longwood alleges the Town attorney has given legal advice without pending litigation and without a request for the same by the BZA regarding petitions pending before the BZA. Longwood claims

they were denied the opportunity to a full and fair hearing on its petition. Despite its discovery, email correspondence from August 8, 2015, October 12, 2015, and November 20, 2015 has been identified as confidential attorney-client privilege and will only be referenced generally in this response. To my knowledge, any privilege has not been waived by a current member of the BZA who maintains an attorney-client relationship with the Town Attorney.

Longwood identifies three (3) main points of contention for this Office to consider:

1. The practice of providing research and legal opinions, receiving information, to the BZA in private;
2. The private polling of BZA members outside the public purview by the BZA's counsel (and for the purpose of determining final and official action);
3. Any other Open Door Law violations by the Long Beach BZA and its counsel as shown by the provided information.

Longwood also seeks a declaration to nullify the ultimate determination of the BZA, however, any injunctive relief may be sought solely through the judiciary. Even if Longwood's complaint was accepted independent of the lawsuit filed in superior court, this Office cannot issue injunctive relief.

ANALYSIS

It is the intent of the Open Door Law ("ODL") the 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 Open Door Law regulates meetings by those public agencies or governing bodies. A "meeting" is defined as a gathering of a majority of the governing body for the purpose of taking official action on business. See Indiana Code § 5-14-1.5-2(c). "Official action" is very broadly defined by our state legislature to include everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. See Indiana Code § 5-14-1.5-2(d).

It is important to note I recently addressed the Town of Long Beach in regard to the Open Door Law in *Opinion of the Public Access Counselor 16-FC-146*. In that Opinion, I stated conclusively executive sessions may be held with an attorney only to discuss strategy related to pending litigation citing *Simon v. Auburn Board of Zoning Appeals*, 519 N.E.2d 205, Ind. App 1988. However, I also opined all other (general) legal advice should be received in an open meeting *or with a non-majority gathering of a governing body*. You have not alleged an executive session took place.

Unless prohibited by local governance considerations, any member (or non-majority gathering) of a governing body may solicit the advice of an attorney behind closed doors. Longwood has not set forth any authority affirmatively stating any prohibition to this. As long as it does not amount to a serial meeting (see Indiana Code § 5-14-1.5-3.1), a private conversation with a contracted attorney is allowable by law. Likewise, a retained attorney can disseminate legal advice to a non-majority

of a governing body any way the attorney sees fit. The board may not "meet" in private to receive the advice as a group, but there is no prohibition in the Open Door Law disallowing an attorney to provide analysis, advice, research or written memoranda for a group unsolicited or upon request.

Attorneys are not retained by municipalities exclusively for the purpose of litigation. There are a myriad of other issues necessitating legal advice. It should also be noted administrative litigation – such as a Board of Zoning Appeals hearing – is defined as litigation in the Open Door Law. While the definition is specific to Indiana Code § 5-14-1.5-6.1(b)(2)(B), it is not prohibited from being applied elsewhere in the ODL.

Moreover, the Indiana Court of Appeals has held government agencies may also rely upon the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney's profession – even when litigation is not pending:

> As long as the communication is within this scope, it is of no moment to the privilege's application that there is no pendency or expectation of litigation. Neither is it of any moment that no fee has been paid. Rather what is essential to the privilege is a 'confidential relation of client and attorney.' Within such a confidential relation, the privilege applies to all communications made to an attorney for the purpose of professional advice or aid, upon the subject of the client's rights or liabilities.

Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley, 580 N.E.2d 371 (Ind. Ct. App. 1991).

The document passed to the BZA member by the Town attorney enjoys the same attorney-client confidentiality as private clients and attorneys do. Litigation is not a condition precedent to the privilege. "Information subject to the attorney client privilege retains its privileged character until the client has consented to its disclosure." *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996), citing *Key v. State*, 132 N.E.2d 143, 145 (Ind. 1956).

Records declared confidential by state statute are exempt from disclosure. See Indiana Code § 5-14-3-4(a)(1). Indiana Code § 34-46-3-1 provides a statutory privilege regarding attorney and client communications. *See also Hueck v. State, 590 N.E.2d 581, 584 (Ind. Ct. App. 1992).* Therefore, the town attorney may properly withhold from disclosure records which are subject to the attorney-client privilege.

The Open Door Law is to prevent real-time official action of a majority of a governing body. From the information provided, it does not appear as if the BZA received any legal advice as a majority.

In *Opinion of the Public Access Counselor 13-FC-324*, I explored the issue of whether an entire Board could receive information via group email. I reasoned that because the information was not *received* simultaneously, it did not amount to a closed door face-to-face real-time discussion. And so it is in this case as well. Indiana law has not yet addressed whether a meeting of the minds over an email chain would constitute constructive presence for public meetings or in an aggregate sum.

However, in *Beck v. Shelton*, 593 S.E.2d 195 (Va. 2004), the Virginia Supreme Court stated the following:

> [T]he key to resolving the question before us is whether there was an 'assemblage.' The term 'assemble' means 'to bring together' and comes from the Latin *simul*, meaning 'together, at the same time.' The term inherently entails the quality of simultaneity. While such simultaneity may be present when e-mail technology is used in a 'chat room' or as 'instant messaging,' it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission.

I do not believe the manner in which the BZA received legal advice from its attorney was in violation of the Open Door Law. It is true the BZA eventually took official action in the aggregate by receiving information, but it did not do so as a group at the same time.

Coincidentally, in *Opinion of the Public Access Counselor 13-FC-324*, I also addressed the issue of whether a call for approval over email resulted in a secret ballot:

> Even through email, a perceived proactive ratification of an action concerning public interest is leaning against the public policy intentions of openness and transparency, but it cannot definitively be considered a violation of the Open Door Law as the legislature intended. I firmly believe the call-and-response nature of the email exchange amounted to an endorsement of the action, but I cannot say it is a vote in the traditional sense. The solicitation in the original email was for signatures only and not necessarily for approval of the issuance of the letter or input as to its content. It appears as if the letter would be sent regardless whether a majority ratified the letter.

This is where I take exception to the situation described in your inquiry. The case in *13-FC-324* involved whether or not to send a letter – a mere administrative task which did not require a vote. The solicitor of the signatures was only 'taking the temperature' of the group. That matter is distinguished from the present controversy.

Affirmation or denial of a BZA petition is something else entirely; it is not an administrative matter, but a substantive fact-and-law-based determination. In my opinion, it rises above the act of polling and amounts to a vote. The attorney was relying on the BZA's input to take binding action on a petition – the act of drafting findings and conclusions. This should occur *after* the BZA votes in an open meeting and not prospectively. The final action may have been ratified at an open meeting, but the totality of the circumstances suggests the BZA may have made a final binding decision akin to a vote.

Because of pending litigation, I decline to make a conclusory statement on whether the BZA violated the Open Door Law. From the information provided, I have not identified any other Open Door Law issues. That being said, the Town of Long Beach has been the respondent in a disproportionate amount of complaints filed with my Office. Typically (although not always) that is a sign of potential systemic non-compliance. The Town is under scrutiny from various

members of the community, which is all the more reason to be especially mindful of the importance of transparency and following the letter of the access laws.

Good government practice is often at odds with traditional notions of efficiency and convenience in the private sector. This includes the attorney-client relationship. There are two (2) different playing fields between private and public sector business. Being a good steward of taxpayer and constituent resources in the open is often inconvenient and uncomfortable compared to closed-door board rooms. But that tension is necessary in order that governing bodies and public agencies may be held accountable for their actions – a fundamental principle of democracy.

Please do not hesitate to contact me with any questions.

Best regards,

Luke H. Britt
Public Access Counselor

Cc: Ms. Julie Paulson, Esq.