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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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ERIC M. DEBUSK  
*Complainant,*

v.

BARTHOLOMEW CO. BOARD OF ZONING APPEALS,  
*Respondent.*

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Formal Complaint No.  
21-FC-182

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Bartholomew County Board of Zoning Appeals violated the Access to Public Records Act.<sup>1</sup> Planning Director Jeffrey Bergman filed an answer on behalf of the department. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

the Office of the Public Access Counselor on November 11, 2021.

## **BACKGROUND**

This case involves a dispute over the Bartholomew County Board of Zoning Appeal's (BZA) retention of virtual comments made during public meetings held using the platform WebEx.

On October 26, 2021, Eric DeBusk (Complainant) filed a public records request with BZA seeking the following:

The written comments submitted and contained in the WEBEX chat during the BZA meeting on 10-25-2021.

On November 4, 2021, the BZA responded to DeBusk's request, stating:

The comments in the chat from WebEx are not part of the public record, are not seen by the Board, are not retained, and therefore are not available.

Six days later, DeBusk filed a formal complaint with this office arguing that the BZA's denial is a violation of the Access to Public Records Act (APRA). Specifically, he contends that the comments are in fact public record, should be available to both the public and members of the board, and are required to be retained by the county.

On November 17, 2021, the BZA submitted a response addressing DeBusk's allegations. The BZA explains how the WebEx chat feature is utilized for virtual meetings, including the BZA meeting held on October 25, 2021. The BZA asserts that the chat is mostly used by members of the public

so that they can indicate if they wish to speak during the allotted public comment portion of meetings. This chat is monitored by a designated staff members throughout the meeting and notifies the presiding officer if a member of the public requests to speak.

The BZA notes that while meetings held using the WebEx platform can be recorded, the chat contents are not included with that recording. This means that the Planning Department is not able to provide the material requested by the DeBusk because it does not exist. Moving forward, in order to address this deficiency, the BZA intends, for future meetings, to do the following: (1) specifically preserve the chat contents; and (2) ask presiding officers to add to their opening meeting instructions an explanation that comments entered into the chat are not a part of the public hearing and that anyone wishing to make comments to the Board needs to request to speak.

## ANALYSIS

### 1. The Access to Public Records Act

The Access to Public Records Act (APRA) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. Bartholomew County and its planning department are public agencies for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the county’s public records during regular

business hours. Ind. Code § 5-14-3-3(a). Moreover, the Bartholomew County Board of Zoning Appeals (BZA) is a governing body of the county for the purpose of the Open Door Law.<sup>2</sup>

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

## **2. Virtual meetings**

Regarding nearly every aspect of life, the COVID-19 pandemic forced Hoosiers to adapt to public health and safety protocols. Government agencies were no different. To that end, the Governor issued executive orders – later codified by the General Assembly<sup>3</sup> – to allow governing bodies to meet virtually.

With virtual meetings, however, came an entirely new set of challenges, none of which were lost on that office. One issue to consider is the retention of virtual meeting details, including ancillary information such as chats and metadata.

This was no easy question to answer. On one hand, the greater the amount of information stored for posterity, the better the access for the benefit of the public. On the other is the matter of practicality; storing all that data comes with the cost of storage and maintenance. Therefore, being strategic about balancing these considerations becomes critical.

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<sup>2</sup> Ind. Code § 5-14-1.5-1-8.

<sup>3</sup> Ind. Code § 5-14-1.5-3.5, -3.7.

But for the pandemic and the ability to hold virtual meetings, the recordings of those meetings and their associated chat data would not exist.

The definition of public record includes:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). It is true that the footage and data would become public record if recorded. It is another matter altogether, however, whether a meeting must be recorded and for how long the footage needs to be maintained.

Ordinarily, there is no legal requirement for recording a meeting, virtual or otherwise. If it is recorded, the retention schedule for the video is subject to the General County/Local Retention Schedules set by the Indiana Archives and Records Administration. For instance the relevant retention schedule, GEN 10-02, states:

For offices, boards or commissions that record their meetings in audiovisual or electronic formats for the purpose of transcribing the minutes, and use the recordings to complete the minutes of the meetings:

DELETE recording or DESTROY storage media after relevant minutes are transcribed and approved.

Presumably, this would include all the chat detail as well. Given that such messages are likely transitory in nature and likely have little public business value, the minutes would be an acceptable substitute for the wholesale recording.

Therefore, in short, if virtual meetings and associated information is recorded, it becomes a public record subject to disclosure under APRA, at least until minutes are created.

Here, the chat transcripts were not recorded and retained because they were not considered part of the official proceedings. Notably, the Open Door Law does not require meetings to be recorded by the governing body itself, only that the public has the right to observe and record. Minutes are the official record of the proceedings and not any other recording.<sup>4</sup>

Here, it appears the chat portion of the meeting was not recorded. If there is no documented record, there is nothing to release. Because there is no requirement to record the meeting or the supplemental elements of its proceedings, there is no violation of APRA or the Open Door Law.

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<sup>4</sup> Ind. Code § 5-14-1.5-4.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the Bartholomew County Board of Zoning Appeals did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to be 'LHB', written in a cursive style.

Luke H. Britt  
Public Access Counselor