
OPINION OF THE PUBLIC ACCESS COUNSELOR

THE NEW YORK TIMES COMPANY,
Complainant,

v.

FORT WAYNE CITY COUNCIL,
Respondent.

Formal Complaint No.
19-FC-108

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Fort Wayne City Council (“Council”) violated the Access to Public Records Act.¹ Joseph Bonahoom and Zach Lange, legal representatives for the Council filed a response to the complaint. In accordance with Indiana Code

¹ Ind. Code § 5-14-3-1 to 10.

§ 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 10, 2019.

BACKGROUND

The New York Times Company (“The Times”) contends that the Fort Wayne City Council violated the Access to Public Records Act when a request for council members email allegedly lacked the entirety of responsive records.

On or about August 9, 2019, a reporter for The Times sent a public records request to the City of Fort Wayne for emails associated with the inaugural Mad Anthony Wayne Day celebrated on July 16, 2019. The Times’ interest in the commemoration was piqued by some amount of controversy surrounding the historical figure General Anthony Wayne.

A narrowed request submitted on August 12, 2019 sought emails from City officials, including all nine Fort Wayne Council members. It should be noted that this complaint does not allege the City of Fort Wayne administration did not comply with the law regarding the production of documents. Rather the Council, as separately elected officials, did not produce emails sent by the Council which were received by City administrators, notably the City Council liaison.

As an illustration of this, The Times submitted, contemporaneous with its complaint, two email chains produced by the City that were not part of the Council’s response, yet were records of individual Council members.

The Times argues the individual Council members, consistent with guidance from this office, should have searched their own emails and produced messages responsive to the

request. On September 18, 2019, the City vowed to instruct council members to search accordingly. The ultimate response on September 27, 2019 was the impetus for The Times' dissatisfaction.

For its part, the City Council responded on December 3, 2019.² In the response, the Council suggests that the discrepancy between the two responses was due to an expanded search request on or about September 18, 2019. The Council seemingly argues that the City provided some records, and the Council others, but the totality of the production of documents between the two entities satisfies the request.

ANALYSIS

1. The Access to Public Records Act (“APRA”)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.

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.” *Id.* The City of Fort Wayne is a public agency for the purposes of APRA, the Council being its governing body; and thus, both are subject to the act's requirements. Ind. Code § 5-14-3-2(n). Unless

² The delay in the Council's response to the formal complaint was due to an initial clerical error of this office and not the fault of the Council in any way.

otherwise provided by statute, any person may inspect and copy the City's and Council's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Here, it appears as if the controversy is not so much one of legal compliance, but one of confusion. It goes without saying that the City of Fort Wayne is the executive branch of the local municipality, whereas its Council is the municipal legislative branch.³ They have separately elected offices mutually exclusive from one another.

Toward that end, relationships between the two municipal branches statewide are as varied as the number of local political subdivisions in the State of Indiana – some being completely siloed, others working harmoniously together. Point being that obligations involving public records requests can be addressed in a unified front or individually when two separate entities are involved.

The Times' skepticism is well-taken in that the material from the City is different than that of the Council when compared side-by-side. Messages from Council members were produced by the City but not by the Council. What is unknown is whether this was a coordinated effort so as not to duplicate pages of documentation.

What concerns this office is that the New York Times receives everything responsive to its request regardless of the source. I hesitate to attribute any wrongdoing on the part of the Council unless there is proof positive they are intentionally withholding records. There does not appear to be an inference of this. Likewise, I cannot issue a mandate that

³ Ind. Code §§ 36-4-5, to -6.

the Council resurrect a search unless it is deficient on its face. Again, without more, that does not appear to be the case.

What I can do is make recommendations. The first is perhaps the most obvious: A municipality the size of Fort Wayne should have ample room on its IT servers and administrative bandwidth to accommodate nine email accounts for its Council members. As I have stated before, there is nothing inherently wrong, per se, about using private email accounts for public business, however, especially in cases such as this, it can be confusing and lead to complaints like the one filed by The Times.

The state's second-largest city's legislative body should probably have dedicated email accounts for conducting public business. That way there can be no question what is public and what is private and it is all stored on centralized servers. Is this practical for every board and commission in the City? Probably not. But just as the Indiana General Assembly has separate government accounts for legislative work, so too should mid-to-large sized cities. While it may be a slight administrative inconvenience for the individual members, it makes records retention much more efficient.

That written, my recommendation to The Times in future requests is to submit separate records requests addressed to the City administration and the Council exclusively from one another. The City does not have dominion over the Council in public access issues and vice versa. The two bureaucratic entities are distinct in nature.

Moreover, the Council's point is well taken that the Indiana judiciary and this office has issued certain parameters to be

followed when submitted public records requests for emails. Although The Times did narrow its search in good faith at least once, a lynchpin of a successful request is a named sender-recipient channel of communication as opposed to a request for a pool of candidates of whom its members may or may not have responsive records. This standard has been reinforced by this office after having been first suggested by the Indiana Court of Appeals in *Anderson v. Huntington County Board of Commissioners*, 983 N.E.2d 613 (Ind. Ct. App. 2013).

This course of action can assist not only the public agency in conducting a search, but it prevents a requester from large unresponsive data dumps. In the experience of this office, public agencies tend to react more favorably to specific requests as opposed to contracting and becoming defensive to requests that are difficult to conduct.

Based on the information provided, it is unclear whether there are more records to be produced. To be sure, if the Council does have more and withheld them – or conducted a substandard search – it would have resulted in noncompliance with the law. That is largely a factual question this office is not equipped to answer. I can only impress upon the Council the importance of thorough search and email retention. In turn, impressing upon The Times the benefit of a precise request targeted at the specific agency from which it is seeking records.

A handwritten signature in black ink, appearing to be the initials 'JTB' with a stylized flourish underneath.

Luke H. Britt
Public Access Counselor