
OPINION OF THE PUBLIC ACCESS COUNSELOR

JENNIFER L. KEHL,
Complainant,

v.

CITY OF FISHERS,
Respondent.

Formal Complaint No.
19-FC-140

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the City of Fishers violated the Access to Public Records Act¹ and the Open Door Law.² City attorney Christopher P. Greisl filed an answer on behalf of the city. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on December 17, 2019.

¹ Ind. Code §§ 5-14-3-1 to -10.

² Ind. Code §§ 5-14-1.5-1 to -8.

BACKGROUND

This case is an offshoot of a larger dispute between the clerk and the common council for the City of Fishers. Jennifer L. Kehl (“Complainant”) is the clerk for the City of Fishers, which is a second-class city under Indiana law. In a second-class city, the city clerk is a separately elected official.

On May 23, 2019, the Fishers City Council announced its investigation of Kehl after current and former employees of the clerk’s office accused Kehl of violating Title VII of the Civil Rights Act of 1964.³ The council hired a third-party law firm to conduct the investigation. The investigation resulted in a report, which the law firm provided to the Council at the end of July 2019. The council then met with Kehl to discuss its concerns stemming from the report. Notably, a city council has the statutory authority to conduct investigations into municipal employees and officials.⁴

In September 2019, Fishers City Council President Richard Block issued a statement that the investigators concluded that Kehl had not violated the law but the report noted management issues, which prompted the council to transfer certain duties previously assumed by the clerk (but not legally required to be performed by the clerk) to other city staff. Kehl describes the council’s action as “stripping [her] of most of [her] duties and employees.”

³ Title VII prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.

⁴ Ind. Code § 36-4-6-21.

Kehl contends that she requested a copy of the specific allegations made against her to the city's human resources department and a copy of the final report provided to the Council. Kehl asserts that the council denied her access to the report.

As a result, on December 11, 2019, Kehl filed a formal complaint against Fishers alleging the council's denial constitutes a violation of the Access to Public Records Act.

The same day, Kehl filed a separate formal complaint against the Fishers City Council alleging the council is in violation of the Open Door Law because the council denies her access to its executive sessions. Kehl argues that she has a duty under the law to attend these meetings and keep the record.

This office consolidated Kehl's complaints into a single action, notified the city council, and solicited a response.

On January 20, 2020, the Fishers City Council filed an answer to Kehl's complaints. First, the council denies that it violated APRA by denying Kehl's request for the investigation report. Specifically, the council argues the report is exempt from disclosure under APRA in accordance with Indiana Code sections 5-14-3-4(a)(1) and (8).

Second, the council denies that it violated the Open Door Law by excluding Kehl from its executive sessions. Essentially, the council argues that Kehl's attendance is not mandated by statute and it has sole discretion over who attends executive sessions.

ANALYSIS

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

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. The City of Fishers is a public agency for the purposes of the APRA. *See* Ind. Code § 5-14-3-2(n). Therefore, any person has the right to inspect and copy the city’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See* Ind. Code § 5-14-3-3(a).

Under APRA, “public record” means:

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). There is no dispute that the investigation report requested by Kehl is a public record. Indeed, the crux of the dispute is whether APRA requires or authorizes the council to withhold the report from disclosure. The council argues that the record is exempt under APRA in accordance with Indiana Code sections 5-14-3-4(a)(1) and (8).

1.1 Indiana Code sections 5-14-3-4(a)(1) and (a)(8)

Kehl wants a copy of the report the city council received from the third party law firm it hired to investigate employee allegations that Kehl violated Title VII. In response, the council argues Kehl is not entitled to the report because APRA does not require disclosure of records protected by attorney-client privilege. Specifically, the council cites Indiana Code section 5-14-3-4(a)(1) and (a)(8).

Under APRA, public records declared confidential by state statute and those declared confidential by or under the rules adopted by the Indiana Supreme Court are excepted from disclosure. *See* Ind. Code § 5-14-3-4(a)(1), -(8).

As an initial matter, this office observes that the investigative report is not, or at least was not at the time of filing, part of any judicial proceeding governed by the rules adopted by the Indiana Supreme Court. Thus, section 4(a)(8) does not apply here. An attorney's report on the rights, responsibilities, and liabilities certainly falls within several exemptions to disclosure under the APRA, including the attorney-client privilege. The privilege was first recognized in Indiana as part of the common law by judicial decision in *Jenkinson v. State* (1845), 5 Blackf. 465, 466. The privilege is now recognized by statute and under the rules adopted by the Indiana Supreme Court.⁵

In any event, the privilege itself lies with the client upon whom the records request is being made. Should the Council

⁵ Ind. Code § 34-46-3-1; Ind. Code § 33-43-1-3(5); Ind. Trial Rule 26(B)(1).

choose to exercise its discretion to release any and all records, it may do so.

It is worth mentioning that the council originally communicated in a public statement that it hired the third-party firm to “conduct an independent investigation into the allegations” against Kehl. Then, when asked for the documentation, the council invoked the attorney-client privilege. The courts are clear the council cannot have it both ways. Either the investigation was independent, or the firm was hired as its legal representative and the council is a client of the firm. This critical distinction is explored further in *Purdue University v. Wartell*, 5 N.E.3d 797 (Ind. Ct. App. 2014).

In sum, Fishers did not err by withholding the requested materials if the firm was hired as legal representation to prepare the report. The issue is not quite so settled as to the matter of the claims themselves. Without the benefit of a written request or denial for and of those materials, it is impossible for this office to determine. We now turn to Kehl’s Open Door Law complaint.

2. Open Door Law (“ODL”)

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. *See* 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 City of Fishers 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 Fishers City Council is a governing body of the city for purposes of the ODL. *See* Ind. Code § 5-14- 1.5-2(b). So, unless an exception applies, all meetings of the Council must be open at all times to allow members of the public to observe and record.

The provisions of Title 36 of the Indiana Code –known as “Home Rule” – often intersects with the Open Door Law or Access to Public Records Act. To the extent it does, this office attempts to exercise its jurisdiction⁶ mindful of the fact that municipal inter-relations and the operations of local governments are not the primary focus of this office. This opinion is no different.

Nevertheless, as explained further below, a second-class city clerk’s duties include keeping “an accurate record of the legislative body’s [city council’s] proceedings”⁷. While the term “proceeding” is not defined in Indiana Code, it can be inferred that the legislature’s intent was to include any official action on public business as part of a governing body’s activities. This includes, but is not limited to, public meetings and executive sessions. The City does not argue otherwise.

Kehl’s ODL complaint centers on the Fishers City Council’s action to prohibit her from attending the Council’s executive sessions, which she argues is violation of the ODL because it prevents her from fulfilling her statutory duty to serve as clerk of the legislative body.

⁶ Ind. Code §§ 5-14-4-3(3); and 5-14-5-6(3).

⁷ Ind. Code § 36-4-6-9(2).

Conversely, the Council argues that Kehl is not entitled to attend its executive sessions because Indiana law makes it clear that the Council has sole discretion over who attends those meetings.⁸

2.1 Executive Sessions

Under the ODL, an executive session is “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.” Ind. Code § 5-14-1.5-2(f).

The ODL authorizes executive sessions in limited, specific circumstances, which must be properly and specifically noticed by reference. *See* Ind. Code § 5-14-1.5-6.1(b)(1) to – (15).

Notably, the ODL requires memoranda, like all other meetings, but with modified requirements. Specifically, Indiana Code section 5-14-1.5-6.1(d) provides the following:

the memoranda and minutes from an executive session must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. The governing body shall certify by a statement in the memoranda and minutes of the governing body that no subject matter was discussed in the executive session other than the subject matter specified in the public notice.

Thus, there is little room for dispute that the ODL requires, at minimum, the memoranda required for all meetings modified to include the specific subject matter and a certified

⁸ This office addressed this matter in *Informal Opinion of the Public Access Counselor* 19-INF-13 (2019).

statement that the body discussed no other subject matter other than the subject matter specified in the public notice. This gives the public comfort that a governing body is providing an attestation that the conversation behind closed doors did not deviate from the noticed subject matter.

Kehl contends that she, as Fishers City Clerk, has a statutory duty as the clerk of the legislative body to attend the City Council's executive sessions and keep an accurate record for the purposes of posterity and precision. The Council disagrees.

3. Duties of the City Clerk

The Indiana Code establishes the city clerk as the clerk of the legislative body.⁹ As noted above, the clerk has a duty, among other things, to “keep an accurate record of the legislative body’s proceedings.” Here, the parties disagree about the interplay of Home Rule and the provision in the Open Door Law governing executive sessions.

During this office’s investigation into this issue, we contacted the city clerks of several second-class cities statewide. Of those who responded, a majority indicated that they do indeed attend executive sessions of their city’s councils. Others who did not attend did expressed concerns that their statutory duties may be compromised by their exclusion. Some were equally concerned about their role as an objective and independent third party serving as a ballast against executive session conversations from drifting into unauthorized territory.

⁹ Ind. Code § 36-4-6-9.

Invariably, all reported that their respective situations were in place because of historical continuity and not because of any established statute, ordinance, or rule. Point being is that reasonable minds can certainly disagree regarding the interpretation of these statutes.

3.1 Intersection with the Open Door Law

Indeed, the ODL authorizes a governing body to exclude the public at large from executive sessions, except it may admit those necessary to carry out its purpose.

The Fishers City Council argues this language unambiguously vests it with the sole discretion over the guest list at its executive sessions.

When scrutinized, there is nothing clear or unambiguous about the statutory scheme around these matters and there does appear to be statewide inconsistency as to application.

This office, just like our courts, must liberally construe the provisions of the ODL, which means exceptions are narrowly applied. Indeed, an executive session is the law's primary exception to the ODL's mandate of open government meetings. To that end, executive sessions are given extra scrutiny by this office as they carry the expectation of both substantive and technical compliance.

Although the public may be excluded, contextually the Clerk is not a member of the public as contemplated by the ODL. As Indiana Code expressly establishes the City Clerk as clerk of the legislative body, one of the specific duties of the Clerk is to "keep an accurate record of the legislative body's proceedings."¹⁰

¹⁰ Ind. Code § 36-4-6-9(2)

Therefore a question exists as to whether a Clerk is can keep an accurate record of the proceeding *in absentia*.

Comparing and contrasting a second-class city's clerk with a clerk-treasurer of a town, the statute's governing powers and duties are functionally identical with one notable exception: when enumerating the duty to a town clerk-treasurer to serve as clerk of the legislative body, the legislature includes the phrase "*by attending its meetings*."¹¹ See Ind. Code § 36-5-6-6.

Fishers argues the omission of this language from the City Clerk's powers is proof positive a Council is not obligated to include a Clerk in an executive session.

When scrutinizing powers and duties, courts will read code provisions harmoniously and presume the legislature did not intend an unreasonable or absurd result.¹² It does not stand to reason then that the Indiana General Assembly would require a town clerk-treasurer to attend meetings to keep an accurate record of the proceeding, but assume a second-class city clerk could somehow do so remotely and from afar. The differences between a city clerk and a town clerk-treasurer are not as dissonant and disparate as Fishers proposes.

Indeed, before this controversy was stoked by allegations of Title VII violations, Kehl attended executive sessions. According to Kehl, only when she indicated that the Council may have discussed unauthorized subject matter during and executive session and subsequent refused to certify the

¹¹ This office addressed this issue as relates to clerk-treasurers in *Informal Opinion of the Public Access Counselor*, 16-INF-02 (2016).

¹² *Chesnut v. Roof*, 665 N.E.2d 7 (Ind. Ct. App. 1996)

memoranda was she barred from those sessions. If true, this strengthens the argument that an uninterested, objective third-party should be the one taking accurate minutes of proceedings.

An executive meeting memorandum constitutes a record of a proceeding. In order to ensure accuracy and objectivity, the individual burdened with the duty to keep the records – or a designee – should be present.

As stated in 19-INF-13:

As a general rule, accuracy and verification of that statement seemingly requires attendance by a Clerk. Beyond a short list of extraordinary circumstances, a City Clerk should generally be allowed to attend executive sessions.

The City has presented in its argument a list of those circumstances, however, it is unclear whether those issues are persistent and ongoing. If they are not systemic and those matters have been resolved, the Clerk should be let back into those meetings to perform her duties.

The City posits that the Council is the absolute gatekeeper of entry into executive sessions. If this is the case, there would be nothing stopping a majority of a governing body from excluding not only a clerk from executive sessions, but also those fellow councilmembers with whom it disagrees politically or ideologically. This should not be.

Put bluntly, executive sessions are not friendly caucuses consisting merely of those who get along and play nice in the local government sandbox. They exist to give a governing body the ability to discuss certain sensitive matters in

private. Both parties should realize the responsibility and seriousness of these meetings and give due consideration to both good governance and confidentiality.

Ultimately, this office cannot compel a city council to include a clerk or impose any other kind of sanction. As noted above, those are local inter-governmental matters. Uncertainty or disputes in nature of powers or duties are relegated to the courts via Indiana Code section 36-4-4-5. As such, this opinion will be the last comment this office makes on these matters between these parties.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor