
OPINION OF THE PUBLIC ACCESS COUNSELOR

JOHN E. MOGUSH,
Complainant,

v.

TOWN OF YORKTOWN; DELAWARE COUNTY
BOARD OF COMMISSIONERS,
Respondent.

Formal Complaint No.
19-FC-5

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to separate, individual formal complaints: one alleging the Town of Yorktown violated the Access to Public Records Act ¹ and the other alleging the same against Delaware County Board of Commissioners. Attorney Steven D. Murphy filed an answer to the complaint on behalf of the Yorktown and attorney Joseph I.

¹ Ind. Code §§ 5-14-3-1 to -10

Rhetts responded on behalf of Delaware County. 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 January 15, 2019.

BACKGROUND

This case involves a request for public records evidencing an agreement between either the Town of Yorktown or Delaware County and a commercial prospect, or both.

John E. Mogush (“Complainant”) filed separate formal complaints with this office against the Town of Yorktown and the Delaware County Board of Commissioners alleging violations of the Access to Public Records Act by both public agencies.

This office consolidated the complaints into one case and solicited responses from both the Town of Yorktown and the Delaware County Board of Commissioners.

1. Town of Yorktown

On November 27, 2018, Mogush requested an update as to the status of negotiations with an economic development prospect, Accutech Systems Corporation (“Accutech”).

On December 7, 2018, Yorktown Town Manager Pete Olson responded to Mogush’s request. Olson noted that the town interpreted the request to be seeking “any documents of agreement between the Town of Yorktown and Accutech.”

Although Olson informed Mogush that the Town did not have documents responsive to his request, he also maintained that “[a]ny negotiations between the Town or its

economic development entities and a commercial prospect are exempt from disclosure under Ind. Code § 5-14-3-4(b)(5).”

In its answer to the formal complaint, Yorktown reiterated that there are no agreements between the town and Accutech. Although Yorktown acknowledges that negotiations between the town and Accutech have been ongoing, it maintains that the records detailing those negotiations are protected from disclosure in accordance with Indiana Code section 5-14-3-4(b)(5)(A).

2. Delaware County Board of Commissioners

On December 17, 2018, Mogush filed a similar public records request with the Delaware County Board of Commissioners. Mogush requested records documenting any agreement involving Delaware County, Yorktown, and Accutech. Three days later, the County denied the request on the basis that it did not have records responsive to Mogush’s request.

In sum, Mogush is seeking records, specifically “any agreement and detail—verbal or in writing” involving the relocation of Accutech from its current location to downtown Yorktown.

In its answer to the formal complaint, the County also asserts that no responsive agreement exists and that negotiation documents, if any, are protected from disclosure under APRA.

3. The Emails

Mogush supplemented his complaints with 33 pages of email exchanges between various local officials and Accutech

among others—to bolster his position that an agreement exists. Notably, the emails do not expressly reference or indicate the existence of the agreement that Mogush is requesting from both agencies. Instead, much of the dialogue involves negotiating and planning, but no indication of a final agreement.

ANALYSIS

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.” Ind. Code § 5-14-3-1. The Town of Yorktown and the Delaware County Board of Commissioners are public agencies for the purposes of the APRA; and thus, subject to the Act’s requirements. Ind. Code § 5-14-3-2(n). As a result, any person has the right to inspect and copy the Town and the Board’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).

As set forth above, based on the information provided, there appears to be no documented agreement responsive to the Mogush’s request. APRA does not require a public agency to create a record to satisfy a records request.

Granted, there may be some circumstantial allusion to preparations, which could be the predicate for an agreement. At any rate, no final offer of public resources appears to have

been extended by Delaware County or Yorktown at the time Mogush filed this complaint.

Under Indiana Code section 5-14-3-4(b)(5)(B), the terms of the final offer of public financial resources communicated by a governing body of a political subdivision to an industrial, a research, or a commercial prospect shall be available for inspection and copying after negotiations with that prospect have terminated.

Here, the negotiations appear to be active with no agreement in place, much less a final offer of public financial resources.

Additionally, Indiana Code section 5-14-3-4-5(A) provides certain public agencies with discretion to withhold from disclosure those records relating to negotiations with a commercial prospect if the records are created while negotiations are in progress. Even after negotiations have concluded, the law provides that records created while negotiations are in progress may be withheld, the final offer notwithstanding.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that neither the Town of Yorktown nor the Delaware County Board of Commissioners violated the Access to Public Records Act.

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

Luke H. Britt
Public Access Counselor