OPINION OF THE PUBLIC ACCESS COUNSELOR

JUDICIAL WATCH INC.,
Complainant,

v.

CITY OF SOUTH BEND,
Respondent.

Formal Complaint No.
19-FC-93

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 South Bend violated the Access to Public Records Act.[1] Assistant City Attorney Danielle Campbell Weiss filed an answer on behalf of the city. 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 September 24, 2019.

[1] Ind. Code § 5-14-3-1 to 10.

BACKGROUND

This case involves a dispute over access to emails between South Bend Mayor Pete Buttigieg and three individuals.

On September 17, 2019, Judicial Watch, Inc. ("Complainant"), filed a public records request with the City of South Bend seeking the following:

> All emails between Mayor Pete Buttigieg and South Bend abortion provider Ulrich "George" Klopfer for the period November 1, 2017 through May 1, 2018; all emails between Mayor Pete Buttigieg and CEO of Whole Women's Health, Amy Hagstrom Miller, from Nov. 1, 2017 through May 1, 2018; and all emails between Mayor Pete Buttigieg and Pro-Choice South Ben Director, Liam Morley, from Nov 1, 2017 through May 1, 2018.

South Bend acknowledged the request the same day.

On September 20, 2019, South Bend issued a letter to Judicial Watch declining to search for the emails. The city concluded that the organization's request did not meet the standard of reasonable particularity.

Specifically, South Bend relied on two opinions from this office explaining that "a request for emails must identify, at a minimum, named individual sender(s), named individual recipient(s), a time frame of six months or less, and a specific subject matter or set of precise keys words." Since the Judicial Watch request did not specify an expressly identifiable subject matter or a set of precise key words, the city denied it. Additionally, South Bend invited Judicial Watch to amend the request and resubmit it but the organization declined.

As a result, Judicial Watch filed a formal complaint against South Bend on September 24, 2019. In essence, it argues an Access to Public Records Act ("APRA") does not require those seeking documents to provide the specific details outlined by the city, and "there is no evidence that Mayor Pete Buttigieg had substantial email conversations with any of the three individuals…" therefore more information should not be necessary to fulfill the request.

South Bend disputes Judicial Watch's claim that the city violated APRA.

Essentially, the city argues that APRA does not define reasonable particularity; and thus, it relies on guidance from this office in addressing access issues. More specifically, South Bend cites *Opinion of the Public Access Counselor*, 18-FC-63 (2018), which states:

> "…this Office has consistently recognized that requests for emails- in order to be reasonably particular- must identify, at minimum, the following four items:
>
> 1. Named sender;
>
> 2. Named recipient;
>
> 3. Time frame of six months or less; and
>
> 4. Particularized subject matter or set of search terms."

South Bend argues that Judicial Watch's initial request in this case did not include a subject matter or set of search terms. The city asserts that it invited the organization to amend the request to include a specific subject matter or search terms but Judicial Watch declined.

South Bend notes that Judicial Watch has established a pattern of refusal to work with the city on matters of public

access. Specifically, South Bend asserts from June 21, 2019 and June 23, 2019 it received seven records requests from Judicial Watch, with five specifically asking for email correspondence. Those requests were not amended, and a lawsuit was subsequently filed.[2]

South Bend maintains that all of the APRA requests it receives—nearly 3,000 in 2019—are processed through the city's law department, which only has one attorney and one administrative assistant dedicated to handling all of the requests. In an effort to save limited time and resources the city has consistently followed the reasonable particularity guidelines set forth by the Public Access Counselor.

ANALYSIS

The principal issue in this case is whether Judicial Watch's request for certain email records of South Bend Mayor Pete Buttigieg identifies with reasonable particularity the records the organization is seeking under the Access to Public Records Act.

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 § 5-14-3-1.5-1.

[2] The Public Access Counselor did not receive a complaint regarding this request.

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 South Bend is a public agency for the purposes of APRA; and thus, subject to the act's requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy the City's public records during regular business hours. Ind. Code § 5-14-3-3(a).

2. Defining Reasonable Particularity

The crux of this dispute is whether the request by Judicial Watch meets particularity standards set by APRA, our courts, and this office.

Under APRA, a request for inspection or copying "must identify with reasonable particularity the record being requested." Ind. Code § 5-14-3-3(a)(1).

Requiring reasonable particularity relieves a public agency from the guesswork of having to anticipate exactly what a requester is seeking. To borrow an idiom from our colleagues at the Hoosier State Press Association, a request should be more like a rifle less like that of a shotgun.

Although "reasonable particularity" is not statutorily defined, the Indiana Court of Appeals addressed the meaning of the phrase in two seminal cases. First, in *Jent v. Fort Wayne Police Dept.*[3], which involved a dispute about daily incident report logs, the court concluded that reasonable particularity "turns, in part, on whether the person making the

[3] 973 N.E.2d 30 (Ind. Ct. App. 2012).

request provides the agency with information that enables the agency to search for, locate, and retrieve the records." 973 N.E.2d at 34.

The second case specifically addressed emails and the sufficiency of search parameters. *See Anderson v. Huntington County Bd. of Com'rs*, 983 N.E.2d 613, (Ind. Ct. App. 2013).

The *Anderson* court essentially ratified a 2012 opinion of the Public Access Counselor pursuant to an underlying formal complaint between the two parties. In sum, that opinion began an ongoing effort by this office to pare down and identify the necessary factors of a particularized email request.

Notably, the Indiana Supreme Court denied transfer in both cases, which indicates the two cases could be read harmoniously.

South Bend correctly cites previous opinions by this office attempting to set forth essential components of request specificity. To the extent its denial and response rely on those opinions, South Bend is justified in doing so and will not be faulted in this case. Judicial Watch failed to apply the established criteria to its request.

These essential components are easy to quantify and qualify and do indeed serve a legitimate purpose. They amount to the "rifle" approach as opposed to a "shotgun."

Indeed each request should be considered individually. There is no "one size fits all" definition of reasonable particularity. In fact, this office has previously acknowledged the elements to be "largely context-specific, in that the generality or accuracy of those elements may fluctuate on a case-by-

case basis." *See Opinion of the Public Access Counselor*, 17-INF-17 (2017).

Here, however, the request does not expressly indicate subject matter or search terms. Plainly enough, this renders the request deficient on its face. What is more, Judicial Watch failed to narrow down the request upon invitation. South Bend did not slam the door of access shut, but left it cracked in case Judicial Watch narrowed its request.

Arguably, the subject matter of the emails in question is somewhat implicit. Nonetheless, because a subject matter is not independently identified as a separate component, it is unreasonable to expect a public agency to assume or infer a requester's intent. Moreover, identifying a subject matter should be the easiest of the four elements to define.

Moreover, our courts have also acknowledged that "[i]mplicit in Indiana Code § 5–14–3–3 is practicality." *Smith v. State*, 873 N.E.2d 197 (Ind. Ct. App. 2007). No more so than when beginning the public access process with a reasonable, practical, and specific ask. The burden remains with Judicial Watch to narrow the request and provide more particularized substance to the subject matter parameter.

As an aside, this office is well aware of the challenges facing South Bend during Mayor Buttigieg's candidacy for the Democratic presidential nomination. To its credit, the city has, by all accounts, performed admirably in keeping pace with the influx of public records requests it has received. To the extent the city has to rely on the technocratic elements referenced above to maintain efficiency in that regard is hardly a shortcoming. It does not appear to apply those factors in a draconian manner or to frustrate requesters.

Finally, it goes without saying that other exemptions to disclosure may very well apply once the emails are retrieved and reviewed.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the City of South Bend followed prior guidance of the Public Access Counselor and has complied accordingly.

Luke H. Britt
Public Access Counselor