

OPINION OF THE PUBLIC ACCESS COUNSELOR

SCOTT SWICK,
Complainant,

v.

TOWN OF DAYTON,
Respondent.

Formal Complaint No.
20-FC-30

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Dayton Town Council violated the Access to Public Records Act.¹ Cindy Marsh filed an answer to the formal complaint with this office. 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 March 2, 2020.

¹ Ind. Code § 5-14-3-1-10

BACKGROUND

This case involves a dispute over the use of a citizen's video camera and whether recorded video footage of a public meeting from that device ultimately became a public record.

On February 10, 2020, the Dayton Town Council held a public meeting. A video camera was placed in front of councilmember Stan Kyger. The camera was pointed outward from the council to record the audience. From Scott Swick's (Complainant) perspective, the camera appeared to be in Kyger's exclusive control.

Swick subsequently requested a copy of the video from the Dayton clerk-treasurer. Eventually the town denied Swick's request. According to the clerk-treasurer, the camera belonged to the wife of councilmember Stan Kyger. The wife of the council president – and the citizen responding to this complaint, Cindy Marsh – allegedly set the camera in front of Kyger to “monitor” the audience for bad behavior. This position is buttressed by a social media page administered by Marsh.

In her response, Marsh verified that she borrowed the camera from Kyger's wife, set the camera on the dais in front of the councilmember to monitor the audience – namely recently ousted council members and their supporters. Touting its effectiveness, she argues that as a private citizen, she is within her rights to record the meeting and it does not become a public record by virtue of her doing so. In any case, the recording was destroyed shortly after the goal of keeping the audience in line was accomplished.

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. The Town of Dayton is a public agency 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 Town’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a).

In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

2. Swick’s request

The crux of Swick’s formal complaint is that it appeared the camera was placed at the council’s direction and a council

member took custody of the camera following the meeting. Thus, he argues, the footage is subject to the APRA.

There does not appear to be a defect in the request. It was made in-person and in writing and specified the record with reasonable particularity.

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). Indiana courts have further clarified “received, retained, maintained, or filed by or with a public agency” as having elements of “possession, custody, or control”. See *Knightstown Banner, LLC v. Town of Knightstown*, N.E.2d 1127 (Ind. Ct. App. 2005).

There is no doubt that wives of public officials are not public employees, nor do they become agents of a political subdivision simply by virtue of being married to elected officials. Without more, they do not have the authority to take official action on public business, nor can they create a public record without express or implied direction.

There must be an element at play elevating a member of the public to official status. The court’s holding in *Knightstown* stands for the proposition that a private citizen can act on behalf of a public authority. “[D]elegating the

responsibilities of creating, receiving, and retaining [a document to a private citizen] does not thereby remove the document from the statute's definition of public document." *Id.* at 1134.

To be clear, while public participation alone does not create this relationship, surrounding circumstances certainly can.

Cindy Marsh's response describes the requisite factors creating an environment wherein she acts on behalf of the town. By her own admission, there can be no doubt she was serving in the capacity as a proxy of the Town of Dayton at the February 10 meeting. Based on the response, coupled with multiple social media posts, Marsh has chosen to position herself as a bailiff of town's proceedings. The council has impliedly and expressly ratified this position by not only designating her to serve as Dayton's videographer, but also saddling her with the responsibility of submitting a formal response in an adversarial administrative process.

Marsh is seemingly tasked by the council to maintain civility during its proceedings and ensure the audience is on its best, most genteel behavior. If this power has not been formally delegated to her, it is certainly implicit in the town's actions. Otherwise surely the town marshal would be doing the marshaling or the council would be keeping the order.

Likewise the unusual step of having Marsh respond to the formal complaint on behalf of the council. Normally, the public access counselor would not accept a response from a private citizen in response to a formal complaint. But since Marsh has so clearly been deputized as a surrogate member of Dayton's bureaucracy, it will be accepted as the town's official response. Although not particularly helpful to the

town's arguments – it posits no useful propositions, points, or authorities – it at least proves the Swick's claim for him.

The video was not created by an interested member of the public exercising their right to observe and record the proceedings of the Dayton Town Council. It was placed to supervise and control the conduct of other attendees on behalf of the council. It should have been maintained as a public record.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Town of Dayton violated the Access to Public Records Act by creating a public record (i.e., the recording), denying access to it, and destroying it.

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

Luke H. Britt
Public Access Counselor