

OPINION OF THE PUBLIC ACCESS COUNSELOR

DAVID M. ASKINS,
Complainant,

v.

BLOOMINGTON COMMON COUNCIL,
Respondent.

Formal Complaint No.
20-FC-77

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Bloomington Common Council violated the Access to Public Records Act.¹ The council's deputy attorney Stephen Lucas filed a response on behalf of the council. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the formal complaint

¹ Ind. Code § 5-14-3-1-10.

received by the Office of the Public Access Counselor on June 16, 2020.

BACKGROUND

On April 8, 2020, Dave Askins (Complainant) filed a public records request with the Bloomington Common Council (Council) seeking the following:

For the period, Dec. 15, 2019 to present I would like all notes and documents of any kind in the possession of Steve Volan related to, or subject to discussion during, any of the gatherings to which city councilmembers refer casually as “caucus.”

Included in this requested are the agendas for these gatherings. Included in this request are all email messages received by Steve Volan from Isabel Piedmont Smith, Sue Sgambelluri, or Dave Rollo, related to so-called “caucus” gatherings, for the relevant time period.

Also included in this request are all email messages sent by Steve Volan to Isabel Piedmont Smith, Sue Sgambelluri, or Dave Rollo, related to the topic of such meetings. Emails targeted by this request included at least those with key words “caucus,” “Crazy Horse,” “Gratzi” and “agenda.” Included in this request are any attachments to responsive emails and any other documents relied on in discussions at these “caucuses.”

On April 30, 2020, the Council responded to Askins. In the response, the Council asserted that a portion of the request lacked reasonable particularity, stated that there were no responsive records, provided some responsive records, and asserted that a search was ongoing for another portion of the request.

About a month later, Askins filed a formal complaint with this office asserting the Council violated the Access to Public Records Act (APRA) by denying certain portions of the request. In essence, Askins argues that the Council inappropriately applied guidance published by this office regarding requests for email records. He claims that his request contained enough information that the Council should have had no problem identifying, retrieving, and producing responsive records in a timely manner.

On July 16, 2020, the Council, through attorney Stephen Lucas, responded to Askins' complaint. The Council disputes Askins' claim that it violated APRA.

In general, the Council claims that the bulk of the information requested by Askins was generated in the members' capacity as a political party and are not public records. It argues the documents, emails, work product, etc. created in the course of political activities are nondisclosable.

The Council also notes problems with the specificity of Askins' request. It argues Askins' request was too general and he did not make efforts to narrow the scope of the document request.

ANALYSIS

1. The Access to Public Records Act

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) says “(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.*

There is no dispute that the City of Bloomington is a public agency for the purposes of the APRA; and thus, subject to the law’s disclosure requirements. Ind. Code § 5-14-3-2(q)(6). Therefore, unless otherwise provided by statute, any person may inspect and copy the city’s public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Even so, APRA contains both mandatory and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)–(b).

2. Denial based on the ODL caucus exemption

Central to this dispute is whether the records requested by Askins are public records at all. The Council argues that some of the records at issue here are not public records because the Council members created the records in their capacity as members of a political caucus—presumptively the Democratic Party—rather than members of the Bloomington Common Council.

Askins disagrees.

Although this not an Open Door Law complaint, APRA and the ODL overlap here based on the Council’s reliance on the ODL caucus exception as the authority for denying, at least part of, Askins’ request.

As an initial matter, it is important to observe that APRA governs access to public records and applies only to public

agencies as defined under the law. *See* Ind. Code § 5-14-3-2(q).

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.

Therefore, in order to qualify as a public record, a record must be created, received, retained, maintained, or filed in the course of the business of public governance.

The Council argues that they weren’t the city councilors during these gatherings but rather just members of a political caucus, which is not subject to the state’s public access laws.

Under the ODL, the term “caucus” means:

A gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussion designed to prepare the members for taking official action.

Ind. Code § 5-14-1.5-2(h). It is true that the state’s public access laws do not apply to political parties. At the same time, the Council cannot recast itself as a political party caucus for purposes of circumventing APRA, the ODL, or both. The law simply does not allow it.

The reason is simple: the Council, as a public entity, is neither the Democratic Party nor one of the party's organizations despite the individual councilors' uniform political party affiliation.

When a majority of the Council gather together for the purpose of taking official action—as statutorily defined—on public business—as statutorily defined—that is not a meeting of the state or local Democratic Party or one of the party's organizations.

On the other hand, if a majority of the Council were officers of the Monroe County Democratic Party or part of the Democratic Women's Caucus or something similar, then those meetings and associated records would not be subject to the public access laws.

The access laws, and this office, do not seek to regulate purely political activity. What can become troublesome, however, is when political activity and public business intersect and line between the two is blurred.

This office is statutorily required to narrowly construe the exceptions found in APRA and the ODL. *See* Ind. Code §§ 5-14-3-1; 5-14-1.5-1.

The purpose of a caucus is to vet and plot political party strategy. All discussions in a caucus should be framed through the clear lens of party ideology and activity. It is not an exception to the Open Door Law, really, because public business should not be implicated whatsoever. Political and public business are mutually exclusive, even if some discussions may have a common nexus.

Caucuses are not, however, an escape hatch from the Open Door Law. They are not an end-around to holding a public meeting.

This matter was recently discussed in *Informal Opinion of the Public Access Counselor 20-INF-1*, which is incorporated by reference and some of which will be reiterated here.

Indeed, *Evansville Courier v. Willner*, 563 N.E.2d 1269 (Ind. 1990), the Indiana Supreme Court observed that a political caucus is not transformed into meeting subject to full public scrutiny under Open Door Law merely “if the persons attending such meetings happen to constitute a majority of a governing body.” *Id.* at 1271.

A caucus is certainly a vehicle for taking official action on the *political party’s business*, which is why a caucus is not subject to the ODL. The goal of the ODL is to ensure the people are informed on the business of the public, not political parties.

A city’s legislative body’s purpose, however, is to carry out its roles and duties in accordance with Indiana Code section 36-4-6 in a public meeting. None of those enumerated powers are inherently partisan in nature; they are public.

Therefore to the extent any caucus purports to take official action on those duties germane to a governing body’s powers, it is a subversion of the Open Door Law. Conversely, a public meeting is not intended to include internal discussions of a political party’s strategy, methodology, or ideology in terms of its platform or strategy. Those are items for a caucus.

In sum, the Council cannot, consistent with the law, gather privately to take action on public business. The letter and spirit of the ODL prohibit that action. Public meetings and caucuses are horses of different colors with separate saddles and tack, even if the rider is the same.

3. Reasonable particularity

Another issue in this case is whether Askins' request meets the reasonable particularity standard set by APRA. 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).

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.*², which involved a dispute over daily incident report logs, the court concluded that reasonable particularity "turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records." 973 N.E.2d at 34.

Requiring reasonable particularity relieves a public agency from the guesswork of having to anticipate exactly what a requester is seeking.

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

² 973 N.E.2d 30 (Ind. Ct. App. 2012).

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.

Here, Askins' request meets the standard of reasonable particularity contemplated by APRA. Although the request is arguably a bit wordy, it contains enough information for the Council to search for and retrieve any responsive records. In effect, Askins used over 150 words to make what amounts to a request for anything and everything appear specific. A verbose request does not automatically or necessarily fail to meet APRA's reasonable particularity standard.

If the agency can reasonably determine what the requester is asking for and proceeds with a search, then it is enough to meet APRA's standard.

The parameters suggested by this office are rooted in practicality and remain flexible. They should not be so strictly applied to render the process impossible.

A request doesn't have a bowl a strike, it just can't be all over the lane and in the gutter.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Bloomington Common Council did not violate the Access to Public Records Act. At the same time, this office recommends the council proceed with the above suggestions.

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

Luke H. Britt
Public Access Counselor