
OPINION OF THE PUBLIC ACCESS COUNSELOR

ABDUL-HAKIM SHABAZZ,
Complainant,

v.

OFFICE OF THE ATTORNEY GENERAL,
Respondent.

Formal Complaint No.
22-FC-22

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Office of the Attorney General violated the Access to Public Records Act.¹ Advisory Division Chief Counsel John Walls filed an answer on behalf of the 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 February 14, 2022.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to public records related to the Office of the Attorney General's(OAG) decision to bar Abdul-Hakim Shabazz from a press conference in October 2021.

On October 28, 2021, Abdul-Hakim Shabazz (Complainant), the editor and publisher of IndyPolitics.org, hand delivered a public records request to the OAG seeking the following:

1. Any and all documents (including lists, reports, memos, e-mails or other compilations) regarding the credentialing of media that covers the Attorney General.
2. Any and all documents (including lists, reports, e-mails, memos or other compilations) describing the reasons for approving/denying media requests.
3. Any and all documents (including lists, reports, memos or other compilations) regarding the interviews Attorney General Rokita has done since being sworn into office in January 2021.
4. Any and all documents (including lists, e-mails, reports, memos or other compilations) regarding the denying of media credentials of Abdul-Hakim's Shabazz's/Indy Politics attendance of the October 14th news conference on robocalls.
5. Any and all documents (including lists, e-mails, reports, memos or other compilations) regarding Abdul-Hakim's Shabazz/Indy Politics since January 2021.

The OAG acknowledged Shabazz's request the same day. On November 4, 2021, the OAG informed Shabazz that his request did not meet the reasonable particularity standard under the Access to Public Records Act (APRA). The agency invited Shabazz to resubmit an amended request. The next day Shabazz replied with the following:

With respect to requests number 1, 2, 4 and 5, in the above correspondence, I am requesting all correspondence between the Attorney General and his Chief of Staff, as well as members of his press staff. The e-mails I am requesting are from six months prior to this date. With respect to requests number 3, I am requesting any media reports or summaries of media correspondence/interviews between the Attorney General and members of the Statehouse Press Corps as well as Indiana media.

The OAG acknowledged Shabazz's amended request. On January 4, 2022, Shabazz contacted the OAG asking for a status update, to which the office responded saying that the request was still pending.

Again, on February 6, 2022, Shabazz emailed the office seeking a status update and received a response four days later which stated, "that responsive and disclosable records would be sent when reviewed."

Notably, on February 7, 2022, Shabazz filed a federal lawsuit² against the Attorney General alleging violations of the First Amendment.

² *Abdul-Hakim Shabazz v. Todd Rokita, in his official capacity as Attorney General of the State of Indiana*, 1:22-cv-00268-JRS-MPB.

On February 14, 2022, Shabazz filed a formal complaint with this office alleging the OAG violated the Access to Public Records Act by failing to appropriately respond to his public records request within a reasonable amount of time.

Four days later, the OAG emailed Shabazz informing him that the office would not respond further to his records request because the request involves records directly related to the subject matter of his federal lawsuit against the attorney general.

On March 1, 2022, the OAG filed an answer to Shabazz's complaint with this office denying any violation of APRA. Specifically, the OAG argues that it must, as the State's law firm, manually review each document to ensure compliance with both APRA and the Indiana Rules of Professional Conduct. Thus, the agency argues that its response time to Shabazz's request is reasonable and warranted under the law.

Moreover, the OAG argues that APRA should not be used as a substitute for discovery when litigation is imminent or when the requestor and a state agency are parties to litigation. The OAG bases this argument on prior guidance from this office. Toward that end, the OAG concludes it is no longer obligated to respond to Shabazz's public records request and this office should consider the matter closed.

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 Office of the Attorney General (OAG) is a public agency for purposes of APRA; and therefore, subject to the law’s 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 OAG’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

3. Impact of federal litigation on APRA requests

The Office of the Attorney General argues the records Shabazz requested are directly related to the subject matter of his federal lawsuit against the Attorney General; and thus, the OAG contends it will not respond further to Shabazz’s request.

A person’s right to public records under the Access to Public Records Act is not affected by separate and still pending litigation in federal court. The Indiana Court of Appeals acknowledged this in its holding in *Kenter v. Indiana Public Employers’ Plan, Inc.*, 852 N.E.2d 565 (Ind.App.2006).

It is true, as the OAG asserts, that this office consistently advises the public and agencies that APRA should not function as a substitute for discovery when litigation is imminent or pending between the parties in *state* court.

This office discourages litigants from employing APRA for litigation discovery because the practice could—and likely would—muddle a process already governed by the Indiana Trial Rules, over which the court has exclusive jurisdiction. This office defers to the judiciary on these matters.

Since the existence of *federal* litigation on a separate matter is not an exemption or exception to disclosure under APRA, the OAG cannot, consistent with the law, base its denial of Shabazz’s request solely on the existence of that litigation.

3. Reasonable time

Shabazz argues that the OAG failed to comply with APRA’s reasonable time standard because the agency has not fulfilled his records request for several months. The OAG disputes Shabazz’s argument.

APRA requires a public agency to provide public records to a requester within a reasonable time after receiving a request. Ind. Code § 5-14-3-3(b). Notably, APRA does not define “reasonable time.”

Determining what is a reasonable time for production of records depends on the records requested and circumstances surrounding the request. Undoubtedly, certain types of records are easier than others to produce, review, and disclose. As a result, this office evaluates these disputes case by case.

Here, Shabazz filed his initial request on October 28, 2021. A week later, the OAG invited Shabazz to narrow his request to meet APRA's reasonable particularity standard, which he did on November 9, 2021. The OAG finished compiling the responsive records for review on January 14, 2022.

It is worth mentioning that Shabazz filed his initial request and his amended request for records with the OAG months ago. Undoubtedly, the subject matter is narrow. This is especially true when considering the scope of records maintained by the OAG and the agency's various divisions.

Once the search was completed, it likely would not have taken an inordinate amount of time to review, curate, and produce the documentation. Given that the OAG claims the materials were indeed already compiled even well before the lawsuit was filed, there has been ample time to fulfill the request.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Office of the Attorney General must disclose any of the public records requested by Shabazz that are not otherwise subject to a disclosure exception under the Access to Public Records Act as soon as practicable.

The existence of federal litigation is not an exemption or exception to disclosure, and the OAG has exceeded the reasonable time standard under Access to Public Records Act in this case.



Luke H. Britt
Public Access Counselor

Issued: March 22, 2022