
OPINION OF THE PUBLIC ACCESS COUNSELOR

THE INDIANAPOLIS STAR,
Complainant,

v.

BUREAU OF MOTOR VEHICLES,
Respondent.

Formal Complaint No.
22-FC-99

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging that the Bureau of Motor Vehicles violated the Access to Public Records Act.¹ General Counsel Daniel T. Shackle filed an answer on behalf of the BMV. 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 June 20, 2022.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute about whether the Bureau of Motor Vehicles (BMV) violated the Access to Public Records Act (APRA) by denying access to a recording of an internal, executive-level meeting.

On April 29, 2022, *The Indianapolis Star* (Complainant) (The Star), requested the following from the BMV:

A copy of the recording(s) of the BMV staff meeting Peter Lacy attended on Tuesday, April 26.

On June 1, 2022, the BMV denied the request. The BMV stated that the recording is excepted from disclosure under APRA based on the statute's deliberative materials exception.²

On June 20, 2022, The Star, through reporter Tony Cook, filed a formal complaint against the BMV. The Star alleges the BMV violated APRA because portions of the meeting likely did not address deliberative material, specifically an icebreaker and discussions of past performance. The Star relies on the provision in APRA that requires any public record having both disclosable and nondisclosable material to be separated and then disclosed. *See* Ind. Code § 5-14-3-6(a). The Star argues the BMV should have the technological capability to do so. It also offers public policy reasons for release of the material.

On July 11, 2022, BMV Chief Legal Officer Daniel Shackle filed a response on behalf of the agency. The BMV argues that the meeting was not subject to the Open Door Law

² Ind. Code § 5-14-3-4(b)(6).

(ODL); its organizers did not meet the definition of a governing body under the ODL and is not required to make any recordings public. The BMV cites a previous opinion of this office³ as support for the argument that discussions and actions that are not opinions or speculations can still be deliberative under APRA depending on the context. The BMV also argues that the recording could be deemed to be “personal notes,” which means their release could be discretionary. The BMV contends that APRA does not define “personal notes;” and thus, the definition is not limited to handwritten notes.

ANALYSIS

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. Further, 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 Bureau of Motor Vehicles (BMV) 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 BMV’s public records during regular business hours. Ind. Code § 5-14-3-3(a). Indeed, APRA contains

³ *Opinion of the Public Access Counselor*, 21-FC-191 (2021).

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

2. Meeting recordings

This opinion addresses a question of first impression for this office: Can recordings of internal staff meetings of public employees be withheld from a public records request under APRA's deliberative materials exception found at Indiana Code section 5-14-3-4(b)(6)? If so, is an agency required to separate the deliberative from nondeliberative portions of the recording.

In contrast to meetings of governing bodies under the Open Door Law (ODL),⁴ gatherings of internal public employees are not open to the public without invitation. While the staff meeting in question involved a meeting of internal employees, it did not involve a governing body as defined by the ODL.⁵

Even if the BMV staff meeting was conducted by a governing body of the agency, there is no requirement that it record its own meeting. If a governing body chooses to do so, that recording must be retained until minutes are subsequently ratified – the minutes being the official record of the board.⁶ Notably, however, recordings of internal staff meetings are not on any general or specific state agency retention schedule.

⁴ Ind. Code § 5-14-1.5-3.

⁵ Ind. Code §§ 5-14-1.5-2(b)(1-3).

⁶ <https://www.in.gov/iara/files/gr.pdf>, at GRADM-2 (“Delete recording or destroy storage media after relevant minutes are transcribed and approved.”)

Nonetheless, once a recording of any activity of a public agency is created by an employee, it does indeed become a public record, which would potentially be subject to disclosure.

3. Deliberative material

Because APRA includes numerous exceptions to disclosure, we turn then to the statute invoked by the BMV to withhold the recording. The BMV claims the record of the meeting is deliberative in nature; and thus, the agency has discretion to withhold it from disclosure.

Under APRA, deliberative materials include records that are:

intra-agency or interagency advisory...including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one's ideas, considerations, and recommendations on a subject or issue for use in a decision-making process.

The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. 766 N.E.2d at 12.

To withhold a public record from disclosure under APRA's deliberative materials exception, the record must be inter-agency or intra-agency records of advisory or deliberative material and expressions of opinion or speculative in nature.

What is more, consider the Indiana Court of Appeals conclusion addressing internal staff meetings, at least as the Open Door Law is concerned:

As originally enacted, the Open Door Law applied only to meetings at which "a majority of the governing body" of a public agency was in attendance. The legislature never intended Sec. 3 to apply to gatherings of agency employees conducting the "internal staff operations of public agencies." *See the Open Door Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 Val.U.L.Rev. 295, 309 (1979–80). Gatherings of employees of public agencies were not then and are not now specifically mentioned as being covered by the Act.

Indiana State Board of Health v. The Journal-Gazette, 608 N.E.2d 989, 991 (Ind.Ct.App.1993). In short, the courts in both cases do not place heightened probative value on internal discussions when government transparency is concerned. The conspicuous lack of mention of recorded internal staff meetings in the access laws is illustrative of the legislature's position as well.

The nature and purpose of internal staff meetings are generally deliberative by design. They are meant to present—or receive—opinions, ideas, speculations, or thoughts in the course of decision making. As the *Newman* court rationalizes, frank discussions lead to better quality decisions.

Holding this type of meeting in a vacuum is not an erosion of transparency but is important for an agency to conduct the preliminary steps of the government decision-making process. Courts are clear that internal staff should still enjoy the ability of floating ideas – both good and bad – outside of public scrutiny. While the result of a decision is certainly ripe for analysis and commentary, not necessarily so is the process that precedes it. This is much different than the decision-making process of an official governing body under the Open Door Law.

If the meetings were mandated to be recorded – or if existing recordings released – it could chill employees from being candid and forthright during those conversations.

4. Separation of material

The Star contends that even if portions of the recording qualify as deliberative under APRA, the nondeliberative segments of the recording should be released. APRA states the following:

If a public record contains disclosable and non-disclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying.

Ind. Code § 5-14-3-6(a). The BMV does not directly address whether the act of parsing out pieces of audio is practical. Even so, this office is leery of recommending that agencies take portions of a nonpublic meeting out of context from the remainder and disclose snippets upon request. Given the nature and purpose of any internal staff meeting such as this,

it is reasonable to interpret the entirety of the meeting as deliberative.

Additionally, APRA contains a provision that places an affirmative duty on public agencies to regulate against any material interference with the function of the agency in the discharge of its public access duties.⁷ While the invocation of this statute should be used sparingly and only when necessary, the release of internal meeting audio could erode the candid nature of employees frankly discussing matters among themselves and their superiors.

Finally, while the above analysis renders the argument moot, the BMV does contend that the recording could be akin to “personal notes” and excepted from disclosure under Indiana Code section 5-14-3-4(b)(7). While it is true that the term “personal notes” is undefined, we do not find that meeting footage rises to a plain, ordinary interpretation of that term.

⁷ Ind. Code § 5-14-3-7(a)

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Bureau of Motor Vehicles did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Issued: August 2, 2022