
OPINION OF THE PUBLIC ACCESS COUNSELOR

KRISTOPHER H. BILBREY,
Complainant,

v.

CITY OF WINCHESTER,
Respondent.

Formal Complaint No.
17-FC-269

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 Winchester (“City”) violated the Access to Public Records Act¹ (“APRA”). The City responded to the complaint through attorney Meeks Cockerill. 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 November 22, 2017.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Kristopher H. Bilbrey (“Complainant”) filed a formal complaint alleging the City violated the Access to Public Records Act by improperly denying him access to disclosable public records under the Act.

The circumstances surrounding Bilbrey’s public records requests—and ultimately this formal complaint—involve a project between Winchester and the Volunteers of America of Indiana (“VOAIN”) to open a new inpatient drug rehabilitation facility—*The Winchester House*— for mothers and expectant mothers with substance abuse disorders to receive treatment.

Bilbrey is staunchly opposed to the project.

On October 23, 2017, Bilbrey filed a written public records request with the City seeking the following:

1. Copies of ALL emails exchanged between Winchester City Mayor Shon Byrum and Winchester City Councilor Missy Williams. The emails would reference the Volunteers of America, bringing a proposed Drug Treatment Facility (referred to as the “Winchester House” or “Fresh Start Recovery”) to Winchester, the financing, the logistics, the process and so on. The emails would be From: Mayor Byrum or To: Mayor Byrum and From: Councilor Williams or To: Councilor Williams. During a time period of April 23rd, 2017 and October 23rd, 2017.
2. Copies of ALL emails exchanged between Winchester City Mayor Shon Byrum and Ran-

dolph County Commissioner Michael Wickersham. The emails would reference the Volunteers of America, bringing a proposed Drug Treatment Facility (referred to as the “Winchester House” or “Fresh Start Recovery”) to Winchester, the financing, the logistics, the process, the church property at 313 S. Meridian St. and/or buying the property and so on. The emails would be From: Mayor Byrum or To: Mayor Byrum and From: Commissioner Wickersham or To: Commissioner Wickersham. During a time period of March 1st, 2016 and September 1st, 2016.

3. Copies of ALL emails exchanged between Winchester City Councilor Missy Williams and the Volunteers of America Chief Operating Officer Shannon Schumacher. The emails would reference the Volunteers of America, bringing a proposed Drug Treatment Facility (referred to as the “Winchester House” or “Fresh Start Recovery”) to Winchester, the financing, the logistics, the process and so on. The emails would be From: Councilor Williams or To: Councilor Williams and From: COO Schumacher or To: COO Schumacher. During a time period of January 01st, 2017 and July 01st, 2017.

4. Copies of ALL emails exchanged between Winchester City Councilor Missy Williams and Volunteers of America President and CEO John von Arx III. The emails would reference the Volunteers of America, bringing a proposed Drug Treatment Facility (referred to as the “Winchester House” or “Fresh Start Recovery”) to Winchester, the financing, the logistics, the lease, the process and so on. The emails would be From:

Councilor Williams or To: Councilor Williams
and From: CEO von Arx III or To: CEO von Arx
III. During a time period of April 19th, 2017 and
October 19th, 2017.

On November 17, 2017, the City denied Bilbrey’s request. The City cited Indiana Code section 5-14-3-4(b)(6) and section (b)(5)(A) as the statutory authority for denying the request. As a result, Bilbrey filed a formal complaint with this Office alleging the City’s denial to be an APRA violation.

The City filed its answer to the formal complaint on December 13, 2017, denying that an APRA violation occurred in this case.

First, the City contends that Bilbrey’s request failed to identify with reasonable particularity—as required under APRA—the public records he is seeking. Specifically, the City challenges Bilbrey’s use of the phrases “[a]ll emails exchanged between” and “the processes and so on” in his request as evidence of deficient particularity.

Next, the City argues that it has discretion under Indiana Code section 5-14-3-4(b)(6) to withhold from disclosure the emails between Winchester Mayor Shon Byrum and City Councilor Missy Williams that reference the Volunteers of America Indiana (“VOAIN”) because those emails constitute deliberative material. The City claims that during time frame relevant to Bilbrey’s request, Mayor Byrum and Councilor Williams were negotiating with VOAIN to finalize a lease and development agreement for the project. What is more, the City claims these emails, as they pertain to the negotiations, are also excepted from disclosure under Indiana Code section 5-14-3-4(b)(5)(A). Winchester invokes the

same statute as the authority for withholding emails between Councilor Williams and VOAIN officials Shannon Schumacher and John von Arx III.

Lastly, Winchester claims it has no emails between Mayor Byrum and Randolph County Commissioner Mike Wickersham that are responsive to Bilbrey's request.

ANALYSIS

1. The Access to Public Records Act ("APRA")

Bilbrey argues that the City violated the Access to Public Records Act ("APRA") by improperly denying him access to public records.

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 City of Winchester is a public agency for purposes of APRA; and thus, is subject to the Act's requirements.

Therefore, unless an exception applies, any person has the right to inspect and copy the City's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, "public record" is broadly defined to mean:

[A]ny 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). Here, the City does not dispute that the emails requested by Bilbrey are public records under APRA.

Instead, the parties disagree about: (1) whether Bilbrey's public records request identified with reasonable particularity the records he wanted; and (2) whether the City had discretion under Indiana Code sections 5-14-3-4(b)(6) and b(5)(A) to withhold the requested emails.

1.1 Reasonable Particularity

The City argues that Bilbrey's public records request was not reasonably particular as required by APRA and, therefore, its denial of the request is appropriate under the Act. It is noteworthy that the City did not challenge the particularity of Bilbrey's request in its denial on November 17, 2017.

Indeed, APRA expressly requires all requests for inspection or copying to identify with reasonable particularity the record being requested. Ind. Code § 5-14-3-3(a)(1). "Reasonable particularity" is not defined within APRA; however, this Office and the Indiana Court of Appeals recognize that the inquiry turns, in part, on whether the person making the request provides the public agency with enough information to enable the agency to search for, locate, and retrieve the requested records. *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012); *see also Anderson v. Huntington County Bd. of Com'rs*, 983 N.E.2d 613 (Ind. Ct.App.2013) (holding a request for emails was not reasonably particular).

As it pertains to requests for emails, this Office interprets the definition of *reasonable particularity* to require the following elements:

1. Identified sender;
2. Identified recipient;
3. Reasonable timeframe; and
4. A specific subject matter and/or set of search terms.

These elements are largely context-specific and what constitutes a reasonably particular request for emails requires case-by-case basis analysis. Also inherent in the reasonable particularity analysis is a standard of practicality.

Here, based on the evidence provided to this Office, it appears Bilbrey crafted a set of parameters that allowed the City to determine that what he seeks falls within a discretionary exception to disclosure under APRA. Bilbrey appears to meet the elements of a satisfactorily specific request for email communication. He did not use vague or common words as search terms and each sender, recipient, and timeframe is accurately identified. The reasonable particularity hurdle has been cleared by the requester.

1.2 APRA's Exclusions and Exceptions

Once a request is crafted with reasonable particularity, the burden shifts to the public agency for disclosure, or alternatively, providing a justification why the production of documents is not necessary.

APRA provides both mandatory and discretionary exceptions to the general rule of presumptive disclosure. For instance, a public agency is prohibited from disclosing certain

public records unless disclosure is specifically required by state or federal statute or otherwise ordered by a court. *See* Ind. Code §§ 5-14-3-4(a)(1) to -(14). Simply put, these are APRA's mandatory exclusions to disclosure.

Additionally, APRA lists several types of records that may be excluded from disclosure at the discretion of the public agency. *See* Ind. Code §§ 5-14-3-4(b)(1) to -(27). Stated differently, these are APRA's discretionary exceptions to disclosure.

The disagreement, at least in part, as it so frequently tends to be, is whether the records at issue must be disclosed or able to be withheld under one of APRA's exceptions. Specifically, in this case, the parties disagree about whether the City of Winchester had discretion under APRA to deny disclosure of the emails requested by Bilbrey.

The ability to exercise discretion to withhold documents should be applied with precision and done so judiciously. A broad or blanket statement claiming all sought public records falls within a discretionary category is met with skepticism. Statutory non-disclosure is not merely a convenient mechanism by which to withhold documents from wary re-monstrators.

Although the two discretionary exceptions invoked by the City are valid, they are often used as a subterfuge to avoid the hassle and inconvenience of having to search for and produce records. Given the City's initial assertion that the requests did not meet reasonable particularity, the invocation of the two exceptions to disclosure seem like a presupposition at best and a pretext at worst.

Whether that is the case here is not a conclusion this Office generally draws. Rarely is the Public Access Counselor afforded an opportunity to scrutinize non-redacted or withheld information to make a determination about whether the public agency's nondisclosure is justifiable. Although that is a service this Office provides, it has not been utilized in this case. Therefore, we simply issue a strong recommendation that the City revisit the absolute application of the two exceptions to disclosure to decide if it is truly warranted and necessary. As noted in Indiana Code section 5-14-3-9(f), there are limits to the discretion afforded by the Access to Public Records Act and the choice to withhold is not a license to unnecessarily obfuscate. The release of public records begins with the presumption of disclosure.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the City of Winchester scrutinize the reasonably particular requests of the Complainant and apply any statutory non-disclosure justification (or not) consistent with the principles laid out in Indiana Code § 5-14-3-1.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor