



STATE OF INDIANA

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April 29, 2014

Robert S. Zaltsberg
C/o The Herald-Times
Bloomington, IN 47401

Re: Formal Complaint 14-FC-61; Alleged Violation of the Access to Public Records Act by the City of Bloomington

Dear Mr. Zaltsberg,

This advisory opinion is in response to your formal complaint alleging the City of Bloomington ("City") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The City has provided a response to your complaint via Ms. Margie K. Rice, Esq. The City's response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on March 27, 2014.

BACKGROUND

Your complaint dated March 26, 2014 alleges the City of Bloomington violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(a).

On March 6, 2014 and again on March 11, 2014, the Herald-Times served upon the City of Bloomington a public records request seeking information related to a former City employee and several private companies contracted for a capital works project. The City employee and contractors are under investigation by several law enforcement agencies.

The City partially satisfied your request; however, they withheld certain records specifically requested. The City based their denial upon the criminal investigatory records exemption found at Ind. Code § 5-14-3-4(b)(1). On March 18, 2014, you asked the City to reconsider the denial. On March 25, 2014 the City reissued the denial. Your contention seems to be that the records were originally created as disclosable public records and the investigatory records exemption should not capture previously generated public documents which would otherwise be available but for the subsequent investigation. In

its response, the City reiterates the criminal investigatory record exemption and also cites Ind. Code § 5-14-3-4(b)(25) and Ind. Code § 5-14-3-4.4(a).

DISCUSSION

The public policy of the 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.” See Ind. Code § 5-14-3-1. The City of Bloomington is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the City’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

I have opined on several occasions the criminal investigatory exemption is significantly broad and casts a wide net. Previous Public Access Counselors have found accordingly. The City cites several of those opinions and I see no reason to question their analyses. My concern is the exemption being applied too broadly – not only in the current instance, but state-wide. When I counsel law enforcement agencies on the issue, I recommend they separate the producible material from the non-disclosable material. It does not appear an attempt was made to do so in this case. If a public record contains disclosable and nondisclosable 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).

It appears the City has made a good faith effort to apply the law and their arguments are meritorious. But, I will caution them as I would any other public agency. The APRA exceptions, particularly the investigatory records exemption, are not tools for capturing any and all records which would possibly relate to a criminal investigation. The information would have to be germane to the crime – there must be a reasonable nexus to the investigation.

What is more, alleged crimes such as embezzlement of public funds are of significant public concern. The public has a vested interest in the stewardship of their tax monies. The release of investigatory records is discretionary - not confidential. Even if it is covered by an APRA exception, public policy may outweigh the purpose of withholding exempted records. I am suggesting this to the extent that the release of records would not compromise the integrity of the investigation, which is the intent of the exception.

CONCLUSION

If there are materials not germane to the investigation which could have been separated from the records compiled in the course of an investigation of the alleged crime, it is the Opinion of the Indiana Public Access Counselor the City of Bloomington has violated at least the spirit of the Access to Public Records Act, if not the letter of the law. Furthermore, although not mandatory, the City should reconsider the release of

information informing the public about the alleged embezzlement of funds. If it does not compromise the investigation itself, I would determine this to be best practice.

Regards,

A handwritten signature in black ink, appearing to read 'L. H. Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor

Cc: Ms. Margie K. Rice, Esq.