
OPINION OF THE PUBLIC ACCESS COUNSELOR

CHAD A. ZARTMAN,
Complainant,

v.

CITY OF WARSAW,
Respondent.

Formal Complaint No.
17-FC-174

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 Warsaw (“City”) violated the Access to Public Records Act¹ (“APRA”) and the Open Door Law² (“ODL”). The City responded to the complaint through City Attorney Michael L. Valentine. The response is enclosed for review. In accordance with Indiana Code § 5-14-5-10, I issue

¹ Ind. Code §§ 5-14-3-1 to -10.

² Ind. Code §§ 5-14-1.5-1 to -8.

the following opinion to the formal complaints received by the Office of the Public Access Counselor on July 18, 2017.

BACKGROUND

Chad A. Zartman (“Complainant”) filed two formal complaints against the City of Warsaw: one alleging a violation Access to Public Records Act; and the other alleging a violation of the Open Door Law. Each complaint will be addressed in turn.

In his first complaint, Mr. Zartman references a public records request submitted on May 17, 2017. In that request, the Complainant sought records of all donations made for The Warsaw Alley project. Of those donations, several were anonymous. The City refused to identify the anonymous donors relying on Ind. Code § 5-14-3-4(b)(15), which allows the identity of donors to remain anonymous upon request. The City uses an online donation portal called Patronicity to solicit funds from donors, anonymous or otherwise. The total fundraising efforts realized an amount of approximately \$56,000. Roughly five percent of those funds were donated anonymously. The City relies on Ind. Code § 5-14-3-4(b)(15) to continue to withhold the names of the donors.

The Open Door Law complaint also tangentially involves the Warsaw Alley project. In order to obtain matching funds from the Indiana Housing and Community Development Authority’s Creating Places grant, a project assistance agreement needed to be approved and signed by the mayor to present to the Board of Works. This approval was solicited over email rather than a public meeting. The Complainant contends this was a final action akin to a vote. Other email evidence appears to show that other final actions have

been taken over email as well by utilizing a “reply-all” approach to approve certain items.

The City concedes this was an inappropriate way of approaching approvals and clarifies its intent was not to obfuscate or hide issues, but was done out of convenience and efficiency.

ANALYSIS

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 Warsaw is a public agency for the purposes of the APRA. *See* Ind. Code § 5-14-3-2(n). Therefore, any person has the right to inspect and copy the City’s disclosable 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). A public agency is required to make a response to a written request that has been mailed within seven (7) days after it is received. Ind. Code § 5-14-3-9(c).

Anonymous Donations

Under APRA, a public agency has the discretion to shield the identity of an anonymous donor if the donor requests anonymity. *See* Ind. Code § 5-14-3-4(b)(15). This is a matter of first impression for the PAC office although it was tangentially addressed in Opinion of the Public Access Counselor 16-FC-229. When this office was first made aware of the Patronicity arrangement, I initially advised the Complainant that the names were disclosable *if the City had a record of*

the donors' identity. Typically, anonymous donations are made to a public agency for a specific purpose, i.e. a playground or a scholarship. Frequently the identity of the donor is unknown even to the agency. This was the first instance of a crowdsourcing arrangement this office has encountered.

Whether the legislature intended anonymous crowdsourcing for public works projects as part of Ind. Code § 5-14-3-4(b)(15) is subject to debate, but withholding those names does fall within the letter of the law. The danger with accepting donations of this sort, especially for public works projects, is the perception arises that a potential vendor or contractor may be given favorable status during the procurement process if a donation—even a small one—is fronted during the fundraising process. The public records request process is meant to edify constituents that their money and resources are being utilized in a way that is free from ethical conflicts and put to appropriate use. The receiving of funds may be completely benevolent and innocent, but I do not begrudge the Complainant for being skeptical.

Therefore, while the City does not appear to have erred in applying Ind. Code § 5-14-3-4(b)(15) in this instance, I encourage public agencies to withhold names of anonymous donors sparingly, and only where absolutely necessary, to avoid the perception of impropriety.

E-mail Approvals

It is the intent of the Open Door Law that the official action of public agencies be conducted and taken openly, unless

otherwise expressly provided for by statute, in order that the people may be fully informed. Ind. Code § 5-14-1.5-1.

Technological advances have made it all-too-easy for public employees and officials to take advantages of gaps and loopholes in the access laws to find shortcuts to doing business. Resourceful attorneys and public officials can often find ways to exploit those loopholes. Email is one of those mechanisms. While communicating over email can be a useful tool for the dissemination of information, public officials must be mindful not to take final action over emails. *See* Opinions of the Public Access Counselor 17-FC-113 and 13-FC-324. The Open Door Law, however, is to be construed liberally in favor of access; and therefore, its ambiguities are construed conservatively.

The City appears to have recognized that approving matters over email erodes the purpose of the Open Door Law, which is to inform the citizenry of the goings-on of government and the decision-making process. I can appreciate that the approvals were done to increase convenience and efficiency. It is true the access laws are not convenient and efficient. But those inconveniences and inefficiencies are critical to good governance and democracy. Expediency is sacrificed for transparency and accountability. After speaking at length with the mayor and city attorney, I am confident the City will be mindful of these considerations going forward.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the City of Warsaw has not violated the Access to Public Records Act; but has violated the Open Door Law which it has now remedied by changing practices.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the printed name of the Public Access Counselor.

Luke H. Britt
Public Access Counselor