
OPINION OF THE PUBLIC ACCESS COUNSELOR

SOUTH BEND TRIBUNE,
Complainant,

v.

CITY OF SOUTH BEND,
Respondent.

Formal Complaint No.
19-FC-82

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 South Bend violated the Access to Public Records Act.¹ Assistant City Attorney Danielle Campbell Weiss filed an answer on behalf of the city. 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 September 10, 2019.

¹ Ind. Code § 5-14-3-1 to 10.

BACKGROUND

This case involves a dispute over access to records related to a contract for towing services between the City of South Bend and a private contractor.

On August 7, 2019, Christian Sheckler, a reporter for the *South Bend Tribune*, filed a public records request with the City of South Bend seeking the following:

Records of any and all billings/collections of fees from individuals by city-contracted towing companies for services related to city-initiated tows of vehicles in the years 2016 through 2019 to date. As towing crashed, illegal, or abandoned vehicles is a city function, carried out on behalf of and under contract with the city, such information is a public record. The records I am seeking include, but are not limited to:

Bills, invoices, receipts, collection letters/emails, and records of all balances, paid or still outstanding, of individuals whose vehicles have been towed by city-contracted towing companies in the above-mentioned years.

Records from the above time frame of vehicle titles signed over by owners of towed vehicles to city-contracted towing companies in lieu of payment for such services, as well as records of revenue from the sale and/or auction and/or scrapping of those vehicles.

Records from the above time frame of all city audits/reviews/reports on financial records, practices, and procedures of towing contractors.

South Bend acknowledged Sheckler's request the next morning by email. Over the next several weeks, the city contends that it conferred with several employees and departments including the South Bend Police Department and the

Board of Public Works to determine whether any responsive records existed.

On September 6, 2019, South Bend issued a letter to Sheckler enclosing the records regarding fees that SBPD charged for impounds from January 1, 2016 through August 7, 2019. The city explained that the other records requested by Sheckler were not “created, received, retained, maintained, or filed with or by the City of South Bend, or otherwise did not exist.”

Sheckler filed a formal complaint against South Bend on September 9, 2019. In essence, Sheckler argues that billing records for towing services are disclosable public records because the services are performed in accordance with a contract with the city, which requires the company to maintain separate records in connection to the services it provides the city and make those records available to the city upon request.

South Bend disputes Sheckler’s claim that its denial constitutes a public access violation.

First, the city contends that the billing records of fees collected or charged by ASAP Towing & Recovery for towing services performed in accordance with the contract are not public records for purposes of the Access to Public Records Act.

Second, South Bend argues requiring the city to produce the requested records would constitute a substantial deviation from APRA’s purpose and from the precedents established under the act, which would have adverse consequences for Indiana local governments.

Third, South Bend notes that because of the volume of invoices, production of the requested records—if it can be done at all—would be extremely difficult, time consuming, and draining on ASAP and city resources.

ANALYSIS

The principal issue in this case is whether the billing records of fees collected or charged by the towing company in accordance with a contract with the City of South Bend are public records for purposes of the Access to Public Records Act.

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 § 5-14-3-1.5-1.

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.” *Id.* The City of South Bend is a public agency for the purposes of APRA; and thus, subject to the act’s requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy the ISP’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Here, Sheckler requested billing public records of fees collected or charged by towing companies for towing services

performed pursuant to agreement for police towing services.” South Bends argues the records are not public records for purposes of APRA.

2. Defining Public Record

The crux of this dispute is whether the towing records requested by Sheckler are public records for purposes of APRA.

Under APRA, “public record” means:

any 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 parties agree about the existence of the towing records. Even so, South Bend argues that the documents are not public records as defined under APRA. The city argues that it is “undisputable that the City did not create, receive, or maintain the records at issue, nor were they filed by or with the City.” Sheckler and the *South Bend Tribune* disagree.

2.1 Created, Received, Retained, Maintained

As noted above, in order for a document to constitute a public record for purposes of APRA, it must be created, received, retained, maintained, or filed by or with a public agency.

Based on the information presented, the determinative issue is whether South Bend *created* the relevant records for purposes of APRA or *receives* or *maintains* them.

APRA does not define the term “created.” There are indeed instances when a third-party contractor or vendor can be in the shoes of a public agency as a ‘state actor’ and be the custodian of public records. *See Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005). The operative consideration in these cases is whether the records were created on behalf of the government.

Typically, goods or service contracts like towing agreements do not involve the creation of public records. The internal operational documentation of the third party stays in-house and there is no legitimate business purpose for giving them to the contracting public agency thus considering them public records.

South Bend’s policy argument is well-received in that an overarching policy statement declaring third-party records to be public is troublesome. This opinion should not be construed to suggest that every document generated by a local government contractor is subject to APRA.

The distinguishing factor in this case, however, is the contractual language itself in Clause 10 of the Requirements Section of the Agreement:

10. Records. The Towing Company shall at all times maintain separate and adequate records in connection with the Towing Service it provides to the City and shall make such records available to the City upon request.

The clause also enumerates the types of records the company is contractually required to maintain separately on the city's behalf. The list includes the types of records requested by Sheckler. Additionally, this language is mirrored in the Records Maintenance section of the initial Request for Proposal ("RFP") before the contract was awarded.

The contract and RFP puts potential bidders and ultimately the parties on notice that the records could be requested by the City. Furthermore, the contract and RFP are public documents thereby putting the public at large on notice that the City has a measure of dominion over those records and could become public at any time.

As a result, it is reasonable for the *South Bend Tribune* to presume the City of South Bend could reach out to the towing operator and gather its records pursuant to the contract. It is also reasonable to presume that the City gathers those records periodically in the usual course of business.

It is true that reasonable minds can differ on the inflection point at which the records are "received" by the agency. The terms received and maintained are used in the past tense in the statute. Therefore the inflection point is their creation.

The fact remains that the records would not exist but for the parties' contractual relationship. They are expressly mandated to exist pursuant to the agreement. Because the records are to be created, separated, and maintained for the express benefit of the City of South Bend *by contract*, one would have to interpret the agreement and the APRA very narrowly to ratify the City's position – something this office is disinclined to do.

That stated, if South Bend's assertion is accurate that over 10,000 responsive invoices exist, this office also recommends the *South Bend Tribune* narrow the request. The request itself is a big ask. Seeking any and all billing and collections records does not meet particularity standards in all probability.

The City is in the best position to determine what types of records would best satisfy the request, or alternatively, work with the Sheckler to find a balance that does not overburden the City or the towing company while still maintaining transparency.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the City of South Bend created an expectation that records, which would otherwise not normally be public documents, became so through contractual language. Because the records request itself lacks a measure of specificity, a hard denial is not appropriate, yet an invitation to narrow the request would better serve the circumstance.

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

Luke H. Britt
Public Access Counselor