
OPINION OF THE PUBLIC ACCESS COUNSELOR

KENNETH L. BIRKEMEIER,
Complainant,

v.

BROWN COUNTY BOARD OF COMMISSIONERS,
Respondent.

Formal Complaint No.
20-FC-131

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Brown County Board of Commissioners (Board) violated the Access to Public Records Act.¹ Commissioner Diana Biddle filed an answer on behalf of the Board. 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 21, 2020.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to construction contracts involving the Brown County government and the Indiana Department of Transportation (INDOT).

On July 13, 2020, Kenneth Birkemeier (Complainant) mailed separate public records requests to the Brown County Highway Department and the Board, both seeking the following:

The most recent work-in-process construction cost and expense report, as it relates to Bridge Number 046-11-013116C Span B currently under construction on Salt Creek. Included in [this report] would be all Contracted costs (or if contracts not completed the estimates). Itemized percentage of completion and third column of itemized costs to date.

The Complainant alleges that he never received a response to his request and that during a September 2, 2020 Board meeting when inquiring about the County's liability he was informed by Commissioner Biddle that a new contract was in place eliminating County liability. During that meeting Mr. Birkemeier requested a copy of that new contract. That request was also submitted via an email sent to Commissioner Biddle. Again, the Complainant claims that he never received a response to either of his requests.

On December 9, 2020, Commissioner Biddle, via email, informed this office that the Complainant had been provided a copy of the original Salt Creek Bridge Agreement. However, sometime after that, INDOT added the removal and reconstruction of the trail bridges to a state contract for the construction of a bridge replacement project over Eel River in

Clay County. This means that there would be no separate agreement for the Salt Creek Trail Bridge, and that Brown County does not possess any records responsive to the Mr. Birkemeier's request since all of the information is now included in the INDOT agreement for the Eel River Bridge replacement project. Ms. Biddle suggests that the Complainant submit his request with INDOT since that agency is most likely to have the information for which he has expressed interest.

ANALYSIS

The key issue in this complaint is whether the Access to Public Records Act requires a contract to be produced pursuant to a request and when that request should be fulfilled.

1. The Access to Public Records Act

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.

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." Ind. Code § 5-14-3-1. Brown County 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 Brown County Board of Commissioner's public records during regular business hours. Ind. Code § 5-14-3-3(a). Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)—(b).

2. Reasonable timeliness

A requester should expect to receive public records – or a denial thereof – within a reasonable time if an agency accepts a request. Ind. Code § 5-14-3-3(b). The term reasonable time is not defined but very much is fluid based upon circumstances.

In this case, the request for the bridge agreement materials was submitted on July 13 and the original agreement on September 3. A lack of response prompted the Complainant to file his formal complaint on September 18.

While the COVID-19 event has turned the public sector, to a large degree, into a measure of disarray, public access has not been halted, merely modified. This office is cognizant of inevitable delays in the process, but that does not mean requests can be ignored. Public record requesters are still entitled to a least an acknowledgement of a request within a reasonable time. If anything, this assures them that a request does not disappear into the ether of bureaucracy.

Even if a denial is appropriate – based upon an exemption to disclosure or the non-existence of a record – a requester has an expectation of timely notification.

Ultimately, it appears as if the request was fulfilled and the Commissioners satisfied their burden of an explanation to

this office. Nevertheless, this opinion can serve as a friendly reminder that, even in these times of uncertainty, public access remains as essential as ever.

CONCLUSION

Based on the foregoing, it is the Recommendation of the Public Access Counselor that the Brown County Board of Commissioners heed the foregoing and integrate public access into its priorities.

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

Luke H. Britt
Public Access Counselor