

## OPINION OF THE PUBLIC ACCESS COUNSELOR

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ROBERT COTTON  
*Complainant,*

v.

CITY OF VALPARAISO  
*Respondent.*

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Formal Complaint No.  
20-FC-179

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the City of Valparaiso violated the Access to Public Records Act.<sup>1</sup> Attorney Patrick Lyp, filed an answer on behalf of 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 December 30, 2020.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

This case involves a dispute over access to records related to a housing study initiated by the City of Valparaiso.

In January 2019, the Valparaiso City Planner issued a Request for Proposals soliciting bids to conduct a housing study. This was done at the behest of the mayor to determine planning for housing growth. The City's Board of Works ultimately approved an agreement between the city and a vendor, which the parties executed in October 2019. Notably, neither the mayor nor the city planner from 2019 is currently in office.

It is unclear exactly what kind of data and recommendations are contained in the housing study, however, Valparaiso intends on making it public in the first quarter of 2021.

On December 7, 2020, Robert Cotton (Complainant), a Valparaiso council member, requested "all documents tendered to the city that pertain to our municipally commissioned and paid for comprehensive Housing Study." The city denied Cotton's request on December 24.

The City argues its denial is appropriate based on the Access to Public Records Act's (APRA) deliberative materials exception to disclosure because the records are speculative material relied upon by the Mayor in the decision making process. The city considers Cotton's request to be made in his capacity as a private citizen as opposed to a council member. On the other hand, the city contends the request was intended to undermine the study and for Cotton's furtherance of self-promotion.

This office received Cotton’s request on December 30. He argues, to a degree, that as a council member, he should be privy to the study’s analytical documents on behalf of his constituents as they were those who ultimately funded the study.

## **ANALYSIS**

### **1. The Access to Public Records Act**

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. The City of Valparaiso is a public agency for purposes of APRA; and therefore, subject to the law’s 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 City’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a); -(b). This case largely involves APRA’s deliberative materials exception.

### **2. Deliberative materials exception**

Under APRA, deliberative material includes records that are:

intra-agency                      or                      interagency  
advisory...including material developed by a  
private contractor under a contract with a public  
agency, that are expressions of opinion or are of

a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Deliberative materials include information that reflects, for example, one's ideas, consideration, and recommendations on a subject or issue for use in a decision making process. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. 766 N.E.2d at 12.

In order to withhold a public record from disclosure under Indiana Code section 5-14-3-4(b)(6), the documents must be interagency or intra-agency records of advisory or deliberative material and are also expressions of opinion or speculative in nature.

### **2.1 Cotton's request**

As an initial matter, it should be noted that this office has an informal policy that it not publicly publish disputes between municipalities or public officials. It is handled offline, usually in letter form. Nonetheless, this issue warrants some comment as it is a foreign concept, at least in recent history, that the deliberative material exception is involved between branches of a municipality.

Furthermore, this office is not privy to the historical and political interactions between Cotton and the City, a consideration very much at stake herein.

The deliberative materials exception exists to allow sound decisions to be made before presenting a product that is ripe for public consumption. The public gets to scrutinize the decision for sure, but the deliberations leading up to that decision can be withheld in order to preserve intellectual integrity.

In this case, it follows that the public release of the housing study is the inflection point. That is the fruit of the labor. The development of the work product is the deliberative part. Because this exception applies to contractors, the city's vendor is able to develop the study, in conjunction with the city, until the time comes to release it publicly.

Generally speaking, however, Cotton's points are well-taken that a city council and a municipality are part of the same team, working for the taxpayer. To that end, this office has indeed always advocated for the free-flow of information between public officials and offices. This fosters better decisions overall. If a city council is to make good budgetary decisions for funding city projects, it stands to reason that they be privy to the yield of the work to a reasonable degree, even if it not yet publicly disclosed.

Many municipalities often work that way. The council and city executive operate in tandem on projects. There is a harmonious relationship between the two branches and the municipality is a cohesive unit, sharing information germane to critical decision-making functions.

Other times there is dissonance, either ideologically, politically, or personally. That is not an indication of a malfunctioning municipality by any means. It's just the reality of the bureaucratic process. Therefore, some public

officials may be more hesitant to share information with those they view as political or ideological rivals. They may feel that an exchange of records might harm the decision-making process if information is leaked prematurely. It appears as if potential leaking may be the operative consideration by the city.

This is very difficult, if not impossible, for the public access counselor to regulate.

Nevertheless, this office counsels officials to invoke discretionary exceptions to disclosure judiciously, and only when truly necessary to preserve the integrity of a decision. That is matter of internal governance.

Finally, it is important to note that deliberative materials are not confidential under APRA. The City has the discretion to withhold or disclose the records. And any invocation of a discretionary exception may not be for arbitrary purposes.

## **RECOMMENDATIONS**

Based on the foregoing, it is the opinion of this office that the City of Valparaiso has the discretion to withhold the material in question. At the same time, this office is unsure that this is the right course of action in this instance. Therefore, it requests the City reevaluate its decision to share the contents of the study with a city council member before its release to the public.



Luke H. Britt  
Public Access Counselor