
OPINION OF THE PUBLIC ACCESS COUNSELOR

DAVE ASKINS,
Complainant,

v.

BLOOMINGTON CITY COUNCIL,
Respondent.

Formal Complaint No.
21-FC-24

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Bloomington City Council (Council) violated the Access to Public Records Act.¹ The Council filed a response on behalf of the agency. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the

¹ Ind. Code § 5-14-3-1-10.

formal complaint received by the Office of the Public Access Counselor on February 17, 2021.

BACKGROUND

This case involves a dispute over access to emails exchanged between members of the Bloomington Common Council.

In *Opinion of the Public Access Counselor 20-FC-77*, this office opined that the practice of the Council's caucusing to discuss public business was contrary to the Open Door Law and the Indiana Supreme Court's holding in *Evansville Courier v. Willner*, 563 N.E.2d 1269 (Ind. 1990). As such, records germane to public business that may have been transmitted under the auspices of a caucus-in-name-only are public record potentially subject to inspection and copying pursuant to the Access to Public Records Act.

Dave Askins (Complainant) had submitted a public records requests seeking emails associated with those gatherings in April 2020.

Notably, 20-FC-77 was delayed significantly through no fault of either party. It was an administrative oversight on the part of this office due to the COVID fallout. In any case, when the opinion was released in December, the Council released its response to Askins' request in late January.

Askins takes exception to the response arguing several points. First, personal email addresses of councilmembers used to conduct public business were redacted without citation. Additionally, Askins argues the deliberative materials exception, cited by the Council to withhold certain material, does not apply to public officials. Moreover, his complaint

cites the unreasonable delay in the production of the documents from April until January and any particularity argument initially made was in bad faith on the part of the Council.

The remainder of the complaint reiterates the conclusion of 20-FC-77 and argues the production of documents was proof positive of an Open Door Law violation due to the inappropriate caucus. Namely, the records demonstrate the Council president was selected to be president during the caucus when it should have taken place in an open meeting.

On February 17, 2021, Askins filed his complaint shortly after the responsive records were released.

For its part, the Council argues its response to the records request was appropriate and timely in that any redactions were made pursuant to statutory exemptions and that any delay was due to the pending advisory opinion in 20-FC-77. In regard to the personal email addresses used by the council members, they were omitted as they were determined to fall outside the scope of the request and they offered no probative value. As for the caucus issues, the Council believes this office narrowed the scope of existing authority but will comply with PAC guidance going forward.

ANALYSIS

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) says “(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.*

There is no dispute that the City of Bloomington is a public agency for the purposes of the APRA; and thus, subject to the law’s disclosure requirements. Ind. Code § 5-14-3-2(q)(6). Therefore, unless otherwise provided by statute, any person may inspect and copy the City’s public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Even so, APRA contains both mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)–(b).

2. Advisory opinion 20-FC-77 and caucuses

The current office of the public access counselor has placed a premium on education through training and published guidance. The formal complaint process, while adversarial in nature, is intended by the current officeholder to be instructive as opposed to adversarial; not punitive or antagonistic. To the extent some language is heavy-handed to emphasize a particular point or clarify a concept is a rhetorical device used judiciously.

In any case, the opinions published are to address a particular situation administratively so that parties know their rights and obligations. If a complainant chooses to use the opinion as a vehicle for litigation, so be it, but this office has a short memory. To that end, it does not regularly litigate past issues or pile on agencies that are finding its legal footing.

And so it is here. It is the understanding of the public access counselor that the guidance given by the current legal representation for Bloomington may be an about-face on some issues than prior Council lawyers. It has been heartening that the Council attorneys have reached out for guidance. While we may not always see exactly eye-to-eye, it is always a robust intellectual discussion.

That stated, this office does not believe the City Council is operating in bad faith, but merely adjusting to new counsel as it moves forward compliance-wise. “That’s the way we’ve always done things” is a terrible way to govern, so their efforts are appreciated.

The information provided has indicated there are some issues to explore further, but I believe the Council has received the message that public business in caucus clothing is contrary to law and precedent.

Even so, this office does not believe that any case law has been narrowed by prior holdings, but simply applies the courts’ logic to facts presented. All of the guidance the PAC has provided is in lockstep with court precedent and the Open Door Law: appointments of officers and members of other governing bodies and committees is public business and not politics. These members in their official capacities serve the community of Bloomington and not the Democratic Party. Full stop.

Nonetheless, this office is simply uninterested in events that occurred a year and a half ago other than establishing a baseline for the remainder of this discussion. 20-FC-77 speaks for itself and is inarguably clear-cut.

3. Reasonable time, email addresses, and deliberative materials

Using the above as a framework, the Council took heed of that guidance and responded to the public records request portion of that situation.

As previously mentioned, any reasonable timeliness obligation under Indiana Code section 5-14-3-3 in that production was the result of this office and not the Council. It will not be cited herein for waiting for the outcome of that advisory opinion.

In spite of the production, the Council redacted email addresses that council members used to conduct public business. Whether they intended to use them for political purposes or otherwise, messages were sent on those accounts regarding public business.

This issue was recently addressed in Opinion of the Public Access Counselor 19-FC-2:

...there is no exception to withhold personal email addresses contained in an email.

When using a private email account for public business, a public employee runs the risk of exposure of that personal email address. The Access to Public Records Act does not recognize an expectation of privacy for such information. In any case, a request for a public record contemplates the four corners of a document. This includes all

of the content and not just the body of an email, unless another compelling reason can be given.²

This office agrees with Askins that the personal email addresses should have not been redacted. While the Council argues they are not probative, the accounts use certainly reveal how public business is being conducted. That is enough to be included.

As for advisory or deliberative materials, this office has considered the issue *ad nauseum*. In all of its conclusions, there has never been a finding that the exception does not apply to public officials or members of governing bodies. It is not hinted at or contemplated in the definition of deliberative materials:

Records that are intra-agency or interagency advisory or deliberative material, 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). While robust, substantive policy work should not be conducted over email as a group, there is no prohibition on back-and-forth emails that would fall under this definition. It should be used as sparingly as possible but members can exchange ideas and opinions over email so long as it does not rise to a *de facto* discussion.

² While not binding, this case was also litigated in Marion County Superior Court, *Martin v. Office of the Attorney General*, 49D13-1907-MI-026838 (2021) where the trial court affirmed the PAC's advisory opinion and adopted his findings.

An important fail-safe to ensure email is not being used excessively is the quality of discussions during the meeting itself. For example, if a certain individual was appointed to a board or a position, the reasons why should be abundantly clear. If a vote is just a perfunctory exercise, the entire point of the Open Door Law is eroded.

Assuredly, the public has the right to see these discussions during an open meeting, but that does not mean the membership of a board cannot deliberate between meetings – just not as a simultaneous majority.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Bloomington Common Council needs to un-redact the personal email addresses of the council members who use them pursuant to public records requests but can cite any relevant privilege in a non-arbitrary and judicious manner. Moreover, it should continue to reserve the caucus exception for *political strategy* gatherings.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor