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## OPINION OF THE PUBLIC ACCESS COUNSELOR

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MORGAN KELLER,  
*Complainant,*

v.

CITY OF MARION,  
*Respondent.*

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Formal Complaint No.  
24-FC-54

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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 Marion violated the Access to Public Records Act.<sup>1</sup> Corporation Counsel Michael Hotz 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 July 23, 2024.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

On June 28, 2024, Morgan Keller (Complainant), filed a public records request, seeking records regarding the City of Marion's (City) media contact policy for employees.

The City replied that same day acknowledging the request and advising they would respond within two weeks. On July 15, Keller was given notice that a document was available for pick-up.

Keller went in person to retrieve the document, however, was told she would be emailed the document instead. Nonetheless, the next day Keller's request was denied saying it lacked specificity. Even still, if it were searchable, the City claimed it would be denied. The City did not provide an exact subsection for this potential denial.

Keller contends she was entitled to a more sound denial and filed her complaint on July 23, 2024.

The City responded to Keller's complaint on August 7, 2024. It argues that Keller's request was overbroad based on the Access to Public Records Act's reasonable particularity standard.

Additionally, the City seemingly refers to Indiana code section 5-14-3-4(b)(6), the "deliberative materials" exception to telegraph an eventual denial even if material could be retrieved.

## 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 Marion is a public agency for purposes of APRA; and therefore, is subject to 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).

At the same time, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

This case involves the applicability of the appropriate denial protocol; reasonable particularity; and as the deliberative materials exception.

## **2. Statutorily guidance on denials**

While disclosure is the presumption under the Access to Public Records Act<sup>2</sup>, there are, of course, exceptions to disclosure.

If a record falls within one of those exemptions, Indiana code section 5-14-3-9 governs denials. In short, a written denial must be accompanied by:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial.

Here, the entirety of section 4 of the APRA was cited as reason for the denial – a section that includes over five dozen specific reasons for withholding documents. Eventually, the City invoked subsection (b)(6) as reason for the denial, however, Keller was entitled to a written denial with that statute at the time.

Curiously, however, Keller was advised that there was a document available and to come to City Hall to retrieve it. Presumably this was the media personnel policy. The public access counselor is certainly not the customer service police, but telling a constituent to physically appear only for the document to vanish is not the kind of three-card monte suitable for a public records request.

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<sup>2</sup> Ind. Code § 5-14-3-1

What is more, the City retroactively told Keller that her request was not specific enough (yet a document was found!). This may be true in terms of the communication piece, but she was teased with a document that then suddenly went missing when she showed up on site. She should have been told at the outset her request lacked reasonable particularity, not used as a post-script to the process.

### **3. Deliberative materials**

Eventually, Keller was denied her request for the disappearing policy document.

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). 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. *Id.* at 12.

The *Newman* case involved a prosecutor's manual instructing staff how to offer plea bargains. It was a strategic document and the Court of Appeals found:

If the policies are the final controlling directives to deputies regarding disposition of cases, then the policies are *not* predecisional and *not* privileged under the [Public Records] Act. If the policies are communicated to deputies who have discretion and authority to make final decisions on cases, then the policies are predecisional, and are privileged under the [Public Records] Act.

Id. at 12. Here, however, the policy in question is not one that would usually be considered strategic or part of the decision-making process at all. While we have not reviewed the policy, it strains credulity that a personnel policy would have any probative decision-making value in the same regard as the *Newman* material. It presumably informs rank-and-file employees on the City's preference in handling media communication but likely does not have any speculative or opinion-based press relations stratagems in a one-sheet memo.

## **CONCLUSION**

Based on the foregoing, it is the opinion of this office that the City of Marion's denial of the Complainant's did not pass statutory muster. I also express skepticism that the deliberative material exception to disclosure applies to the document that the search yielded and recommend its release.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized, flowing script.

Luke H. Britt  
Public Access Counselor

Issued: November 12, 2024