STATE OF INDIANA

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July 25, 2016

Mr. Joseph Hero
11723 South Oak Ridge Drive
St. John, Indiana 46373

Re: Formal Complaint 16-FC-150; Alleged Violation of the Access to Public Records Act by the Lake County Council

Dear Mr. Hero:

This advisory opinion is in response to your formal complaint alleging the Lake County Council ("Council") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. The Council has responded via Mr. Ray Szarmach, Esq. His response is enclosed for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on June 27, 2016.

BACKGROUND

Your complaint received June 27, 2016 alleges the Council violated the Access to Public Records Act when it denied your request. On June 21, 2016, you hand-delivered a request to the Lake County Council's Office for "all emails sent or received by Dan Dernulc between January 1, 2016 and June 21, 2016." Your request was subsequently denied by the Council on June 22, 2016.

In its denial, Mr. Szarmach stated Mr. Dernulc is not a public agency and therefore his emails are not public records subject to the APRA. He further contended that because the requested writing was not created, received, retained, maintained, or filed by or with the Council, it is not a public record. Finally, he stated private correspondence is not in the public domain, which is required to be accessible.

ANALYSIS

The public policy of the 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." *See Indiana Code § 5-14-3-1*. The Lake County Council is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)(1).* Accordingly, any person has the right to inspect and copy the Council's disclosable public records

during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a).*

In response to the complaint filed, the Council first contends Mr. Dernulc is not himself a "public agency" and therefore his emails are not subject to the APRA. I find this argument misguided. Under this interpretation, the public would be excluded from innumerable records and correspondence between government employees *acting on behalf of a public agency*. It is the intention of the APRA to provide the public with information relating to the operation of its government. When a public official is conducting public business, he is acting on behalf of the public agency as an agent of that entity. Scores of Indiana public officials do not have access to government servers (school board members, councils of small towns, appointed delegates, etc.). The Council cites two Public Access Counselor opinions from 2000 and 2002, however, I strongly disagree with those opinions and they lead to a potentially dangerous result. To follow the Council's argument would be to exclude an enormous amount of information from public inspection and scrutiny.

The Council contends Mr. Dernulc's private email does not fall under the APRA's definition of a public record, because they were not "created, received, retained, maintained, or filed by or with a public agency." I previously opined on the issue of whether private emails may be considered public record in *Advisory Opinion 14-FC-199*. In the opinion, I stated:

> When a civil servant is acting in his or her official capacity as a public figure, *any* documented record received or generated by the public official is a potentially disclosable public record. Individuals are most definitely subject to the APRA. This is reinforced by the General Assembly's legislation in 2013 to attach personal liability to individual public employees for willful violations of the access laws. See Ind. Code § 5-14-3-9.5(c).

The General Assembly was clear in its direction the APRA be liberally construed in favor of granting the public access to government affairs. To allow government officials to escape public scrutiny by simply utilizing a private email account is inherently violative of the spirit of the APRA. The APRA states that "it is the public policy of the state 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."

The Indiana Supreme Court tangentially addressed this issue recently in *Citizens Action Coalition v. Koch*, No. 49S00-1510-PL-00607 (2016) wherein Justice David opined on the part of the majority that APRA applies to individual members of the General Assembly. The logic employed by the Court applies here when categorizing emails of individual members of the City Council. The members are not a public agency in and of themselves, but they are acting as agents of the government when performing official duties.

Further buttressing this position is the definition of public record as stated in the Indiana Records and Archives Administration statute at Ind. Code § 5-15-5.1-1(o):

> "Record" means all documentation of the informational, communicative, or decision making processes of state and local government, its agencies and subdivisions made or received by any agency of state and local government or its employees in connection

> with the transaction of public business or government functions, which documentation is created, received, retained, maintained, or filed by that agency or local government or its successors as evidence of its activities or because of the informational value of the data in the documentation…

The Council next asserts its denial was proper because the request received was not "reasonably particular." Under Indiana Code 5-14-3-3(a)(1), "a request for inspection or copying must identify with reasonable particularity the record being requested." Reasonable particularity is not defined under the APRA. If the public agency cannot determine what records to seek, your request is determined to have lack of reasonable particularity. A public agency is not required to fulfill a request which lacks reasonable particularity.

In *Informal Opinion 15-INF-26*, I addressed reasonable particularity with respect to an email request. I wrote:

> I do not believe that requiring a named sender, recipient, date range (preferably six months or less) and a set of key words is so draconian as to be burdensome. This frankly prevents a "fishing expedition" and prevents a requester from casting a wide net to capture a voluminous amount of emails. A requester should have done enough leg work to know the lanes of email traffic between communicators.

When a request lacks reasonable particularity, the public agency is not required to conduct a vast search of all its records to produce each document which may fall within the broadly defined terms of the requestor. Rather, it may deny the initial request and require the requestor to craft a more specific request in which the documents sought are readily identifiable.

Your request, in its current form, indeed lacks reasonable particularity. Your request for "all emails sent or received by Dan Dernulc between January 1, 2016 through June 21, 2016" -does not identify the recipients of emails you wish to review. These guidelines prevent fishing expeditions for issues you may be unaware of, but hope to discover by retrieving a broad set of records. They also help save the limited time and resources available to public agencies in having to procure massive sets of records. It is my suggestion you identify one or a few specific recipients whose emails may relate to an issue of interest to you and resubmit your request to the Council for processing.

Finally, the Council curiously contends the proper action for an individual who has received a refusal from an agency to confirm or deny the existence of a record or who has been denied the right to inspect or copy a public record is to file an action in the circuit or superior court of the county in which the denial occurred. The Council, however, cites legal precedent in which the Court declared specific issues relating to legislative procedures to be nonjusticiable because of Indiana's constitutional provision requiring separation of powers. The holdings in *Masariu v. The Marion Superior Court No. 1*, 621 N.E.2d 1097 (Ind. 1993) and *Berry et al. v. Crawford, et al*., 990 N.E.2d 410 (Ind. 2013), relied upon by the Council, exclusively address judicial enforceability of internal legislative procedures for the State General Assembly. These cases do not address applicability of the Access to Public Records Act to local legislative bodies.

The Council also cites *Citizens Action Coalition v. Koch*, No. 49S00-1510-PL-00607 (2016), in which the court declined to interpret what materials fell within the legislative "work product" exemption of the APRA. The Court concluded the APRA does apply to a legislative body, including the members and groups which make up the legislative body. *Id.* at 5. The Council mistakenly interprets this extremely narrow ruling on the justiciability of the legislative work product exemption as allowing *any* legislative body to deny an APRA request. This is most certainly not the case.

The Indiana General Assembly provided a statutory mechanism for a requestor to seek a remedy through the judiciary for the denial of public records by any public agency at Indiana Code § 5-14-3-9(e). Although the Supreme Court did not interpret this statute as an implicit waiver of the separation of powers argument, it only addresses the State of Indiana Legislature's work product. I will not interpret *CAC v. Koch* as applying to any government entity except the Indiana General Assembly and its members. To do so would erode the very purpose of the APRA and effectively render it completely meaningless.

CONCLUSION

Based on the forgoing, it is the Opinion of the Public Access Counselor the Council did not violate the Access to Public Records Act in denying your request for lack of reasonable particularity. Modification of your request by adding another party in an email exchange with Mr. Dernulc could potentially resolve this issue. The Council may assert a statutory exception from disclosure as listed in Indiana Code § 5-14-3-4, however, the Council should note the burden of proof for the nondisclosure of a public record is placed on the public agency. Council members should also note use of a private email for carrying out business in their official capacities may potentially be considered a disclosable public record and therefore should be considered to be subject to the APRA and retained accordingly.

Regards,

Luke H. Britt
Public Access Counselor

Cc: Mr. Ray L. Szarmach