OPINION OF THE PUBLIC ACCESS COUNSELOR

LAUREN A. CROSS,
Complainant,

v.

CITY OF GARY,
Respondent.

Formal Complaint No.
19-FC-81

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the City of Gary ("City") violated the Access to Public Records Act.[1] City Attorney Rodney Pol 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 September 9, 2019.

[1] Ind. Code § 5-14-3-1 to 10.

BACKGROUND

This case involves a dispute over access to text message conversations between two individuals that relate to official City business.

On August 28, 2019, Lauren Cross ("Complainant"), a reporter for the *Times of Northwest Indiana*, filed a public records request with the City of Gary ("City") seeking the following:

> Text messages dated Dec. 16, 17, and 18 between Joe Van Dyk and MaiaCo's Mike Reinhold discussing official business, including a planned meeting to be held with Rizner Williams III, Tom Wisniewski and Commissioner Kyle Allen.

The same day, Mr. Pol responded via email, explaining that Mr. Van Dyk, who served as the Director of Redevelopment for the City, no longer worked for the City thus his phone had been "processed" and no longer contained any of the messages sent or received by Mr. Van Dyk.

Ms. Cross filed a formal complaint against the City on September 9, 2019. In essence, she argues that the City failed to follow protocol relating to retention of recrods when they erased Mr. Van Dyk's phone memory. Also, she believes that at the time she submitted the request Mr. Van Dyk was still working with the City as part of a "transitional phase."

The City disputes Cross's claim that its denial constitutes a public access violation.

First, the City refutes the Complainant's claims by explaining that Joseph Van Dyk resigned from his position as the Director of Redevelopment on May 9, 2019 and since then

has been contracted as a consultant for the Gary Redevelopment Commission for specific projects. When he resigned his post, the phone used by Mr. Van Dyk was turned over to the City's IT Department and processed, this means that the memory was cleared so that the phone could be re-issued to another city employee. Since he is no longer a city employee, Mr. Van Dyk does not presently possess a City phone.

Second, Mr. Pol argues that test messages are not susceptible to retention by the City. He goes on to explain that text messages are "short-lived, transient methods of communication," and that this type of data is only stored on the phone itself unlike emails, which can be stored on external servers. Also, if there were to be rules implemented to require the retention of text messages it would likely result in immense financial and logistical burdens being placed on municipalities.

Over all, the City argues that since it does not possess the records that were requested it did not violate the APRA by failing to provide them. Therefore, the complaint should be dismissed.

ANALYSIS

The principal issue in this case is whether the text messages of a former employee should be retained in the ordinary course of business, and if the messages are erased, is the act a violation of the Access to Public Records Act.

1. The Access to Public Records Act ("APRA")

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 § 5-14-3-1.5-1.

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." *Id.* The City of Gary is a public agency for the purposes of APRA; and thus, subject to the act's requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy the City's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Here, Complainant Cross requested text messages from approximately eight months prior to the request, but had been deleted three months prior to the denial.

2. Public Record

The crux of this dispute is whether the text messages requested by Cross are a public record.

Under APRA, "public record" means:

> any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the City argues that it text messages may be public record, but are more transitory in nature and can be deleted.

This office opined in 2016 on the matter of text messages in *Informal Opinion of the Public Access Counselor 16-INF-30* and spoke in practical terms regarding their retention and storage. That Opinion is enclosed and incorporated by reference. In relevant part, it stated the following:

> The practical problem with retention is that there is often no central server where text messages are stored. Governmental units provide smartphones to their employees through outsourced providers or employees use personal devices. Unlike emails, local government servers do not capture the messages. While they are most likely akin to instant messages and mostly a substitute for brief face-to-face conversations, they are documented records of actions of public employees. The practice of retaining those messages would likely be costly and time-consuming; therefore, my recommendation is each agency develop and implement a policy so that employees do not potentially run afoul of APRA considerations. Best practice would dictate each employee keep track of his or her own substantive public business messages and retain them on their own respective devices – personal or government issued. This shows good faith and stewardship of government-related information.

The City's response largely mirrors that rationale. I do not interpret the City's actions to be in bad faith or necessarily

contrary to prior guidance. Make no mistake, had the messages been deleted while there was a pending request, that would be an altogether different matter

Therefore this opinion should be viewed as practical guidance to explore, if possible, systemic policies and measures which would require retention of *critical* messages practicable. There are certainly examples of text messages of public officials being used in very consequential and probative ways. While difficult to police and difficult to enforce, some measure of internal control can be implemented to preserve high-value text messages. I agree with the City that perhaps they do not *all* have to be kept, but ones with more than just fleeting value should be retained.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the City of Gary did not willfully or recklessly delete a public record, but should likely revisit their policy on public employees' and officials' text messages to ensure that critical communication is not needlessly lost.

Luke H. Britt
Public Access Counselor