

OPINION OF THE PUBLIC ACCESS COUNSELOR

LANCE O. GIDEON,
Complainant,

v.

CITY OF MARTINSVILLE,
Respondent.

Formal Complaint No.
20-FC-100

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 Martinsville violated the Access to Public Records Act.¹ Clerk-Treasurer Rebecca J. Tumey filed a response with our office. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on July 27, 2020.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to text messages and emails requested by a newspaper reporter.

On July 23, 2020, Lance Gideon (Complainant), a reporter for the Reporter-Times, requested from the City of Martinsville electronic correspondence between the Clerk-Treasurer and the city attorney regarding a named individual.

The next day, the Clerk-Treasurer supplied some emails responsive to the request and stated that text messages do not exist. Gideon, however, provided additional information evidencing other emails and text messages did exist. Despite this, the Clerk-Treasurer insisted the city provided Gideon everything responsive to the request. As a result, Gideon filed a formal complaint with this office on July 27, 2020.

Clerk-Treasurer Tumey responded to the complaint arguing the texts and emails in question were subject to the attorney-client privilege and all of the non-privileged material was handed over pursuant to the request.

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 Martinsville 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 and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)–(b).

This case involves the accessibility of text messages and emails.

2. Attorney-client privilege

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). There is no dispute that the texts and emails at issue here are public records as defined by APRA. The question is whether they are disclosable. Indeed, under APRA records declared confidential by state statute are exempt from disclosure. *See* Ind. Code § 5-14-3-4(a)(1).

Specifically, Indiana Code section 34-46-3-1 codifies the attorney-client privilege by prohibiting an attorney from being required to testify as to confidential communications made to them in the course of professional business, and to advice given in such cases.

In addition, an attorney has statutory duty to preserve the secrets of the attorney's client. *See* Ind. Code § 33-43-1-3. Moreover, in Indiana, a communication between an attorney and a client is privileged and not discoverable under Trial Rule 26(B)(1).

This office has long maintained that attorney-client privilege intersects with public records and can be withheld by the client if it is documented on any manner of documentation, including attorney fee invoices.

Therefore it is certainly plausible that the documented communication between a Clerk-Treasurer and the city attorney would qualify.²

The question is not, however, if the records are disclosable, but what is the responsibility of the responding agency to properly deny a portion of the request.

Stated differently, an agency cannot merely release a portion of a request and omit the remainder without referencing why. Instead, a denial must be accompanied by a statement referencing the specific exemptions or exceptions justifying the denial. *See* Ind. Code § 5-14-3-8(d)(2)(a).

² This opinion presumes the attorney for the municipality as political subdivision also has a representative relationship with the office of the Clerk-Treasurer, a separately elected office. This is sometimes, but not always the case.

This was not done by the Clerk-Treasurer. So when the complainant discovered other documents existed through other sources, it understandably sowed a certain amount of confusion and suspicion.

Thus, while the denial of access was not improper, the method by which the Clerk-Treasurer denied it did not meet statutory compliance. I trust this will not happen going forward.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Clerk-Treasurer for the City of Martinsville should have cited the specific exemption or exception authorizing the withholding of all or part of the requested public records as required by APRA.

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

Luke H. Britt
Public Access Counselor