

**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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DAVID M. ASKINS,  
*Complainant,*

v.

BLOOMINGTON COMMON COUNCIL,  
*Respondent.*

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Formal Complaint No.  
20-FC-104

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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 Bloomington City Council violated the Access to Public Records Act.<sup>1</sup> Attorney Stephen Lucas filed a response with this 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 28, 2020.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

This case involves a dispute over access to certain portions of an email sent from one member of the Bloomington Common Council to the other council members.

On June 11, 2020, Dave Askins (Complainant) filed a public records request with the council seeking the following:

A copy of the document(s) described by Councilmember Piedmont-Smith at the June 10, 202 city council meeting as containing the information that had been requested the previous week and the hire of Stephen Lucas as council administrator/attorney, and which had been conveyed to all councilmembers, and which is on information and belief in possession of all city councilmembers.

On June 30, 2020, the Council sent Askins a redacted version of an email, which explained the Council's logic in offering a salary of \$85,500 to Stephen Lucas. Aside from one sentence, which simply stated the type of information contained within the email, the Council redacted the entire body of the email. According to the complaint, portions of the email had been redacted because that material was considered advisory or deliberative, and therefore was excluded from disclosure at the discretion of the Council under APRA.

Askins argues that the exception only applies to advisory or deliberative material that are expressions of opinion or are of a speculative nature. Thus, the Council incorrectly applied the exception to the email sent by Council member Volan, since Volan was not expressing an opinion, rather he was reporting the logic used by the Council to decide how to appropriate taxpayer funds.

Askins also argues that even if the email constitutes an intra-agency communication the Council still misapplied the exception because it was never intended to shield the communication between elected officials on the same governmental body from public view. He muses that if this had been the intention of the legislature, then what is stopping members of an elected body from solely conducting deliberative processes through written communications rather than in the public domain.

On August 20, 2020, the Council, through attorney Stephen Lucas, responded to Askins' complaint. The Council denies wrongdoing and contends the redacted information was appropriately withheld from disclosure because it met the exception requirements pursuant to Indiana Code section 5-14-3-4(b)(6).

Specifically, the Council argues that the email in question is appropriately defined as an advisory or deliberative intra-agency communication because it contained the opinion of a council member and was shared with other council members to communicate internal thoughts and deliberations ahead of the Council's decision to replace the retiring Council Administrator-Attorney. Contrary to Askins' claims, the Council asserts that the email did not contain facts about a decision that had already been made, but rather the email was sent before the Council made a decision on replacing their attorney.

Furthermore, the Council dismisses Askins' assertion that the deliberative materials exception was never intended to apply to communications between elected officials serving on the same body. The Council cites previous opinions published by this office, explaining that frank discussions 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. Overall, the Council maintains that its decision to redact portions of an email exchanged between council members was the right one under APRA.

### ANALYSIS

The key issue in this case is whether the Access to Public Records Act's deliberative materials exception applies to materials exchanged between members of the same governing body.

#### 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).

Here, the parties disagree about the applicability of APRA's deliberative materials exception.

## **2. Deliberative materials**

The crux of this dispute is whether the Bloomington Common Council has discretion under APRA's deliberative materials exception to withhold the records requested by Askins.

Under APRA, deliberative materials include 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). Deliberative materials include information that reflects, for example, one's ideas, considerations, and recommendations on a subject or issue for use in a decision-making process.

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. 766 N.E.2d at 12.

To withhold a public record from disclosure under APRA's deliberative materials exception, the record must be interagency or intra-agency records of advisory or deliberative material and expressions of opinion or speculative in nature.

Academically speaking, there is little to argue insofar as the Council's arguments are concerned. They demonstrate an understanding of the exception.

Still, there is a difference between statutory invocation of an exception to disclosure and that exception's ultimate application.

City councils are nothing if not deliberative bodies. That is their function and their charge. They are decision-making entities at the highest levels of municipal government. Those decisions directly impact their communities, all the more so when an expenditure of funds is involved.

Toward that end, not only is APRA implicated here, but also the Indiana Open Door Law:<sup>2</sup>

In enacting this chapter, the general assembly finds and declares that this state and its political subdivisions exist only to aid in the conduct of the business of the people of this state. It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed.

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<sup>2</sup> Ind. Code § 5-14-1.5-1-8.

Ind. Code § 5-14-1.5-1. It is unclear what the impact of the “logic” contained in the email had on the ultimate decision to hire the attorney. It is equally unclear what kind of discussion or deliberation preceded the vote. What is clear is that a thoughtful and detailed discussion of any decision of a governing body is required before taking final action. So the email, if at all a factor in the decision, should be made public. This is even more so when the email was teased during a public meeting.

Cursory votes are prohibited and final action taken by agenda item alone is void. The arguments presented by the Council would be more appropriately applied to internal discussions of an agency rather than a governing body. As a deliberative body, it certainly seems disingenuous to argue that documented deliberative material is off limits when those materials are referenced in a public meeting.

Moreover, the deliberative materials exception is often called the exception that swallows the rule. Therefore when determining whether to invoke the exception, it should be applied thoughtfully and judiciously. There is indeed a cause of action for arbitrary or capricious exercise of discretion in withholding public records.<sup>3</sup> The Council will be well-served being mindful of this going forward.

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<sup>3</sup> Ind. Code § 5-14-3-9(g)(2).

## **CONCLUSION**

Based on the foregoing, it is the opinion of this office that the Bloomington Common Council did not violate the Access to Public Records Act, however, there is a question as to whether the council arbitrarily invoked APRA's deliberative materials exception.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

**Luke H. Britt**  
**Public Access Counselor**