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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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PARIS LEWBEL,  
*Complainant,*

v.

CITY OF CARMEL,  
*Respondent.*

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Formal Complaint No.  
18-FC-63

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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 Carmel (“City”) violated the Access to Public Records Act<sup>1</sup> (“APRA”). The City responded to the complaint through corporation counsel Douglas Haney. 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 April 30, 2018.

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

## BACKGROUND

Paris Lewbel (“Complainant”), an investigative reporter for WRTV, filed a formal complaint alleging the City of Carmel violated the Access to Public Records Act by failing to provide requested emails.

On March 27, 2018, Lewbel submitted a public records request to the City requesting emails between the Mayor and three other staff members with specific keywords associated with the request. In part, Lewbel sought the following:

All emails, sent between 05/01/17 & 12/31/17 on public or private email accounts/servers between James Brainard and Nancy Heck with the following keywords: Paris Lewbel, Channel 6, WRTV, RTV6, crash, accident, car.

Lewbel made the same request for emails between Mayor Brainard and three other staffers, all involving the same date range and keywords.

The City denied Lewbel’s request on April 17, 2018. The City denied Lewbel’s request for three reasons: (1) he sought records on electronic devices not in the custody nor control of the City; (2) the records requested are advisory or deliberative in nature; and (3) the request did not identify the records Lewbel was seeking with reasonable particularity.

As a result, Lewbel filed a formal complaint with this Office on April 30, 2018.

The response of the City primarily focuses on the reasonable particularity aspect of the request, however, it did attach an affidavit of a legal secretary that the search was indeed performed and failed to yield any “hits” or responsive records.

## ANALYSIS

This formal complaint presents the issue of whether the City of Carmel properly denied access to the emails requested by Lewbel.

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

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 Carmel (“City”) is a public agency for the purposes of the APRA, and subject to its requirements. Ind. Code § 5-14-3-2(n).

Therefore, any person has the right to inspect and copy the City’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. Ind. Code § 5-14-3-3(a).

#### 1.1 Reasonable Particularity

Of all the provisions of the Access to Public Records Act – a short, yet complex set of laws – reasonable particularity is often challenging to qualify. Toward that end, this Office has consistently recognized that requests for emails—in order to be reasonably particular—must identify, at minimum, the following four items:<sup>2</sup>

1. Named sender;
2. Named recipient;

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<sup>2</sup> See *Opinion of the Public Access Counselor*, 17-FC-52 (2017).

3. Time frame of six months or less; and
4. Particularized subject matter or set of search terms.

It appears that the City did indeed apply those search parameters to a query and found no records matching the Lewbel's request. Had that been the initial denial, it is unlikely this Office would have accepted the complaint. A public agency does not have to create records to satisfy a request and if, after a reasonably diligent search, no records are found, then the request may be appropriately denied.

Nonetheless, this Office does take exception to the initial denial and a portion of the City's response to the formal complaint. While there is no indication the City violated the law, it appears as if a teaching moment may be in order to educate both parties on their respective rights and responsibilities under the law.

The search parameters for emails have been honed over the past several years begin with a case cited by the City – *Anderson v. Huntington County Board of Commissioners*, 983 N.E. 2d 613 (Ind. Ct. App. 2013). In *Anderson*, the court cited an opinion from a previous Public Access Counselor regarding the issue of reasonable particularity as it relates to request for emails. At the time, the only parameters were a named sender and recipient and a timeframe.

In the years subsequent, this Office has developed *Anderson* even further to include a reasonable timeframe limitation (generally less than a year and preferably six month), added key words and subject matter to the mix, and capped the number of "lanes" or "channels" of email threads to four. This has been met with great enthusiasm by municipalities

and other public agencies who seek to narrow the scope of a search for practicality's sake.

So, this Office does indeed take exception with a public agency that bristles at the notion of performing a search with those advanced parameters indicated. Simply put, Lewbel followed the scripts. Regardless how the City chooses to interpret the request, it meets the standard for reasonable particularity under APRA. It is most certainly not a "fishing expedition."

#### **1.2 Non-Governmental Email**

Lewbel's request conspicuously included a request to search the private email accounts of the authors of the messages. The City has denied searching those accounts because the City does not have custody or control over those accounts.

This approach is also antithetical to this Office's guidance in the past. While the City as a monolithic organization may not have access to its employees private email accounts, the employees potentially utilizing private email for public business do. If an employee chooses to use private email for public business – therefore acting as an agent of the municipality – then those messages are to be treated as if they were public record on a municipal server. APRA's definition of *public record* does not exclude records that otherwise qualify on the basis of their location.

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. To allow government officials to escape public scrutiny by simply utilizing a private email account is inherently

violative of the spirit of the APRA. Individual employees are not a public agency in and of themselves, but they are acting as agents of the government when performing official duties. The medium is not the focus, but the message most certainly is.

### **1.3 Deliberative material**

Under APRA, materials developed by public employees communicated for the purposes of decision making that are of an advisory or speculative nature may be withheld from disclosure at the discretion of the agency. *See* Ind. Code § 5-14-3-4(b)(6). Public agencies will often preface a search by preemptively declaring any potential hits qualify as deliberative material.

The determination of whether a requested record qualifies for non-disclosure under APRA's deliberative materials exception, however, is to be made *after* the search, not before. A public agency cannot—consistent with APRA—deny a public records request on the pretext that the records are deliberative or otherwise nondisclosable if the search has not yet occurred or yielded any material for review.

### **CONCLUSION**

In sum, private email search notwithstanding, it appears as if the City has met its obligation to search for the records, the query of which yielded no records. Nevertheless, this Office respectfully request the City take into consideration the above guidance for the future and recognize that, although sometimes burdensome and inconvenient, the dissemination of public records upon request is an affirmative duty under the law.



Luke H. Britt  
Public Access Counselor