



STATE OF INDIANA

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April 1, 2015

Mr. William R. Groth, Esq.
C/o Energy and Policy Institute
P.O. Box 15790
Washington, D.C. 20003

-and-

Citizens Action Coalition
603 East Washington Street
Indianapolis, Indiana 46204

Re: Formal Complaint 15-FC-107; Alleged Violation of the Access to Public Records Act by Indiana House Representative Eric Koch and the Indiana House Republican Caucus

Dear Mr. Groth,

This advisory opinion is in response to the formal complaint alleging Indiana House Representative Eric Koch and the Indiana House Republican Caucus ("Caucus"), violated the Access to Public Records Act ("APRA") Ind. Code § 5-14-3-1 *et. seq.* The Caucus responded to your complaint via Ms. Jill S. Carnell, Esq., Chief Counsel. Her response is enclosed for your review. I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on March 23, 2015.

BACKGROUND

The complaint dated March 23, 2015 alleges the Indiana House Republican Caucus violated the Access to Public Records Act by failing to produce information you requested.

On or about March 9, 2015, a public records request was submitted to Representative Koch requesting the following information: Any and all emails, correspondence, or other documents that pertain to "net metering," "solar energy," "distributed generation," "electric fairness," or "fixed charges," and that were created from September 1, 2014 to the present, between Representative Eric Koch and [10 different named parties]."

On March 16, 2015, Chief Counsel for the Caucus acknowledged and denied your request arguing that the Indiana Access to Public Records Law was inapplicable to the Indiana General Assembly. Additionally, counsel cites Ind. Code § 5-14-3-4(b), alleging the conversations are work product of the legislature. Finally, counsel contends your request is not reasonably particular because it involves ten different parties and a time period of six months.

ANALYSIS

The public policy of the APRA states that “a (p)roviding person 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 Ind. Code § 5-14-3-1. As it stated in *Opinion of the Public Access Counselor 15-FC-69*, the Indiana House Republican Caucus is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Any person has the right to inspect and copy the Caucus’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).¹

Although not defined in the APRA, the Indiana Court of Appeals addressed the issue of reasonable particularity in the APRA in *Jent v. Fort Wayne Police Dept.*, 973 N.E.2d 30 (Ind. Ct. App. 2012), and again in *Anderson v. Huntington County Bd. of Com’rs.*, 983 N.E.2d 613 (Ind. Ct. App. 2013). The Court in *Jent* held:

Whether a request identifies with reasonable particularity the record being requested turns, in part, on whether the person making the request provides the agency with information that enables the agency to search for, locate, and retrieve the records.

Furthermore, in *Opinion of the Public Access Counselor 14-INF 30*, I opined:

Consider the definition of particularity in The New International Webster’s Dictionary and Thesaurus, Encyclopedic Ed., 200: “exactitude in description; circumstantiality; strict or careful attention to detail; fastidiousness.” I do believe voluminous records requests can meet that standard and agencies are required to satisfy voluminous requests, but to

¹ 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 Caucus, exclusively address judicial enforceability of internal legislative procedures. The case does not address applicability of the Access to Public Records Act to the legislature. There is no authority in case law or statute exempting the Indiana General Assembly from the APRA. Judicial enforceability and applicability are mutually exclusive. This Office has traditionally been consistent in this holding. See also the *Opinions of the Public Access Counselor 03-FC-62*; and *03-FC-31* (“*The House of Representatives is clearly a public agency for the purposes of the APRA*”).

meet the reasonable particularity standard, they cannot be blanket requests.

When it comes to email, I generally rely on the guidance provided by the Court in *Anderson*. The Court agreed with former Public Access Counselor Hoage that a reasonably particular request names a specific sender, recipient, and date frame. I would also contend a specific request would include one or more key words for a search parameter.

In your amended request, you have seemingly satisfied the elements of specificity considered to be reasonably particular. Your request appears to meet the standard set forth by the APRA.

Furthermore, buttressing the applicability argument, the General Assembly has carved itself out an exception for work product pursuant to Ind. Code § 5-14-3-4(b)(14). The Caucus references this exception to disclosure in its denial. The disclosure or denial of the work product is at the discretion of the legislature.

As discussed in the footnote above, this Office – charged with the responsibility of making recommendations to the General Assembly in regard to access issues – considers the legislature to be subject to the APRA. The intent of the APRA is to foster trust and good faith between the public and the government. It is a safeguard for accountability and stewardship for civil servants. I am confident the General Assembly strives to espouse those virtues. As Indiana Public Access Counselor, I humbly and respectfully request the Caucus reconsider its position on the blanket inapplicability of the Access to Public Records Act and treat public records requests in a manner consistent with the spirit of transparency and openness.

That being said, this Office also recognizes the importance of maintaining the integrity of the legislative process. This includes legislator-constituent communication channels. Work product of legislators is not defined in Indiana Code or case law. Although there is no explicit legislator-constituent privilege, the *Masariu* and *Berry* cases suggest the General Assembly has the discretion to define their own work product. To the extent the legislature may define work product to include the type of information you seek, I implore the General Assembly to be judicious in deciding what to withhold and what to release. It indeed requires a delicate balance, but the scales should favor transparency.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline that extends to the left and then curves back under the name.

Luke H. Britt

Public Access Counselor

Cc: Ms. Jill S. Carnell, Esq.