OPINION OF THE PUBLIC ACCESS COUNSELOR

TIM CLARK,
Complainant,

v.

BROWN COUNTY HEALTH DEPARTMENT,
Respondent.

Formal Complaint No.
20-FC-91

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaints alleging the Brown County Health Department violated the Access to Public Records Act.[1] Judy Hess of the Department 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 7, 2020.

[1] Ind. Code § 5-14-3-1–10.

BACKGROUND

This case involves a dispute over access to a draft policy and procedures manual referenced in a pending septic ordinance in Brown County.

On May 22, 2020, Tim Clark (Complainant) filed a public records request with the Brown County Health Department seeking the following:

> A copy of the current and Proposed Septic Ordinance that was being sent to members of the Health Board.

After the county provided a copy of the ordinance, Clark also requested a copy of the department's policies and procedures manual referenced in the ordinance. Clark submitted this request on May 27, 2020.

The Brown County Health Department denied his request on June 15, 2020 because the manual was not finalized. The county promised the manual after the ordinance was passed. Clark argues Brown County should provide the manual along with the proposed ordinance. As a result, Clark filed a formal complaint with this office on July 7, 2020.

In its response, the Department again argues that the policy and procedures manual is still a work in progress and, while created, has not been finalized and completed. Therefore it was being withheld. No further legal argument was provided[2].

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[2] The Brown County Board of Commissioners also reached out to this office on August 5, 2020, confirming that while the Board of Health voted to recommend the ordinance to the commissioners for approval, the manual was not complete.

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 Brown County Health Department 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 Department'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 a draft document.

2. Draft documents and deliberative material

The crux of this dispute is whether the request by Clark for the policy manual accompanying the ordinance can be withheld before it is finalized.

Under APRA, an agency has discretion to withhold the following from public disclosure:

> Records that are intra-agency or interagency advisory or deliberative material, 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). Drafts and working copies often fall into this category. Agency staff have some measure of discretion in making sure their work product is finalized and fit for public consumption before it is laid bare as a final version. While end versions of policy are ripe for scrutiny, the law provides for the benefit of the exchange of ideas—good and bad—in a relative vacuum before a working copy is made available as a final product.

At some point, however, the agency makes a decision to either adopt or nix a policy. Once the agency makes that decision has been made, the final version of the policy becomes a disclosable public record.

Typically, that inflection point is when a version is up for consideration. Consider that the Indiana General Assembly's publication of prior versions of legislation during the lawmaking process. As bills are amended by the house and senate, former versions of legislation are not withheld or

discarded, but are published as a trail of decisions leading to a final result. Those prior versions inform the public how the legislature makes decisions and the evolution of a particular initiative, which is important information for constituents.

And so it is on the local level as well. Once a policy, ordinance, or resolution is presented to a board for approval, that version, whether adopted or not, is no longer deliberative. The decision to submit for approval has been made and the version no longer becomes speculative in nature.

The critical issue in this case is whether the ordinance and the accompanying policy has been submitted for approval. There is no argument that the ordinance is disclosable, however, Clark has been under the assumption that there is a final version of the policy manual and the Brown County Health Department is simply hiding it for unknown reasons. Clark even claims to know the page count of the document based on his sources within the department.

Based on the information provided, the ordinance in question has been in the works since at least December 2019 and possibly longer. The policy manual has been referenced in some, if not all, versions of the ordinance. It is unclear whether the policy has been presented to the Brown County Board of Health for approval, however, it stands to reason that if they approve the ordinance for submission to the county executive, they are comfortable with that version of the accompanying policy and procedures manual.

Simply put, at this point in the process, it seems reasonable to release a recent version of the policy manual. The deci-

sion-making process will most likely not be harmed by doing so. While the working copy may still be somewhat fluid, chances are it is not radically so. If the Brown County Health Department is wary of the document being passed on as final, it should include "DRAFT" watermarks, which usually alleviate that problem.

Even legitimate denials of disclosure must not be arbitrary. This office has not been presented with a compelling reason why release of the manual would harm the decision-making process.

3. Denials of public records request

As a final note, the Brown County Health Department should know that public records requests cannot be denied summarily without a legal standard for doing so. Indiana Code section 5-14-3-9(d) sets forth the requirements for denials. APRA requires a public agency to provide a statutory exemption or exception to disclosure when it denies a written public records request. The above analysis notwithstanding, at minimum, the Brown County Health Department should have cited APRA's deliberative materials exception to disclosure.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Brown County Health Department should release a draft copy of the policies and procedures manual accompanying the pending septic ordinance.

Luke H. Britt
Public Access Counselor