OPINION OF THE PUBLIC ACCESS COUNSELOR

RYAN MARTIN,
Complainant,

v.

INDIANAPOLIS CIVILIAN POLICE MERIT BOARD,
Respondent.

Formal Complaint No.
18-FC-102

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging that the Indianapolis Civilian Police Merit Board ("Board") violated the Access to Public Records Act.[1] The Board filed an answer to the complaint through Deputy Chief of Counseling Ellen Gabovitch. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the

[1] Ind. Code §§ 5-14-3-1 to -10

formal complaint received by the Office of the Public Access Counselor on July 20, 2018.

BACKGROUND

This case involves a dispute over the public disclosability of an investigation report created by the Internal Affairs division of the Indianapolis Metropolitan Police Department ("IMPD") in connection with IA's investigation into the actions of two IMPD officers involved in a fatal police-action shooting and whether the officers should have disciplinary charges lodged against them.

Ryan Martin ("Complainant"), a reporter for the *Indianapolis Star*, contends that the Indianapolis Civilian Police Merit Board ("Board") violated the Access to Public Records Act ("APRA") by failing make the Internal Affairs Investigation Report ("IA Report") available for inspection and copying.

In May, the Board held a three day disciplinary hearing to consider whether to accept or reject IMPD Chief Bryan Roach's recommendation to terminate two officers that fatally shot a motorist. During the hearing, an attorney for the officers requested the entire IA Report—which IMPD had provided to the attorney—be entered into evidence.

Ultimately, the Board—by a vote of 5-2— found "no violation" on multiple disciplinary charges levied against the officers.

After the hearing, on May 15, 2018, Martin requested the following from the Board:

> Copies of all documents presented to the Civilian Police Merit Board for the hearing of Officers

> Michal P. Dinnsen and Carlton J. Howard, including all exhibits.

The Board provided most of the requested records to Martin save for the IA Report. The Board denied disclosure of the IA Report in accordance with Indiana Code sections 5-14-3-4(b)(1) and (6) and Indiana Code section 5-14-3-6.5.

As a result of the denial, Martin filed a formal complaint with this Office. Martin—and by extension the *Indianapolis Star*—contend that any confidentiality and discretion to withhold a record from disclosure is waived once the materials are presented in an open hearing of the Board.

In response, the Board argues that there is no reason that a document should lose its protection from disclosure because it is provided to a public agency during an open meeting. IMPD had marked the IA Report "Confidential" when it submitted the document to an attorney for the officers because it contained witness statements, mental impressions, and opinions of investigators including descriptions of evidence gathered in the investigation.

Moreover, the Board argues that the release of the IA Report would subject it to liability based on IMPD designating it confidential. What is more, the Board contends that a record does not lose its designation as nondisclosable merely by virtue of being submitted to a tribunal during an open meeting by a third party.

ANALYSIS

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

The Access to Public Records Act ("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 Indianapolis, the Indianapolis Civilian Merit Police Board and the Indianapolis Metropolitan Police Department are public agencies for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the City's public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

As a preliminary aside, this Office thanks and commends both parties for their cordial and thoughtful submissions. While adversarial, the formal complaint process is also an invitation to resolution and both sides have been amenable to recommendations and dialogue in this matter.

2. Release of confidential vs. discretionary records

The City proffers an argument which, to the best of our knowledge, is an issue of first impression to this Office. Ostensibly, the City interprets Indiana Code section 5-14-3-10(a)(2) to allow a public agency to unilaterally declare a record confidential and attach potential criminal liability if discretion is exercised to disclose after an agency does so. It states:

> (a) A public employee, a public official, or an employee or officer of a contractor or subcontractor of a public agency, except as provided by IC 4-15-10, who knowingly or intentionally discloses information classified as confidential by state statute, including information declared confidential under:
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> (1) section 4(a) of this chapter; or
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> (2) section 4(b) of this chapter *if the public agency having control of the information declares it to be confidential*;
>
> commits a Class A infraction.

(emphasis added). As noted above, the APRA contemplates three categories of public records in terms of disclosability. First are those records that are unequivocally disclosable. The APRA establishes a presumption is that all records are disclosable unless declared otherwise by statute. Those are not the issue in this case.

The second category of records are those that are declared to be *de facto* confidential. A partial list of those is found at

Indiana Code section 5-14-3-4(a), however, other confidentiality requirements are scattered throughout federal and state statutes.

The final category of records are those of which the Indiana General Assembly has granted authority to a public agency to withhold at its *discretion* so long as the exercise of that discretion is not arbitrary or capricious. A list of these types of records is found at Indiana Code section 5-14-3-4(b).

It is important to note the crucial distinction between confidential records and discretionary records. Although the difference is subtle, they are mutually exclusive in that a public agency cannot unilaterally declare any record to be confidential if it is not designated so by State or Federal statute.

This Office and the courts have never interpreted the APRA to allow public agencies to declare a document confidential simply because it chooses to, even if the record is non-disclosable as being subject to discretionary release under section (4)(b). What the APRA does contemplate, is the ability of a public agency to pass an administrative rule or ordinance declaring something confidential *if it has the specific statutory authority to do so.* Ind. Code § 5-14-3-4(a)(2).

The power to deem a record something confidential is predicated on authority granted by the Indiana General Assembly rather than the inherent authority of a government unit. Statutory authority is the condition precedent to declare a record non-disclosable.

In withholding the Internal Affairs report, the City has invoked both the investigatory law enforcement records and deliberative materials found at Indiana Code sections 5-14-

3-4(b)(1) and (6) respectively. There is little question that the records qualify for those exceptions but they are not listed in section (4)(a) as *confidential* by definition.

Therefore confidential records under section 4(a), may not be disclosed without consent or special standing. Discretionary records, however, may be disclosed at the agency's choosing.

Internal affairs reports are not *de facto* confidential, but rather released or withheld at a law enforcement agency's discretion. There is no statutory authority that gives a law enforcement agency to declare IA reports confidential. Therefore, even if the IMPD submitted the IA Report to the Merit Board marked as "CONFIDENTIAL," the designation does not have legal weight.

In turn, Indiana code section 5-14-3-6.5 would not apply. It states:

> A public agency that receives a *confidential* public record from another public agency shall maintain the confidentiality of the public record.

(emphasis added). The plain language of section 6.5 does not contemplate discretionary release records to be confidential when shared with another agency. The receiving agency still retains the choice to disclose or keep internal. It is not an infraction to exercise discretion to release another agency's deliberative or investigatory material.

3. Submission of a record to a tribunal

This Office has long held that an agency typically loses its *discretion* to declare something contained in section 4(b) to be non-disclosable once it is submitted to a court of record

or provided to an external party. As noted above, a tribunal would have the ability to keep confidential materials non-disclosable, but not discretionary records.

The City of Indianapolis considers Merit Board proceedings to be an administrative hearing of record.[2] Due process hearings are conducted in various manners throughout the State, but Indianapolis has chosen, perhaps rightfully so, to hold the Board's meetings in the open. Other preliminary steps are held in executive session or at the administrative level, but the hearings in front of the Merit Board are *de novo* adjudicative exercises held upon petition to appeal a lower decision. Toward that end, they are held as administrative hearings and not as internal fact-finding or deliberative investigations. Those are the predicate to the Merit Board hearings.

Local hearings of record are generally not subject to the Administrative Orders and Procedures Act or the Indiana Trial Rules but those procedural elements often influence the proceedings and are loosely followed[3]. Merit Board administrative hearing procedures are not codified in the Indianapolis municipal code, however, procedural rules generally hold that non-confidential court and hearing records are disclosable. Therefore it stands to reason that evidence used in an open local administrative proceeding as evidence, save for

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[2] Indianapolis Municipal Code Title 1, Chapter 279, Section 237(k).

[3] *Sullivan v. City of Evansville*, 728 N.E.2d 182 (Ind. Ct. App. 2000) (observing: "Although such proceedings are not subject to all of the procedural safeguards afforded at a trial, it is evident, as courts have held, that the procedural standards should be at the highest level workable under the circumstances, and that the fact-finding process should be free of suspicion or even the appearance of impropriety)".

statutorily confidential material, is open for public inspection.

The City chose to use the Internal Affairs report as evidence in the hearing. The report was also shared with the officers and their attorneys. Presumably, much of the report was discussed on the record - in the presence of the audience, including media – and much of the information would have been integrated into the Board's findings of fact and conclusions or recommendations.

To be clear, had IMPD not submitted the IA report as evidence to the Merit Board, IMPD could retain discretion to withhold the document as investigatory or deliberative. However, because it was provided both to the Board and – even more critically - to the opposing party, discretion is lost. The disclosure has occurred and the bell cannot be unrung.

The Merit Board cannot then attempt to exercise discretion on the part of IMPD, just as it could not exercise discretion on the part of the officers. Interestingly enough, the Merit Board's decision can be reviewed upon petition to the Marion Circuit or Superior Court where the same principles would apply.

RECOMMENDATION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indianapolis Civilian Police Merit Board should release the requested report because the Board lacks discretion to withhold it from disclosure under the Access to Public Records Act.

Luke H. Britt
Public Access Counselor