OPINION OF THE PUBLIC ACCESS COUNSELOR

THE NEW YORK TIMES,
Complainant,

v.

ELKHART COUNTY BOARD OF COMMISSIONERS,
Respondent.

Formal Complaint No.
18-FC-142

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Elkhart County Board of Commissioners violated the Access to Public Records Act.[1] Attorney Michael F. DeBoni filed an answer to the complaint on behalf of Muncie. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received

[1] Ind. Code §§ 5-14-3-1, to -10

by the Office of the Public Access Counselor on December 7, 2018.

BACKGROUND

This case stems from a dispute between Sarah M. Nir, a reporter for the *New York Times*, and the Elkhart County Board of Commissioners ("Board") over access to records concerning an inmate who died while in the custody of the Elkhart County Community Corrections Department.

On July 31, 2018, a female inmate at a work-release facility died on the way to the hospital after several days of complaining about stomach pain.

On October 18, 2018, Nir submitted a public records request to the County for documentation regarding the inmate's death. The Board produced some records but withheld others in accordance with the investigatory and deliberative records exceptions to disclosure under the Indiana Access to Public Records Act. Specifically, the Board withheld thirteen memoranda prepared by Community Corrections employees regarding the inmate's death and emails regarding the same also exchanged by Community Corrections employees. Nir challenges those denials as improper

Nir's main contention is that the county withheld the records in their entirety; no disclosable information was separated from the sensitive material. Additionally, Nir asserts that the investigatory records exception was applied too broadly by the Board and the County Prosecutor.

The Elkhart County Board of Commissioners refutes these claims and argues the exemptions to disclosure were applied

appropriately.[2] Notably, the Board relies upon an Indiana Court of Appeals case from 1998, *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind. Ct. App. 1998), to withhold the entirety of the records and not separating non-sensitive material. Furthermore, the Board argues much of the material was compiled in the course of a law enforcement investigation, to wit the Prosecutor's decision whether to pursue criminal charges.

ANALYSIS

The primary issue in this case is whether the Elkhart County Board of Commissioners has discretion under the Access to Public Records Act to withhold from disclosure the record requested by The New York Times.

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

APRA expressly 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 Elkhart County Board of Commissioners ("Board") is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). That means unless an exception applies, any person has the right to inspect and copy the Board's public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA has both mandatory and discretionary exemptions to the disclosure of public records. *See* Ind. Code §§ 5-14-3-4(a),

[2] The Board also addresses matters of reasonable particularity and timeliness, however, they do not appear to be at issue in this case and will not be discussed further herein this Opinion.

(b). One category of records that may be withheld from disclosure at the discretion of the agency are those records categorized as deliberative materials. *See* Ind. Code § 5-14-3-4(b)(6). Additionally, a law enforcement agency has the discretion whether to release investigatory materials compiled in the course of the investigation of a crime.

These exceptions to disclosure are at the heart of this case.

2. Deliberative Materials Exception

The Board maintains that it has discretion to withhold the materials requested by Nir because it qualifies under APRA's disclosure exception for deliberative materials.

Under APRA, *deliberative material* includes 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, consideration, 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.

In order to withhold a public record from disclosure under Indiana Code Section 5-14-3-4(b)(6), the record must be interagency or intra-agency records of advisory or deliberative material *and* expressions of opinion or speculative in nature.

Granted, APRA's deliberative materials exception is broad and can be subject to abuse. Some have called it the exception that swallows the rule. Potential abuse notwithstanding, as the *Newman* court indicates, the exception has valuable and sound application and can certainly be exercised consistent with good governance and transparency principals.

This Office is often asked to ratify the application of disclosure exemptions without the full picture of the situation. Notably, we have not been made privy to the withheld records nor has it been explained why they were created.

In order for the deliberative exemption to apply, the materials developed reflecting opinion, speculation and the like, must be a predicate to a decision. It is unclear in the current case exactly what that decision might be.

It seems as if they were indeed *compiled* for the purpose of a law enforcement investigation. More on that later, however, if the records were created independent of a decision, the exemption would not apply. Mere expression of opinion is unequivocally disclosable absent a decision upon which the opinion is predicated.

3. Separation of disclosable material

The Board suggests it is not under an obligation to parse out sensitive material from that which is not subject to a

statutory exemption from disclosure based upon its reading of *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826 (Ind. Ct. App. 1998).

Indiana code section 5-14-3-6 states if a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying.

This Office does not read *Journal Gazette* to be dismissive of Section 6 of the APRA. Rather it affirmed a trial court's recognition that the entirety of the records *in question in that specific case* were inherently subject to discretionary release as a whole. It didn't order separation of non-exempt materials because of the very nature of documents themselves. There simply wasn't any non-disclosable material contained within them.

To adopt the Board's reasoning is to adopt a decision that a speck of deliberation within a larger document colors all of the associated material – hundreds of pages of documentation potentially tainted by a single line of text and withheld. This is certainly not the intent of the APRA.

The exemptions to disclosure under the APRA are already broad enough. Far be it from this Office to expand them further. Arguing that the separation of disclosable materials from nondisclosable is a moot consideration flies in the face of the purpose of the statute.

Indeed, if they were the predicate to a decision, the memos and emails in the current case may indeed contain some deliberative material. However, it is more than likely that the

materials created contained underlying facts and timelines of the underlying incident of the inmate's death. Facts and timelines do not qualify as deliberative by the very definition of the statute. Therefore, they must be separated and disclosed accordingly.

4. Investigatory Records

Finally, the Board argues that the materials in question are not subject to disclosure because the County Prosecutor used them in the investigation of a crime.

Under APRA, public access to investigatory records of law enforcement agencies may be provided or denied at the agency's discretion. Ind. Code § 5-14-3-8(b)(1). The term investigatory record means "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i). "Law enforcement agency" is also statutorily defined, and includes county prosecutors. *See* Ind. Code § 5-14-3-2(q)(6).

This discretion is not absolute. APRA establishes a cause of action for abuse of discretion as arbitrary and capricious. Ind. Code § 5-14-3-9(g)(2). That determination is not for this Office, but ultimately for the courts. That stated, it is my statutory obligation to provide guidance and advice to public agencies and the public on how to avoid that and similar pitfalls.

Prosecutors and law enforcement officials alike often justify their withholding of records based upon the broad language of the statute. "Information compiled in the course of an in-

vestigation of a crime" seemingly serves as a records supermassive black hole where anything near its orbit gets sucked into its vortex of gravity, never to escape.

Arguably, however, this is expressly contrary to the General Assembly's intent that the APRA be liberally construed to favor transparency. *See* Ind. Code § 5-14-3-1.

This is not to be dismissive of discretion on the part of law enforcement to preserve the integrity of investigations, however, no prosecutor, police officer, chief or sheriff is Midas. Everything they touch does not turn to investigatory gold.

Hence APRA's prohibition on arbitrarily or capriciously exercising discretion to withhold a public record from disclosure. There must be a compelling reason to withhold a record – even if the law allows them to do so.

To that end, we have often provided law enforcement agencies the following parameters to ensure justified use of the discretion. These parameters, developed with other law enforcement agencies, have been generally well-received. So much so that the legislation concerning access to body-worn camera footage mirror them: would the release of the record compromise an ongoing or open investigation; would the release jeopardize a reasonable expectation of privacy; or would disclosure of investigatory material create a public safety risk. The Board has not invoked any of these considerations and has only cited to a broad interpretation and application.

The formal complaint process of this Office would be meaningless if the purpose was merely to rubberstamp the arguments of public agencies. Here, the Elkhart County Board of Commissioners has not provided a compelling reason why either the deliberative materials or the investigatory records exception would or should apply to the records in question.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Elkhart County Board of Commissioners has not sustained its argument that APRA's exceptions apply in this matter.

Luke H. Britt
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