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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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BRYAN E. WOLFE,  
*Complainant,*

v.

KOKOMO POLICE DEPARTMENT,  
*Respondent.*

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Formal Complaint No.  
19-FC-68

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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 Kokomo Police Department violated the Access to Public Records Act.<sup>1</sup> Corporation Counsel Beth A. Copeland filed a response on behalf of KPD. 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 August 15, 2019.

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

## BACKGROUND

This case involves a dispute over access to records related to a motorcycle crash investigated by the Kokomo Police Department.

On August 8, 2019, Bryan E. Wolfe, Chief Investigator for Keller & Keller LLP, filed a written request for public records with the Kokomo Police Department for records related to a crash on May 17, 2019 involving a client of Wolfe's firm.

Specifically, Wolfe requested the following:

Driver and witness statements, a copy of the CD collected by the investigating officer from the Crew Car Wash video camera system, RMS Report 2019-02665, Event Data Recorder download reports related to this crash, a copy of mathematics utilized in the pedestrian throw formula and any other mathematic formulas utilized and related computations utilized in this crash investigation, documentation of measurements taken, scale diagrams (if any), photogrammetry or total station data sets (if utilized) & related outcomes, and digital images/scene photographs pertaining to [the] crash...

Five days later, KPD denied Wolfe's request in writing. The department noted its policy prohibiting the release of narratives, statements, photographs, or evidence regarding criminal investigations without a subpoena. KPD noted that it adopted this policy in accordance with Indiana Code section 5-14-3-4(b)(1), which gives law enforcement agencies discretion to withhold investigatory records from public disclosure.

As a result, Wolfe filed a formal complaint with this office alleging the KPD's denial constituted a violation of the Access to Public Records Act ("APRA"). Essentially, Wolfe asserts that KPD inappropriately applied APRA's investigatory records exception to disclosure by denying his request.

KPD disputes Wolfe's claim of a public access violation. The department asserts that it compiled the documents requested during the course of a criminal investigation; and thus, the KPD has discretion to deny disclosure. KPD also observes that the fact the investigation is closed is immaterial to the applicability of the exception.

### **ANALYSIS**

The primary issue in this case is whether the Kokomo Police Department compiled the records requested by Wolfe in the course of the investigation of a crime; and thus, authorizing the department to deny disclosure under the Access to Public Records Act.

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

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") 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." *Id.* The Kokomo Police Department is a public agency for the purposes of APRA;

and thus, is subject to the act's requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy the ISP's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, "public record" means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the records requested by Wolfe are public records for purposes of APRA. Although public records are presumptively disclosable, APRA contains both mandatory and discretionary exceptions to disclosure.<sup>2</sup>

This case involves the applicability of one of APRA's discretionary exceptions to disclosure: the investigatory records exception.

## **2. Investigatory Records of Law Enforcement**

APRA gives law enforcement agencies the discretion to withhold investigatory records from public disclosure. Ind. Code § 5-14-3-4(b)(1). Indeed, the Kokomo Police Department is a law enforcement agency for purposes of APRA. *See* Ind. Code § 5-14-3-2(q)(6). That means KPD has discretion

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<sup>2</sup> Ind. Code § 5-14-3-4(a) and (b).

under APRA to withhold the agency's investigatory records from public disclosure.

Under APRA, "investigatory record," means "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i). In other words, "if there is no criminal investigation, the documents cannot be withheld at [the agency's] discretion pursuant to the investigatory records exception." *Scales v. Warrick County Sheriff's Department*, 122 N.E.3d 866, 871 (Ind. Ct. App. 2019).

Here, both sides agree that Wolfe requested records associated with a two vehicle accident that occurred in Kokomo on May 17, 2019. KPD denied Wolfe's request by asserting the documents are investigatory records, which gives the department discretion to withhold them from disclosure under APRA.

As set forth *supra*, APRA defines "investigatory record" as "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i).

In this instance, based on the information presented, this office cannot agree that the records at issue in this complaint constitute investigatory records for purposes APRA.

The KPD crash report supports this conclusion.

First, in the crash report, a KPD crash investigator concludes that "[t]here is no need for criminal prosecution in this case." The officer's conclusion, of course, substantially weakens the agency's argument that the records are investigatory records for purposes of APRA.

Second, in the crash report, the responding officer initially concluded that the primary cause of the crash was one driver's failure to yield. In a separate entry in the same report dated May 29, 2019, the same KPD crash investigator who concluded there was no need for criminal prosecution also agreed that the cause of the crash was one driver's failure to yield.

Although APRA does not define "crime," our criminal code defines the term "crime" to mean "a felony or a misdemeanor." Ind. Code § 35-31.5-2-75.

Subject to some exceptions, a failure to yield is a Class C infraction. *See* Ind. Code § 9-21-8-49. Additionally, our courts have long recognized that "[t]raffic infractions are civil, as opposed to criminal, proceedings in nature." *Pridemore v. State*, 577 N.E.2d 237, 238 (Ind. Ct. App. 1991). Moreover, Indiana Code section 34-28-5-1 governs the prosecution of infractions.

Granted, offenses like aggressive driving and reckless driving are misdemeanors. *See* Ind. Code §§ 9-21-8-52, 55. Even so, the crash report noted that the crash was not the result of aggressive driving, and did not document any contributing circumstances that would constitute reckless driving.

Third, the investigating officer's crash report also noted the non-yielding driver's apparent physical status after the crash to be "normal." In other words, in the officer's judgment, the driver's physical condition was not affected by alcohol, drugs or medication, handicap, illness, or fatigue. The driver also tested negative for alcohol on a portable breath test at the scene.

As support for its argument that the crash was a criminal investigation, KPD notes that one of the drivers sustained serious bodily injury, which prompted the agency to convert the situation from a traffic investigation to a criminal investigation.

KPD also lists a series of actions the department took in the investigation that it otherwise would not have taken in a traffic investigation. Specifically, KPD asserts that its Accident Investigation Department performed the following actions:

- (1) obtained a portable breath test;
- (2) obtained a blood draw from the potential suspect to test for the presence of drugs and alcohol;
- (3) collected a list of medications from the potential suspect;
- (4) marked with paint the final resting spot of tire marks, gouges, & scrapes and then photographed the scene with paint;
- (5) called the city's engineering department to shoot scene for potential CAD drawing;
- (6) took possession of and towed the potential suspect's vehicle to a secured lot for processing;
- (7) collected a video from an outside source;
- (8) collected event data recorder from the inside of the potential suspect's vehicle; and
- (9) computed speed estimation using Pedestrian Throw Formula.

All that may be true, but an agency's decision to conduct a more in-depth investigation in certain motor vehicle crashes does not automatically transform the investigation into a criminal matter. It may become a criminal investigation. On the other hand, it may not. So too is the case here.

Motor vehicle accidents are not inherently criminal (e.g., a felony or misdemeanor) in nature. Indeed, criminal culpability may arise in connection with a vehicle accident but not always.

Our legislature granted law enforcement agencies a considerable amount of discretion to withhold sensitive material accumulated during criminal investigations through APRA's investigatory records exception. This scope of the exception is arguably the broadest APRA has to offer.

Here, among other things, a KPD crash investigator concluded and documented in the crash report that the crash was not criminal in nature. As a result, the investigatory records exception does not apply.

As an aside, KPD correctly notes that statutory language of APRA does not limit the applicability of the investigatory records exception based on the age of the records or the status of the investigation. Our courts have observed and recognized the the same. *See Lane-El v. Spears*, 13 N.E.3d 859 (Ind. Ct. App. 2014). It should also be noted that the *Lane-El* case also cites the statute cautioning against applying discretion arbitrarily.<sup>3</sup>

Ultimately, because the records in this case are not investigatory records compiled in the course of an investigation of a *crime*, the status of the crash investigation is not relevant to the disclosure inquiry because the exception does not apply.

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<sup>3</sup> Ind. Code § 5-14-3-9(g)(2)



## CONCLUSION

Based on the foregoing, it is the opinion of this office that the investigatory records exception does not apply to the records in this case. This office recommends the KPD release the requested records in accordance with the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor