
OPINION OF THE PUBLIC ACCESS COUNSELOR

CHRISTOPHER L. DAVIS,
Complainant,

v.

INDIANA STATE POLICE,
Respondent.

Formal Complaint No.
19-FC-70

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana State Police (“ISP”) violated the Access to Public Records Act.¹ ISP responded via Legal Counsel Cynthia Forbes. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the amended formal complaint received by the Office of the Public Access Counselor on August 19, 2019.

¹ Ind. Code § 5-14-3-1 to 10.

BACKGROUND

This case involves a dispute over access to investigatory records of the Indiana State Police. This matter was previously addressed in *Informal Opinion of the Public Access Counselor 19-INF-6* wherein the current Complainant's inquiry posited an academic question rather than an adversarial complaint.

In this matter, however, the Complainant Christopher Davis was denied investigatory records of the case known colloquially as the "Burger Chef Murders". Davis is the proprietor of a local podcast and was seeking the information in relation to his true crime reporting. A fellow podcaster, Ashley Flowers of the Crime Junkies podcast, was provided access to the information by an Indiana State Police ("ISP") District Investigative Commander.

On July 18, 2019, Davis submitted a public records request for the investigatory file of the Burger Chef Murders using *Informal Opinion of the Public Access Counselor 19-INF-6* as a predicate. In that Opinion, the Public Access Counselor opined that releasing information to one requester but not another could be considered arbitrary and possibly a waiver of any exemption to disclosure. Nevertheless, the request was denied on July 25, 2019.

Davis' main argument is that ISP's decision to allow Crime Junkies the opportunity to inspect the information is arbitrary and capricious if the information is off-limits to other requesters.

ISP responded to the complaint with a background analysis of the issue. The Crime Junkies podcast, via Ashley Flowers,

was indeed given access to the investigative file. While no copying of the material was allowed, she did view the file. ISP argues that as a board member of Crime Stoppers – an organization which partners with ISP for the furtherance of tips and leads – she was a known quantity to ISP and trusted with certain access. It is not an unusual practice for ISP to leverage outside assistance in investigations , i.e. the media, privately owned laboratories, psychologists, etc..

In the course of its dealings with Ms. Flowers, a district commander misunderstood the relationship with her. While he was authorized to speak with her generally about the case, he was not to permit her to inspect the actual file itself. ISP considers the Burger Chef investigatory file to be highly sensitive and off-limits to everyone, including the Crime Junkie podcast.

Nevertheless, Ms. Flowers was permitted to view the investigatory file, albeit with restrictions. As a result, the district commander was informally disciplined (received employee counseling) and re-educated on ISP records protocol and procedure. Typically, all public records access request goes through ISP Legal. In this case, ISP Legal did not authorize inspection.

ISP argues that a single employee cannot make decisions on behalf of the agency as a whole without express authorization. Because ISP administration did not make the decision to allow inspection, it is not arbitrary, although ISP concedes it was a mistake for the employee to do so. For similar reasons, it did not waive any privilege universally because of a single action on the part of a lower ranking employee.

ANALYSIS

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 § 5-14-3-1.5-1.

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 Indiana State Police is a public agency for the purposes of APRA; and thus, 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).

APRA generally provides law enforcement agencies with discretion to withhold investigatory records from public disclosure. Ind. Code § 5-14-3-4(b)(1). “Investigatory records,” in this context means “information compiled in the course of the investigation of a crime.”

This exemption to disclosure is broad – and there are circumstances where the discretion has been abused – but it is not absolute. Discretion can be exercised inappropriately and has its limits.

While *Informal Opinion of the Public Access Counselor 19-INF-6* will not be reproduced in whole here, it is incorporated by

reference. In particular, consider the following excerpt from that Opinion:

Although APRA does not contain a waiver provision, our courts acknowledge that a public agency can waive the exceptions to public disclosure. *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. The Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003);

In *Ind. Newspapers*, the Indiana Court of Appeals rejected the argument that a public agency cannot waive the exceptions under APRA on the basis the act contains no express waiver provision. 787 N.E.2d 893 at 919. “Waiver is the voluntary and intentional relinquishment of a known right.” *Id.*

The court noted a situation where a public agency might waive the protections provided by APRA’s exceptions:

If, for example, an agency allowed one party access to materials and then in turn denied another party access to the same materials based upon an exception to APRA, the agency might well be held to have waived the applicable APRA protections.

Id. at 919. The court further explained that its conclusion on the issue of waiver does not frustrate the purpose of APRA’s exceptions, “for if the agency has already disclosed the allegedly non-disclosable materials, the purpose of the

APRA exceptions will have already been compromised.” *Id.*

Moreover, the court observed that “in such a case, the decision to deny access after allowing others access could be considered an arbitrary and capricious abuse of discretion. *See* I.C. § 5–14–3–9(f)(2).” Without a very compelling reason, this office does not condone picking and choosing who gets what when disclosure exceptions are waived.

In 2017, the Indiana Court of Appeals declared that “[a]n arbitrary and capricious decision is one which is patently unreasonable and is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion.” *Groth v. Pence*, 67 N.E.3d 1104, 1122 (Ind. Ct. App.), *transfer denied*, 86 N.E.3d 172 (Ind. 2017).

Here, based on the information provided, it is conceivable that the law enforcement agency waived the protections afforded by APRA’s investigatory records exception. If the agency allowed one party access to certain investigatory records and then in turn denied you access to the exact same investigatory records, the agency likely waived the applicable protections under APRA.

The general premise of that Opinion holds true, however, new facts have come to light that influence this adversarial complaint. It is clear, and this Office takes ISP at its word, that the rival podcaster was not intended to have viewed the records. Simply put, the district investigative commander

allowed access when he should not have. The question becomes whether his actions compromise ISP's ability to withhold the material as a whole, rendering the discretion arbitrary and/or waived.

This Office thinks not.

From the perspective of the Complainant, giving access to one podcaster over another is arbitrary and unfair. It seems as if ISP may be playing favorites and picking and choosing who receives "most favored nation" status in the economy of public access transactions. From a 10,000 foot view, this is a credible interpretation of the circumstance. And make no mistake, had ISP ratified the district commander's actions or given him authorization to do so, this Office would agree.

Reviewing ISP's response, however, it is obvious that internal controls and protocols were not followed but corrective measures were taken to ensure compliance going forward. This Office does not believe that one employee acting in an individual capacity necessarily binds the entire agency to those rogue actions when he has not been given authorization to act in a particular manner. ISP as the principal did not give the commander agency to grant permission to inspect the files.

This is undoubtedly cold comfort to the Complainant but the sensitivity of the investigative files remain even though the veil was pierced by a single incident. Given the circumstances, the investigation was not compromised or its integrity eroded simply because one person was able to view the material with restrictions.

This Office enjoys a healthy relationship with ISP and is regularly consulted for guidance by their attorneys and information officers. While we do not always agree completely, I have confidence that this deviation from best practice in this situation is an outlier and ISP has taken appropriate steps to ensure compliance in the future.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indiana State Police did not waive its ability to withhold investigatory records and did not apply its discretion arbitrarily in this instance.

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

Luke H. Britt
Public Access Counselor