OPINION OF THE PUBLIC ACCESS COUNSELOR

MAX C. JONES,
Complainant,

v.

INDIANA STATE POLICE,
Respondent.

Formal Complaint No.
19-FC-95

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 formal complaint received by the Office of the Public Access Counselor on September 27, 2019.

[1] Ind. Code § 5-14-3-1 to 10.

BACKGROUND

This case involves a dispute over access to an investigation report from the Indiana State Police, which relates to the alteration of a candidate filing document in the Vigo County Clerk's office.

On September 18, 2019, Lisa Trigg, a reporter for the *Tribune-Star*, filed a public records request with ISP and the Office of Prosecuting Attorney Ann Smith Mischler seeking the following:

> The state police investigator's report on the Vigo County Election Board/ Tess Brooks-Stephens altered candidate document incident. This report was submitted to the Sullivan County Prosecutor's Office for review.

Both ISP and the Prosecutor's office denied the request on the basis that the documents in questions are considered investigatory records and are therefore exempt from disclosure. While denying the request, ISP did provide the media summary report pertaining to the case in question.

Max Jones ("Complainant"), editor of the *Tribune- Star*, argues that ISP's report should not be considered an investigatory records because at the time of the request "… the case had been closed" and "…the decision had been made by the prosecutor not to file charges." Jones goes on to assert that "it is in the public interest to have access to the ISP report so that it can know what actually occurred in the government office that led to the police investigation and appointment of a special prosecutor to review the case."

On September 30, 2019, Cynthia Forbes submitted ISP's response to the complaint. In the letter Forbes denies any

wrong-doing on the part of ISP and reaffirms ISP's opinion that the requested records should be considered investigatory and are exempt from disclosure at the discretion of the agency.

First, she argues that because the requested report was generated as part of a criminal investigation it meets all the necessary criteria to be categorized as an investigatory records.

Second, Forbes dismisses the idea that records are automatically declassified as investigatory if charges are not files or the case in question is closed. She cites Formal Complaint 09-FC-157, as well as the Indiana Court of Appeals ruling in *Lane-El v. Spears*[2] as evidence that "APRA does not provide a time or any other limitations on an investigatory record and its disclosure." Therefore, since Jones does not contend whether the requested record is investigatory, the cited statute and case law invalidate his argument.

ANALYSIS

The primary issue in this case is whether the Indiana State Police had discretion under the Access to Public Records Act to withhold from public disclosure the records requested by Jones.

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.

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[2] 13 N.E.3d 859 (Ind. Ct. App. 2014)

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, 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).

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, ISP is a law enforcement agency for purposes of APRA. *See* Ind. Code § 5-14-3-2(q)(6). That means ISP has discretion 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, there is little doubt the records in question meet the definition of an investigatory record. ISP argues that the agency gathered and kept the records at issue here as part of the investigation into the Vigo County Election Board.

Much of the following analysis mirrors the reasoning recently stated in *Opinion of the Public Access Counselor*, 19-FC-76 (2019).

Based on the information presented, this office agrees that the records in contention fall under the investigatory records exception.

Jones notes that the records he wants are related to a closed case. Although that is a reasonable public policy argument, the 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).

To be sure, the investigatory records exception is broad, but it is not absolute. In other words, the discretion given to law enforcement agencies to withhold investigatory records has limits.

For instance, Indiana Code section 5-14-3-9(e) establishes a cause of action that allows any person or organization who has been denied the right to inspect or copy a public record by a public agency to file an action to compel disclosure in the circuit or superior court of the county where the denial occurred.

Indiana Code section 5-14-3-9(g)(1)(A) and (B) sets forth the agency's burden of proof in determining whether it properly

denied access to a record under APRA's discretionary exceptions, which includes the investigatory records exception.

In short, an agency must prove that the requested record falls into one of the discretionary exceptions under APRA and establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. Conversely, the person requesting the records meets their burden of proof by showing that the denial of access was arbitrary or capricious.

Stated differently, if an agency exercises its discretion to deny disclosure arbitrarily or capriciously, a petitioner can prevail in action to compel disclosure. 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).

That is not to say ISP has exercised its discretion inappropriately, only that it has not demonstrated to this office that the choice was not arbitrary. As stated it *Opinion of the Public Access Counselor*, 19-FC-73:

> Stated differently, the department's response could have just as easily been: "the records are investigatory records [and non-disclosable] *because we said so*." That approach does not comport with the letter or the spirit of the law.

Again, while the exception is broad, it is not absolute. This office has informally created a makeshift test as a guideline for police agencies. An agency should consider whether the release of records would: (1) interfere with an investigation; (2) jeopardize an expectation of privacy of a victim, witness, or identified individual; or (3) compromise public safety generally.

If the release would endanger one of these factors then the agency should withhold the records. If not, the records should not be withheld.

As a final aside, this situation is comparable to the matters addressed in *Opinion of the Public Access Counselor*, 14-FC-61 (2014), which also dealt with the investigation of a public agency:

> What is more, alleged [wrongdoings of public agencies] are of significant public concern. The public has a vested interest in the stewardship of their tax monies [and trust]. The release of investigatory records is discretionary - not confidential. Even if it is covered by an APRA exception, public policy may outweigh the purpose of withholding exempted records.

That written, this office encourages ISP to reevaluate its decision consistent with this opinion. To the extent there is a compelling reason to maintain nondisclosure, so be it. However, this office does interpret the APRA as expecting a measure of judicious reflection when exercising discretion to withhold a record.

Luke H. Britt
Public Access Counselor