

**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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MEGAN E. CAIN,  
*Complainant,*

v.

INDIANA STATE POLICE,  
*Respondent.*

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Formal Complaint No.  
20-FC-105

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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 Indiana State Police violated the Access to Public Records Act.<sup>1</sup> Legal counsel Barbara L. Rosenberg filed an answer on behalf of ISP. 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 July 30, 2020.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## **BACKGROUND**

This case involves a dispute over access to a specific missing person case file maintained by the Indiana State Police (ISP).

On June 12, 2020, Megan Cain (Complainant) filed a public records request with ISP seeking the following:

An opportunity to inspect or obtain copies of public records that pertain to the investigation and disappearance of Donnie W. Westfall (“Mr. Westfall”).

This information is being obtained so the family of Mr. Westfall can review the records and hire a private investigator to exclusively investigate Mr. Westfall’s disappearance. This information is not being sought for commercial purposes.

On June 23, 2020, ISP responded to Cain’s request and asked that she indicate precisely what records she was requesting. Cain replied that she was hesitant to try to narrow the request because she wasn’t sure what exactly was in the file and she was worried she may not be able to specify each record that was being kept in the case file.

On July 1, 2020, ISP denied Cain’s request. The agency claimed the requested records were investigatory records; and thus, ISP would withhold the records from disclosure in accordance with Indiana Code section 5-14-3-4(b)(1).

As a result of the denial, Cain filed a formal complaint with this office. Cain argues that the requested records do not meet the requirements to be categorized as investigatory because the issue is being investigated as a missing person case, and not a criminal matter, seeing as no criminal indictments or criminal findings have ever been issued in the

individual's disappearance. In support of her claim, Cain cites a court of appeals case, *Scales v. Warrick County Sheriff's Department*, 122 N.E.3d 866 (Ind. Ct. App. 2019), in which the court decided that records requested by a father in connection to the disappearance of his daughter, could not be withheld under the investigatory records exception.

On August 18, 2020, ISP filed a response to Cain's complaint denying the agency violated APRA. First, ISP reiterated that the investigatory records exception gives the agency the discretion to disclose or not disclose investigatory records, which are defined as information compiled in the course of the investigation of a crime. Ind. Code 5-14-3-2(i). Furthermore, Rosenberg highlighted that the Indiana Court of Appeals ruled on this issue and held, ... the APRA does not limit the definition of investigatory records to those that will interfere with active law enforcement proceedings.

Second, ISP explained that unlike the current situation involving the missing person, the *Scales* case related to missing persons records for an individual that had been found at the time the records had been requested. Rosenberg concludes that ISP rightfully chose to withhold the missing persons case records because the case is still open and pending with additional leads to pursue, and it was vital that the agency maintain potential admissibility should criminal charges be filed.

## ANALYSIS

The issue in this case is what constitutes a law enforcement investigatory under the Access to Public Records Act for an agency to withhold a record.

### **1. The Access to Public Records Act**

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.” Ind. Code § 5-14-3-1. The Indiana State Police (ISP) is a public agency 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 ISP’s public records during regular business hours. Ind. Code § 5-14-3-3(a). Indeed, APRA contains exceptions—both mandatory and discretionary—to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)—(b).

### **2. Investigatory records**

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).

The *Scales* case is critical in this regard because it recognizes the important distinction between criminal matters and other law enforcement activities. While APRA's investigatory record's exemption is broad and gives considerable discretionary latitude to police, it is not absolute and all-encompassing. Indeed, this office has recognized the contrasting distinction as well. See *Opinions of the Public Access Counselor* 19-FC-75 & 76.<sup>2</sup>

Unfortunately, ISP mischaracterizes the *Scales* case and attempts to distinguish it from the current situation by claiming the missing person in *Scales* was found alive at the time of the request. Sadly, this was not the case as Kelly Scales' body was found in the back seat of her car at the bottom of a lake – a fact our Court of Appeals conspicuously states.

Moreover, while foul play was not discovered at the scene, the *Scales* case indeed had a potential criminal factor as some motive and recent prior bad behavior as to a suspect was

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<sup>2</sup> See *Opinion of the Public Access Counselor*, 19-FC-75 (2019); *Opinion of the Public Access Counselor* 19-FC-76(2019).

cited as well. Even so, the court concluded that the Sheriff's Office had not carried its burden to sustain the investigatory records exception.

And so it is here as well. A potential eventuality of criminal activity is not enough to sustain those cases where a suspected crime is not immediately apparent. If there is a good faith suspicion of criminal activity, so be it: the exception may apply. But not all investigatory activity is criminal in nature. Not all law enforcement investigations lead to an alleged or suspected crime. A cursory statement of possible future criminality is not enough to invoke the exception to disclosure. APRA and the *Scales* case recognize this and therefore this office will follow suit.

Finally, it is unclear how many documents are in the file requested. Based on the arguments presented, it does not appear that it would be voluminous. It is unlikely the request is unreasonably vague.

## CONCLUSION

Based on the information provided, the law enforcement activity in this matter is of a non-criminal nature. Therefore this office recommends ISP fulfill Cain's request as presented.

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

Luke H. Britt  
Public Access Counselor