
OPINION OF THE PUBLIC ACCESS COUNSELOR

TONY COOK
Complainant,

v.

INDIANAPOLIS METROPOLITAN POLICE DEP'T.,
Respondent.

Formal Complaint No.
21-FC-101

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Indianapolis Metropolitan Police Department violated the Access to Public Records Act.¹ IMPD legal advisor Daniel Bowman filed an answer on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received

¹ Ind. Code § 5-14-3-1-10.

by the Office of the Public Access Counselor on July 22, 2021.

BACKGROUND

This case involves a dispute over redactions made by the Indianapolis Metropolitan Police Department (IMPD) to a 2013 report involving a juvenile.

On April 29, 2021, Tony Cook (Complainant), a reporter with the *Indianapolis Star*, filed a public records request with the IMPD seeking the following:

A copy of the 2013 IMPD report referenced by Deputy Chief Craig McCartt during his update for the media shortly after 4 p.m. on Friday, April 16, 2021, regarding the shooting at FedEx and suspect Brandon Scott Hole.

On May 7, 2021, IMPD provided Cook a redacted copy of the report. IMPD cited the Driver's Privacy Protection Act (18 USC § 2721), the Indiana data breach law (IC § 24-4.9-1 et seq.), and the Access to Public Records Act as authority for the redactions.

On the same day, Cook objected to IMPD's redactions. He argued that IMPD failed to properly cite the specific exemption under APRA that would allow for the redactions, and that "the burden of proof [to justify redactions] lies with the public agency denying a records request, not with the member of the public making the request."

On July 7, 2021, IMPD agreed to remove the redaction of the victim's name but refused to remove any other redactions in the report.

On July 22, 2021, Cook filed a formal complaint alleging IMPD's redactions constitute an improper denial of access in violation of the Access to Public Records Act (APRA). Cook argues that IMPD's redactions are overbroad for several reasons.

First, he contends any privacy concerns are unfounded since Brandon Hole is dead. Second, Brandon Hole can no longer be charged with a crime, so it is doubtful the record—which is more than 8 years old—holds any investigatory value. Third, “IMPD's wholesale redaction of nearly 60 lines of narrative suggest a less judicious approach to public records than what is required under the law.” Fourth, Brandon's name is visible in various parts of the redacted report, thus highlighting the arbitrary nature of the redactions. Fifth, Cook cites Indiana Code section 31-39-3-2, which states that “the nature of the offense allegedly committed and the circumstances immediately surrounding the alleged offense” should be disclosed for allegations of delinquency that would be a crime if committed by an adult. Thus, the report narrative should be disclosed.

On August 11, 2021, IMPD filed an answer to Cook's complaint disputing his claims. IMPD argues that the juvenile records law and APRA's discretionary exception for the investigatory records of law enforcement agencies govern access to the report.

IMPD asserts that it correctly applied the juvenile records law and its discretion to redact the report in accordance with the investigatory records exception. It argues that Cook's assertion of staleness of the exception due to the suspect's death is largely irrelevant as the exception does not

bookend the exemption with a deadline after an investigation is closed.

Furthermore, IMPD argues the records provided satisfies the letter of the law and provides the requisite information it is obligated to release.

ANALYSIS

1. The Access to Public Records Act

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. Indianapolis Metropolitan Police Department (IMPD) 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 IMPD’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)—(b).

2. Juvenile law enforcement records

In general, juvenile law enforcement records are confidential. Ind. Code § 31-39-3-4(a). A law enforcement agency is required to take appropriate actions to protect the records from unauthorized disclosure. Ind. Code § 31-39-3-4(b).

At the same time, certain juvenile law enforcement records are subject to public disclosure. *See* Ind. Code §§ 31-39-3-2

to -3. For instance, the following information contained in records involving allegations of delinquency that would be a crime if committed by an adult is considered public information:

- (1) The nature of the offense allegedly committed and the circumstances immediately surrounding the alleged offense, including the time, location, and property involved.
- (2) The identity of any victim.
- (3) A description of the method of apprehension.
- (4) Any instrument of physical force used.
- (5) The identity of any officers assigned to the investigation, except for the undercover units.
- (6) The age and sex of any child apprehended or sought for the alleged commission of the offense.
- (7) The identity of a child, if the child is apprehended or sought for the alleged commission of:
 - (A) an offense over which a juvenile court does not have jurisdiction under IC 31-30-1-2 and IC 31-30-1-4; or
 - (B) an act specified under IC 31-30-3-3.

Ind. Code § 31-39-3-2. As a result, the pieces of information listed above are disclosable to the public because the case involved allegations of juvenile delinquency that would be a crime if committed by an adult.

Here, IMPD provided much of the required information, however, some was redacted. Cook challenges those redactions.

3. Investigatory records

IMPD couples its invocation of the juvenile law enforcement records statute with APRA's discretionary exception for investigatory records.

APRA carves out a broad disclosure exception for the investigatory records of law enforcement agencies. Ind. Code § 5-14-3-4(b)(1). "Investigatory record" means information compiled in the course of the investigation of a crime. Ind. Code § 5-14-3-2(i).

Notably, investigatory records are not confidential per se. Rather, a law enforcement agency has the discretion to release them or not. Disclosure can be a partial or total at the choosing of the agency. As discussed below, this discretion is not absolute and can be, in the experience of this office, overly applied.

The arguments presented by Cook are well taken as are IMPD's contentions. Nevertheless, this office is charged with erring on the side of transparency in public records disputes.

The facts as they stand are not in dispute. The name of the juvenile is known, and he is deceased. A crime was committed. An investigation into further criminal conduct and any subsequent criminal prosecution is moot. Nevertheless, presumably the FedEx incident is still under investigation even if the name of the suspect is a known quantity.

The investigatory records exception serves several purposes including the integrity of the investigation itself (including subsequent prosecution); any threat to public safety; and any expectation of privacy of witness or victims. Here,

Cook argues the closure of the investigation into Brandon Hole obviates the necessity of the application of the investigatory records exception to disclosure.

That may be true in part, but not entirely. Presumptively, the investigatory methods and protocols of IMPD in situations like this would be laid bare in a complete report. The APRA exception seeks to protect these details as well. Police responses and investigatory tactics can be legitimately protected even after the closure of the investigation of a commission of a crime. To that extent, this office agrees with IMPD's assertion that the exception does not expire when the investigation does. Furthermore, there may be details that would compromise public safety or the safety of a witness or victim in relatively perpetuity. In those instances, the exception can endure.

Even so, the discretion to withhold records is not absolute. The law prohibits arbitrary or capricious abuse of discretion. Ind. Code § 5-14-3-9(g)(2). Just because an agency can invoke an exception, does not mean it is always appropriate.

To that end, the closure of a case or the death of a suspect may very well tip the scale over into the arbitrary and capricious category. Investigatory methodology notwithstanding, other details would be fair game for a public records request.

Finally, the head of a law enforcement agency also has discretion to grant access to confidential juvenile law enforcement records to serve the public interest. *See* Ind. Code §§ 31-39-4-9 to -11. Arguably, that concept applies here.

Therefore, IMPD's reference of the prior report places the record in the orbit of public interest. Its existence is newsworthy to the extent that it could contextualize the public's understanding of the subsequent shooting, an important consideration when evaluating the propriety of its release.

In sum, if the record does not compromise public safety at large or a legitimate expectation of privacy, it is the recommendation of this office that the record be disclosed.

As a final aside, Cook takes exception with IMPD's interpretation of Indiana Code section 31-39-3-2(4)'s language regarding "any instrument of physical force used." IMPD interprets this as applying to the use of force by IMPD and not the subject of the investigation. This office disagrees. That information would be contained in subsection (3): description of the method of apprehension. Subsection (4), similar to Indiana Code section 5-14-3-5(c) (a general description of any injuries, property, or weapons involved), applies to the suspects use of force in the commission of the crime.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indianapolis Metropolitan Police Department did not carry its burden of demonstrating that the withholding of the eight-year-old report of a deceased suspect was warranted in this case.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor