
OPINION OF THE PUBLIC ACCESS COUNSELOR

BRADEN D. DUNLAP
Complainant,

v.

CITY OF KOKOMO
Respondent.

Formal Complaint No.
21-FC-26

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the City of Kokomo violated the Access to Public Records Act.¹ Attorney Thomas Rethlake filed an answer on behalf of the City. 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 March 8, 2021.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to a law enforcement recording depicting a police action shooting by an officer of the Kokomo Police Department.

On December 30, 2020, Braden D. Dunlap (Complainant), a reporter for *The Kokomo Perspective*, emailed the Kokomo city attorney requesting to view body camera footage from an officer-involved shooting that occurred on December 28, 2021. The City initially denied Dunlap's request because the case was under investigation.

On March 1, 2021, Dunlap followed up with the City and requested an update on when he would be able to view the law enforcement recording he requested access to at the end of December.

Two days later, the City denied Dunlap's request. Kokomo cited Indiana Code section 5-14-3-5.2(a)(2)(B) as authority for the denial. The statute authorizes an agency to withhold a law enforcement recording from public disclosure if disclosure is likely to interfere with the ability of a person to receive a fair trial by creating prejudice or bias concerning the person or a claim or defense presented by a person.

On March 8, 2021, Dunlap filed a formal complaint with this office alleging the City's denial violates the Access to Public Records Act (APRA). Specifically, Dunlap argues that the City misapplied the disclosure exception, and the City should disclose the requested footage.

Two days later, the City filed a response to Dunlap's complaint defending its denial. Essentially, the City stands by

the reasons for its original denial of access to the body camera footage. Additionally, the City relies on an opinion² published by this office as support for the denial. The City contends that opinion supports the argument that an agency may withhold a law enforcement recording in accordance with Indiana Code section 5-14-3-5.2(a)(2)(C) if disclosure may affect an ongoing investigation, and if the recording is an investigatory record of a law enforcement agency.

For this case, the City asserts that the requested record is an investigatory record; and thus, disclosure is not mandatory under APRA. Moreover, the City cites the fidelity of the defendant's right to fair trial under the same section of statute.

On February 4, 2021, the Howard County Prosecutor's Office filed charges against the individual depicted in the requested footage. The City argues that it consulted both the Howard County Prosecutor and a Captain of the Kokomo Police Department about disclosing the footage, and everyone agreed the recording should not be released until after the court concludes criminal proceedings to preserve the defendant's right to a fair trial.

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.

² *Opinion of the Public Access Counselor*, 19-FC-92, (2019).

The City of Kokomo (City) and the Kokomo Police Department (KPD) are public agencies for purposes of APRA; and therefore, subject to the law's 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 Kokomo's public records during regular business hours. Ind. Code § 5-14-3-3(a).

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

2. Law enforcement recordings

In general, any person may inspect and copy a law enforcement recording unless one or more of the following circumstances apply:

(1) Section 4(b)(19) of this chapter applies and the person has not demonstrated that the public agency that owns, occupies, leases, or maintains the airport approves the disclosure of the recording.

(2) The public agency finds, after due consideration of the facts of the particular case, that access to or dissemination of the recording:

(A) creates a significant risk of substantial harm to any person or to the general public;

(B) is likely to interfere with the ability of a person to receive a fair trial by creating prejudice or bias concerning the person or a claim or defense presented by the person;

(C) may affect an ongoing investigation, if the recording is an investigatory record of a law enforcement agency as defined in section 2 of this chapter

and notwithstanding its exclusion under section 4(b)(1) of this chapter; or

(D) would not serve the public interest.

However, before permitting a person to inspect or copy the recording, the public agency must comply with the obscuring provisions of subsection (e), if applicable.

See Ind. Code § 5-14-3-5.2(a). Here,

Even if none of the circumstances in 5.2(a) apply, a law enforcement agency has discretion to withhold a law enforcement recording from disclosure. Specifically, APRA provides the following:

Except as provided in subdivision (19) and sections 5.1 and 5.2 of this chapter, a law enforcement recording. However, before disclosing the recording, the public agency must comply with the obscuring requirements of sections 5.1 and 5.2 of this chapter, if applicable.

Ind. Code § 5-14-3-4(b)(27). APRA also gives law enforcement agencies the discretion to withhold investigatory records from public disclosure. *See* Ind. Code § 5-14-3-4(b)(1). Indeed, KPD is a law enforcement agency for purposes of APRA. *See* Ind. Code § 5-14-3-2(q)(6). That means KPD 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).

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.

Notably, under APRA, law enforcement recordings are not investigatory records. Our legislature explicitly excluded law enforcement recordings (i.e., body camera recordings and dash camera recordings) from the general reach of APRA’s discretionary exception for investigatory records.

APRA’s investigatory records exception provides, in relevant part, the following:

Investigatory records of law enforcement agencies or private university police departments. *For purposes of this chapter, a law enforcement recording is not an investigatory record...*

Ind. Code § 5-14-3-4(b)(1) (emphasis added). Simply put, the plain language of the statute removes law enforcement recordings from the wide reach of APRA’s investigatory records exception.

Even though the investigatory records exception does not generally apply to law enforcement recordings, law enforcement agencies still have 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.

What is more, the law enforcement recording statutes in Indiana are inarguably favorable to law enforcement. Agencies enjoy a fair amount of discretion to limit the footage the public can see. Toward that end, the City also cited the “fair trial” language in Indiana Code section 5-14-3-5.2(a)(2)(C) in its initial denial.

Even so, invocation of the discretionary exceptions to disclosure under APRA are not absolute. Rather, the law places a bookend on the exemptions and exceptions in that they cannot be applied arbitrarily or capriciously. *See* Ind. Code § 5-14-3-9(g)(B)(2).

The situation in question involves two Level 6 felonies: (1) pointing a firearm at another; and (2) criminal recklessness with a deadly weapon. The probable cause affidavit from the officer who fired his weapon is publicly available and relatively detailed. The footage in question presumably captures the interaction contemporaneous with the alleged crimes and is not part of an ongoing investigation, but is the critical evidence in the case.

Based on the information provided, it is an unlikely scenario that the footage would compromise any ongoing investigation now that charges are pending. The City has not claimed there is any further investigatory activities to be conducted into the pointing of a firearm at another and criminal recklessness with a deadly weapon.

Furthermore, the City cites the integrity of the due process rights of the defendant to a fair trial as justification for the denial. Indeed, Indiana Code Section 5-14-3-5.2(a)(2)(C) contemplates such a scenario. Nonetheless, this is a curious exception for a prosecutor or police to cite and seemingly

would require the input of a defense attorney or public defender.

Nevertheless, this case is scheduled for a jury trial on July 9, 2021. Notably, based on the most recent data available, Howard County saw a mere nine jury trials in 2019, only two of which were for Level 6 felonies.

Even if this case does end up in front of a jury, the City has not applied the exemption to the facts of the case. This officer requires a little more than the mere citation of a statute to justify a denial. The application of the exemption to the relevant facts is critical for this office to make a determination.

APRA requires a preponderance of the evidence to justify denial of access to body camera footage. While this office does not authenticate evidence or sworn testimony, an argument akin to a preponderance (i.e., a greater than 50% chance that the claim is true) should be attempted. While the City rightfully cites a legal standard, it fails to carry its burden of persuasion that the exemption should apply in this case.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the investigatory records exception does not apply to the records requested in this case unless an investigation is actually ongoing. Moreover, the City has not met its burden that any due process right would be compromised by the release of otherwise disclosable public record.



Luke H. Britt
Public Access Counselor