
OPINION OF THE PUBLIC ACCESS COUNSELOR

NINA SCHUTZMAN
Complainant,

v.

INDIANAPOLIS METROPOLITAN POLICE DEP'T,
Respondent.

Formal Complaint No.
21-FC-76

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 (IMPD) violated the Access to Public Records Act.¹ 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 June 14, 2021.

BACKGROUND

This case involves a dispute over access to 911 recordings and the application of the investigatory records exception.

On June 1, 2021, Nina Schutzman (Complainant) filed a public records request with IMPD seeking the following:

Any 911 call recordings in relation to an incident that occurred on Dec. 12, 2012, around 6:30 p.m. in the area of White River Parkway walking path near the intersection of Limestone and New York Street, during which the body of a female was located.

On June 2, 2021, IMPD denied Schutzman's request, claiming that pursuant to Indiana Code 5-14-3-4(b)(1) the requested recordings are considered investigatory records, and thus IMPD, as a general rule, does not release such documents without a subpoena.

In turn, Schutzman filed her complaint on June 14, 2021, arguing that IMPD should release the 911 recordings since a portion of the call in question had been made available to the media and because the case is nearly a decade old.

On July 7, 2021, IMPD filed a response denying Schutzman's allegations. IMPD's response reiterates that the requested 911 records are considered investigatory records, therefore the agency has the discretion to withhold them. Furthermore, it rejects the Complainant's argument that the age of the case would affect the disclosability of case records.

Finally, regarding Ms. Schutzman’s assertion that the media had a portion of the 911 call, IMPD has not identified any records authorizing the disclosure of the 911 call, partially or in its entirety.

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. The 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 the IMPD’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. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

2. Schutzman's requests

The crux of this dispute revolves around the discretion of law enforcement agencies to withhold 911 calls.

At first blush, this case appears to be a simple one in light of the Indiana Court of Appeal's ruling in *Hasnie v. Carroll County E-911*, 148 N.E.3d 996 (Ind.Ct.App.2020) wherein a county dispatch center was told by law enforcement to withhold a 911 call pursuant to a request. Here, the request was not made to dispatch but directly to IMPD who indeed had compiled the call in the course of an investigation of a crime.

This office owes deference to the *Hasnie* court as binding precedent and will treat it accordingly. Indeed, pursuant to that holding, a 911 call *can* be withheld pursuant to a request, the public access counselor can ask the question: *should* it be withheld.

Some states have statutory language declaring 911 calls to be unequivocally confidential under any circumstance. That is not the case in Indiana. The law is silent on the matter.

Nevertheless, *Hasnie* confirms the discretion of law enforcement agencies to withhold investigatory material in its custody, including 911 calls. A law enforcement agency who uses a 911 call in the course of its investigation may keep the call in-house. Even still, discretionary release or withholding is permissive and not mandatory. See Ind. Code § 5-14-3-4(b)(1).

Absent the call being in the possession of the police, a 911 call is otherwise disclosable and no exception to disclosure

applies. It is only once law enforcement agency colors it investigatory does it become discretionary release.

This office does take exception to the notion that law enforcement is the gatekeeper of what is disclosable and what is not when it comes to public records that would be released but for the existence of an investigation. Certainly, records created pursuant to an investigation are sensitive as are those records that would not otherwise be public record.

Toward that end, this office scrutinizes the discretion element of withholding otherwise disclosable public records more closely than it would other types of investigatory material. The law contemplates this as well. Denial of a public record, even when an agency has such discretion, cannot be done arbitrarily or capriciously. See Ind. Code § 5-14-3-9(g)(2).

To wit: just because you can doesn't always mean you should.

This office has not had the opportunity to review the call in question. It may very well be sensitive to the point that exercising discretion to withhold it is appropriate. IMPD's response clearly states *that* the exception applies, but not *why it should* in this circumstance. Such ambiguity is often a limitation of this complaint process.

Another wrinkle in this circumstance is the allusion that a portion of the call may have been released to other media. The Complainant included a link to a clip where a call was included. It is unclear whether this short clip was a dramatization or the actual call. In any case, it was not long enough to tell one way or the other. If the call was indeed

released to one entity, however, it should be released upon request to anyone else seeking it.

As a final aside, IMPD's initial denial invoked the statutory exemption but also stated that IMPD "as a general rule, does not release such documents without a subpoena."

This is a common refrain from law enforcement agencies yet strikes at the heart of the notion that the discretion is not absolute. The law does not contemplate that only those involved in an open case with discovery options at their disposal have standing to request public records. Nor should a case be opened solely to have an officer of the court issue a subpoena. It may be time to finally retire the subpoena-for-public-access argument. If discretion to withhold is appropriate, so be it, but this determination should be made on a case-by-case basis.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indianapolis Metropolitan Police Department did not violate the Access to Public Records Act in invoking an exemption to disclosure, but the question remains whether the call is truly investigatory and if its release would actually compromise any pending investigation or subsequent prosecution.



Luke H. Britt
Public Access Counselor