
OPINION OF THE PUBLIC ACCESS COUNSELOR

NINA SCHUTZMAN,
Complainant,

v.

ELKHART COUNTY PROSECUTOR'S OFFICE,
Respondent.

Formal Complaint No.
23-FC-29

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Elkhart County Prosecutor's Office violated the Access to Public Records Act.¹ Elkhart County Prosecutor Vicki Elaine Becker filed an answer on behalf of the office. 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 15, 2023.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over the Access to Public Records Act's (APRA) investigatory records exception.

On March 6, 2023, Nina Schutzman (Complainant), who works for the *Audiochuck Podcast Network*, filed a public records request with the Elkhart County Prosecutor's Office requesting the following:

Copies of public records related to Ada Haradine, who disappeared from her Elkhart home on May 8, 1985, and whose remains were found on May 12, 1988, in Cass County, MI. This includes but is not limited to:

1. Case file index
2. Incident reports
3. Investigative reports
4. Supplementary homicide reports
5. Witness and suspect statements
6. Media communications, inc. press releases
7. Any news or media footage that was saved or attached to this case file.

The next day, Elkhart County Prosecutor Vicki Becker denied Schutzman's request. Prosecutor Becker asserted some of the requested records are investigatory records under APRA; and thus, are excepted from disclosure at the discretion of the agency. Additionally, the prosecutor indicated some of the requested records are covered by APRA's exception for attorney work product.

On March 15, 2023, Schutzman filed a formal complaint with this office alleging the Elkhart County Prosecutor's Office violated APRA. Specifically, she argues that the Prosecutor misapplied the investigatory records exception and

failed to separate any disclosable information from the non-disclosable information in the records.

On March 28, 2023, the Elkhart County Prosecutor's Office filed an answer to Schutzman's complaint. The agency argues the only records responsive to Schutzman's request are covered by APRA's disclosure exceptions for investigative records or attorney work product. Prosecutor Becker asserts the underlying case remains unsolved and the records should remain in house to protect the integrity of the investigation.

ANALYSIS

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. Further, 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 Elkhart County Prosecutor's Office 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 agency'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) to -

(b). This case concerns the investigatory record and work product of an attorney exceptions to disclosure.

2. Investigatory records

Under APRA, the investigatory records of law enforcement agencies may be excepted from disclosure at the discretion of the agency. Ind. Code § 5-14-3-4(b)(1). Prosecuting attorneys are included in APRA’s definition of law enforcement agency. *See* Ind. Code § 5-14-3-2(q)(6).²

Moreover, “investigatory record” means “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i). Notably, APRA does not define the term crime, but the Indiana Code generally defines crime as “a felony or misdemeanor.” *See* Ind. Code § 35-41-1-6.

Here, Schutzman requested the investigatory file of an unsolved homicide from the 1980s. The parties do not dispute the case entails a criminal investigation; and thus, APRA’s investigatory records exception potentially applies to records compiled during that investigation.

It is no secret that APRA gives law enforcement agencies broad discretion to withhold certain public records. Even so, some agencies have increasingly wielded APRA as a cudgel against public access, in some cases to a comically unreasonable degree.

Nevertheless, no discretionary exception in APRA is absolute. As a preliminary matter, APRA places the burden of

² “Any law enforcement agency, which means an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as ... prosecuting attorneys...”

proof for the nondisclosure of a public record on the agency. *See* Ind. Code § 5-14-3-1. For the purposes of this proceeding, that means the Prosecutor must justify the application of APRA's investigatory records exception the records requested by Schutzman.

What is more, if an agency cannot show that its decision to withhold a discretionary record is not arbitrary or capricious, it may be found in violation of the law by a court. *See* Ind. Code § 5-14-3-9(g)(2). This office adopts a similar standard for adjudicative purposes.

Indeed, there is no automatic inflection point when an unsolved case becomes open to the public. This office has ratified agency denials for records from decades-old cold cases. And it may very well do so here, but the Prosecutor's 150-word statement in response to the complaint does little by way of persuasion. To her credit, Prosecutor Becker offered to cooperate further if necessary.

To be clear, this office is not interested in the release of information that may compromise the integrity of an investigation or subsequent prosecution, jeopardize the safety of witnesses, or erode the ability of law enforcement to protect and serve the public.

Presumptively, the file contains sensitive material that may trigger one of the above considerations. Those records should be withheld without question. However, it strains credulity that every document or piece of information from the file would be "law enforcement sensitive" from a nearly 40-year-old case. Certain elements, to be sure, but not a complete veil of secrecy over an investigation.

Notably, one of APRA's primary purposes is to hold government accountable, especially those units with the substantial power of protecting public safety. Agencies should thoughtfully balance access with any available disclosure exception and all things being equal, err on the side of transparency.

Therefore, it is the recommendation of this office that the Prosecutor revisit the request to determine whether portions of the file may be released without compromising further investigation or prosecution.

3. Work product of an attorney

Additionally, the Prosecutor relies on APRA's disclosure exception for attorney work product, which provides:

information compiled by an attorney in reasonable anticipation of litigation. The term includes the attorney's:

- (1) notes and statements taken during interviews of prospective witnesses; and
- (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions.

Ind. Code § 5-14-3-4(b)(2). It stands to reason that any prosecutor's notes contained in the file would qualify as prosecutorial strategy or methodology; and thus, could be withheld from disclosure upon request. The attorney work product exception is broader in application than other discretionary exceptions under APRA. As a result, this office takes no issue with the Prosecutor's invocation of this exception for those qualifying materials.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Elkhart County Prosecutor revisit the request and determine if any portions of the file are disclosable under APRA consistent with this opinion.



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Luke H. Britt
Public Access Counselor

Issued: May 25, 2023