
OPINION OF THE PUBLIC ACCESS COUNSELOR

KARA M. KENNEY (WRTV),
Complainant,

v.

MUNCIE POLICE DEPARTMENT,
Respondent.

Formal Complaint No.
22-FC-107

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging that the Muncie Police Department violated the Access to Public Records Act.¹ Attorney Benjamin Freeman filed an answer on behalf of the department. 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 5, 2022.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute about whether the Muncie Police Department (MPD) violated the Access to Public Records Act (APRA) by denying access to law enforcement recordings.

On March 4, 2022, WRTV filed a public records request with MPD requesting body camera footage from multiple cases, which included:

all police worn body camera footage, video footage recorded inside police vehicles, and police reports related to the police action shooting of Jonathan Levi Allen on or about March 3, 2021, in the vicinity of West Centennial Avenue and Wheeling Avenue, Muncie, Delaware County, Indiana.

On April 8, 2022, MPD denied WRTV's request. MPD stated that "the release of the requested footage would not serve the public interest" in accordance with Indiana Code section 5-14-3-5.2(a)(2)(D).

On July 5, 2022, WRTV, through investigative reporter Kara M. Kenney, filed a formal complaint against MPD. WRTV contends MPD violated APRA because the agency improperly applied the disclosure exception cited in the denial.

WRTV argues the public has an interest in viewing the footage. Moreover, WRTV notes that the Delaware County Prosecutor's office issued a 20-page news release, including screen shots from the body camera footage, outlining why police were justified in shooting and killing Allen.

Additionally, WRTV argues that MPD is wrong to withhold the recordings because other law enforcement agencies, like IMPD, have release footage in similar incidents.

On July 25, 2022, MPD, through attorney Benjamin Freeman, filed an answer to the complaint. First, MPD argues that this office should dismiss WRTV's complaint because it was not filed in a timely manner. Since MPD denied the request on April 8, 2022, the agency asserts the deadline to file formal complaint was May 8, 2022² under Indiana Code section 5-14-5-7(a).

Second, MPD reaffirmed its position that releasing the footage would not be in the public interest. MPD asserts that it reached this conclusion based on the violent and graphic nature of the video. Furthermore, after considering WRTV's argument regarding the Delaware County prosecutor's press release and the previous actions of other law enforcement agencies, MPD stands by the denial based on APRA's public interest exception.

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

² While it is true that Kenney's complaint is untimely, she presents an issue of law that this office is interested in exploring. Therefore, for procedural purposes, this advisory opinion is informal in nature and would not exhaust an administrative remedy.

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 Muncie Police Department (MPD) 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 MPD’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).

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.

Ind. Code § 5-14-3-5.2(a). Here, MPD suggests the recording, if released, may compromise a fair trial or would not serve the public interest.

Even if none of the circumstances in 5.2(a) apply, a law enforcement agency has discretion to withhold portions of 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.

Notably, the statutes governing public access to law enforcement recordings are inarguably favorable to law enforcement. Agencies enjoy considerable discretion to limit what footage the public can see.

Toward that end, MPD cited the “fair trial” language in Indiana Code section 5-14-3-5.2(a)(2)(B) in its initial denial as well as the “public interest” provision of subsection (a)(2)(D).

Even so, the discretionary exceptions to disclosure under APRA are not absolute. Instead, the law places a bookend on the exemptions and exceptions so an agency cannot apply them arbitrarily or capriciously. *See* Ind. Code § 5-14-3-9(g)(B)(2).

This case involves, at least in part, footage of a police action shooting. Since police have authority—when necessary—to exercise deadly force, it is undoubtedly an issue of public interest when it happens. There can be little doubt that the public’s interest would be served by clarifying the events. Ostensibly, disclosure of the recording accomplishes that end.

Additionally, MPD justifies the denial based on the disclosure exception that allows an agency to withhold a law enforcement recording from disclosure if it 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.” Ind. Code § 5-14-3-5.2(a)(2)(B).

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 MPD correctly cites a legal standard, it fails to carry its

burden of persuasion that the disclosure exception applies in this case.

Consider the Indiana Court of Appeals holding in *Sullivan v. National Election Defense Coalition*, 182 N.E.3d 859 (2022). In *Sullivan*, the court observed the following:

The agency meets its burden of proving it properly exercised a discretionary exception by proving that the record falls within any of the categories of excepted records under section 5-14-3-4(b) and, again, “establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit[.]” Ind. Code § 5-14-3-9(g)(1)(B).

MPD asserts that footage of violence and bodily injury are inappropriate for public dissemination. This office agrees on that point. APRA, however, requires an agency to obscure those images while releasing the remainder. *See* Ind. Code § 5-14-3-5.2(e)(1).

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Muncie Police Department should reconsider its denial in this case consistent with the Access to Public Records Act and this opinion.

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

Luke H. Britt
Public Access Counselor

Issued: September 15, 2022