
OPINION OF THE PUBLIC ACCESS COUNSELOR

SAM HARTON,
Complainant,

v.

SCHERERVILLE POLICE DEPARTMENT,
Respondent.

Formal Complaint No.
23-FC-72

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Schererville Police Department violated the Access to Public Records Act.¹ Attorney David M. Austgen filed an answer on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to both formal complaints received by the Office of the Public Access Counselor on August 8, 2023.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over access to records germane to a police action shooting and the applicability of the Access to Public Records Act's (APRA) investigatory records exception.

On February 7, 2023, Sam Harton, (Complainant), attorney for a citizen involved in a police action shooting, filed a public records request with the Schererville Police Department (SPD) seeking a multitude of records related to a shooting that took place on August 20, 2022. The request included investigative reports, body and dash cam footage, communication, and any disciplinary actions of the officers involved.

SPD acknowledged the requests the following day. On February 17, 2023, SPD denied the records pursuant to APRA's the investigatory records exception.²

On March 10, Harton pushed back on the denial, particularly the portions of the request seeking law enforcement recordings, arguing that they are not considered investigatory records under APRA. He also telegraphed the intention to file a lawsuit against SPD.

Three days later, SPD again acknowledged the request, but denied it again on May 4.

On July 5, 2023, Harton tapered his request and limited the ask to inspection of the law enforcement recordings and the daily log information pursuant to Indiana Code section 5-14-3-5.

² Ind. Code § 5-14-3-4(b)(1).

SPD denied the request on July 31 for the same reasons as his prior requests. As a result, Harton filed a formal complaint with this office on August 8, 2023.

SPD filed its response to Harton's formal complaint on September 7, 2023. SPD argues the denial was appropriate given the pending criminal investigation into the shooting and describes its version of Harton's client's criminality.

Ultimately, SPD contends there were no law enforcement recordings identified and the remainder were investigatory records of the law enforcement agency. It suggests the information was available through the criminal proceeding and would possibly be available through subsequent civil litigation, if filed.

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 Schererville Police Department 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 city'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 raises several issues in terms of timeliness, law enforcement recordings, dispatch records, and investigatory material.

2. Timeliness

We first consider the timeline of events and whether this case is even ripe for review. Indiana Code section 5-14-5-7 sets a 30-day statute of limitations for filing a complaint. A complaint should be filed within 30 days of a denial, or alternatively a constructive denial.³

Although this office is flexible when it comes to the interpretation of timelines, here, everything prior to Harton's July 5, 2023, amended request will not be addressed based upon the statute of limitations.

While this office does not historically look favorably on amended requests in attempts to resurrect a timeline and avoid the statute, the July 5 request is just different enough to warrant an opinion.

3. Law enforcement recordings

Therefore, we turn to the substantive portions of the complaint, the first being the matter of law enforcement recordings.

Investigatory records and law enforcement recordings are indeed treated as mutually exclusive records in terms of access under APRA.

³ Constructive denials occur when an agency fails to respond within a reasonable time or goes silent in the process of a request.

Generally, any person may inspect and copy a law enforcement recording unless one or more of the statutory exceptions apply. *See* Ind. Code § 5-14-3-5.2(a) apply. Nonetheless, a person depicted on a law enforcement recording has the unequivocal right—by statute—to inspect the footage at least twice. *See* Ind. Code § 5-14-3-5.1. This occurs regardless of whether charges are filed for underlying criminality.

Unlike its response to this office, SPD's denial on July 31 to Harton's request does not indicate the nonexistence of any law enforcement recording, despite Harton's client's standing to inspect.

Indeed, SPD should have been clear that the denial was predicated on the lack of material instead of simply saying the material will not be provided. Undoubtedly, had the footage existed, Harton's client would have been entitled to view either body worn or dash mounted camera footage. Criminal proceedings are neither a condition precedent nor a prohibitive factor in compliance.

4. Daily log

Similarly, daily log entries from dispatch activities are not investigatory records either. Instead, APRA mandates documented entries, created within 24 hours of activity, for officer dispatch activity. *See* Ind. Code § 5-14-3-5.

Daily logs are among the few public records that APRA requires an agency to create. They are unequivocally disclosable even if they contain some material germane to an investigation. They essentially serve as proof of law enforcement activity. While the level of detail required in the daily

log is debatable, the statutorily required descriptions cannot be denied from any member of the public, irrespective of their involvement in the situation.

In this regard, criminal proceedings are similarly irrelevant to access. They exist independent of a prosecutor's charges in any underlying case and must be provided upon request.

Considering these circumstances, the July 5 requests fall outside the exchange of information contemplated by the trial rules of discovery and should not be treated as such when disclosure is mandatory and not discretionary.

SPD would be well served to refamiliarize itself with the fundamental aspects of APRA and the facets of mandatory disclosure. It should also limit its use of criminal proceedings as a smoke screen for denials in contexts such as these. SPD's denial and formal complaint response are disheartening examples of how not to handle public access requests.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Schererville Police Department violated the Access to Public Records Act.



Luke H. Britt
Public Access Counselor

Issued: September 28, 2023