
OPINION OF THE PUBLIC ACCESS COUNSELOR

BRETT C. KIMBERLIN,
Complainant,

v.

INDIANA STATE POLICE,
Respondent.

Formal Complaint No.
23-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 Indiana State Police violated the Access to Public Records Act.¹ Attorney Jeff Pitts 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 by the Office of the Public Access Counselor on August 21, 2023.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

In this case we consider whether the Indiana State Police (ISP) had authority to deny access to documents in accordance with the Access to Public Records Act's (APRA) investigatory records exception.²

On June 17, 2023, Brett C. Kimberlin (Complainant) filed a public records request with ISP seeking 13 categories of records related to his 1981 conviction. The request will not be replicated here but it appears Kimberlin essentially requested the entirety of the investigatory file and some personnel records of the investigating detective.

In July, ISP denied the majority of Kimberlin's request, but the agency did provide the personnel information. ISP predicated the denial on APRA's investigatory records exception, which gives law enforcement agencies discretion to withhold records compiled in criminal investigations.

Kimberlin disputes the propriety of ISP's denial. As a result, he filed a formal complaint with this office on August 21, 2023. Kimberlin argues the records are necessary to prove that an ISP detective mishandled his case, and he is working on a documentary series regarding his conviction.

ISP filed its response on September 22, 2023. ISP argues that Kimberlin missed the deadline to file a complaint by nine days; and thus, this office should summarily dismiss the complaint. In the alternative, ISP maintains that it had discretion to deny disclosure under APRA's investigatory records exception.

² Ind. Code § 5-14-3-4(b)(1).

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 Indiana State Police (ISP) 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 ISP’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 involves the applicability of APRA’s discretionary exception for the records

2. Timeliness

ISP challenges the timeliness of Kimberlin’s formal complaint with this office. Notably, ISP denied Kimberlin’s records request on July 17, 2023, and he filed his complaint on August 23, 2023. ISP argues Kimberlin is barred from filing because he exceeded the 30-day statute of limitations found in Indiana Code section 5-14-5-7.

This office takes its cues from the Open Door Law and uses business days instead of calendar days when calculating timing.³ Therefore, we do not count weekends and holidays.

³ Ind. Code § 5-14-1.5-5(a).

We are consistent with that policy and err on the side of the complainant when there is a close call. Kimberlin's complaint is timely and will be addressed as such here.

3. Investigatory records of law enforcement agencies

The gravamen of this case is determining whether withholding the documentation as investigatory records complies with APRA. Notably, the burden of proof for nondisclosure of a public record falls on the public agency responsible for the denial. *See* Ind. Code § 5-14-3-1.

In other words, it is up to ISP to show why APRA's investigatory records exception applies to the records the agency withheld from disclosure.

To be sure, the investigatory records of law enforcement agencies may be withheld from disclosure at the discretion of a public agency. *See* Ind. Code § 5-14-3-4(b)(1). Under APRA, investigatory record means information compiled in the investigation of a crime. Ind. Code § 5-14-3-2(i).

While it is true that there must be criminality implicated, it does not need to be proven in court or even charged. Here, the investigatory file in question—at least tangentially—involves a series of bombings and multiple other criminal matters. These activities do not lose their criminal nature simply because they were charged federally and not by state prosecutors. The material in question certainly qualifies as investigatory records of a law enforcement agency for purposes of APRA.

We then turn to the question of whether the invocation of the exception to disclosure is warranted.

It is true that this office is not always in lockstep with ISP's policy of withholding records just because they qualify as investigatory.⁴ Indiana's investigatory records exception is exceptionally broad compared to other states and even the federal Freedom of Information Act. Even when an agency has statutory discretion to withhold a record, it cannot be done so arbitrarily, that is, without consideration of underlying reasons.

Nonetheless, this office is not a law enforcement agency and therefore some deference to the subject matter experts is warranted. As ISP articulates in its response, criminal investigations are complex and have many moving parts which can often contain sensitive information. Sensitive law enforcement information can include investigatory methodology, witness and victim info, or specific public safety considerations that would make disclosures imprudent.

The difference between cases where this office has disagreed with ISP is based on that complexity. For example, a marijuana possession case⁵ versus a murder investigation.⁶

The motivation behind Kimberlin's request appears to be to find exculpatory material, question the fidelity of forensic hypnosis practices, prove jury tampering, and discredit ISP personnel who testified at his 1981 trial. These are all arguments to raise in a trial setting, but the Access to Public

⁴ *See* Informal Op. of the Public Access Counselor, 23-INF-11 (2023).

⁵ *Opinion of the Public Access Counselor*, 15-FC-17 (2015).

⁶ *Opinion of the Public Access Counselor*, 22-FC-48 (2022).

Records Act is not designed to be a mechanism for collateral attacks against public agencies.⁷

Because investigations in cases like Kimberlin’s likely involve delicate and complex investigatory methodology and procedure, information regarding victims and witnesses, and other public safety considerations, ISP’s denial and complaint response are commensurate with the request.

Kimberlin’s arguments regarding public interest and accountability are well received, nonetheless, ISP has carried its burden to demonstrate that the denial was justified in this case.

⁷ These matters were seemingly put to rest in *Brett Kimberlin v. DOJ*, No. 21-1691 (7th Cir. 2022), *cert. denied*, 143 S.Ct. 564 (U.S. Jan. 2023)(No. 22-124).

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Indiana State Police did not violate the Access to Public Records Act.

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

Luke H. Britt
Public Access Counselor

Issued: October 25, 2023