
OPINION OF THE PUBLIC ACCESS COUNSELOR

SAM STECKLOW,
Complainant,

v.

INDIANAPOLIS METROPOLITAN POLICE DEPT.,
Respondent.

Formal Complaint No.
19-FC-51

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 violated the Access to Public Records Act.¹ IMPD Legal Advisor Melissa Coxe 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 June 24, 2019.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

This case involves a dispute about public records connected to the use of force data compiled by a law enforcement agency.

Sam Stecklow (“Complainant”), a reporter for the Invisible Institute in Chicago, filed a formal complaint alleging the Indianapolis Metropolitan Police Department (“IMPD”) violated the Access to Public Records Act (“APRA”) by improperly denying him access to public records.

On May 28, 2019, Stecklow filed a public records request with the IMPD requesting any datasets, databases, or spreadsheets documenting use of force incidents. The request included potential data fields, which may or may not exist within that documentation.

IMPD denied access to the dataset by claiming the investigatory record exemption found at Indiana Code section 5-14-3-4(b)(1).

Stecklow takes exception to this categorization as use of force investigations are internal policy-based determination and not criminal matters. He relies on a previous opinion from this office as support for his argument.²

IMPD argues in its response to the formal complaint that any use of force investigation could potentially or eventually manifest itself into a criminal investigation; and thus, the investigatory records exception applies. IMPD cites to *Opin-*

² *Opinion of the Public Access Counselor*, 14-FC-135 (2014).

ion of the Public Access Counselor, 09-FC-157 (2009), as support for giving law enforcement agencies broad discretion to apply the investigatory records 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 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.*

There is no dispute that the Indianapolis Metropolitan Police Department (“IMPD”) is a public agency for the purposes of the APRA; and thus, subject to the Act’s disclosure requirements. Ind. Code § 5-14-3-2(q)(6).

Therefore, unless otherwise provided by statute, any person may inspect and copy IMPD’s public records during regular business hours. *See* Ind. Code § 5-14-3-3(a). Even so, the Act contains both mandatory and discretionary exceptions to the general rule of disclosure. Specifically, 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. Investigatory Records of Law Enforcement Agencies

APRA defines investigatory records as “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i). Law enforcement agencies are authorized to withhold investigatory records from public disclosure at the discretion of the agency. Ind. Code § 5-14-3-4(b)(1). This discretion, however, is not absolute.

For instance, APRA establishes a cause of action to compel disclosure when an agency denies disclosure of public records. *See generally* Ind. Code § 5-14-3-9. In the case of discretionary exceptions to disclosure, the burden of proof is on the agency to show that the record falls within one of the categories of exempted records and 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).

Conversely, the person requesting access to public records meets their burden of proof by showing the agency’s denial is arbitrary or capricious. In the context of a discretionary denial under APRA, the Indiana Court of Appeals observed that “[a]n arbitrary and capricious decision is one which is patently unreasonable and is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion.” *Groth v. Pence*, 67 N.E.3d 1104, 1122 (Ind. Ct. App. 2017) (internal quotations omitted).

That determination is not for this office, but ultimately for the courts. Still, it is my statutory obligation to provide guidance and advice to public agencies and the public on how to avoid that and similar pitfalls.

Here, based on the information provided, Stecklow raises a presumption that IMPD's denial could be an abuse of discretion. IMPD relies on a very speculative inference that every use of force incident could potentially result in a criminal investigation. If that is true, then IMPD has bigger problems than public access.

Regardless, that is not the standard for invoking the investigatory records exception under APRA. As the Indiana Court of Appeals recently observed: "[t]he documents in contention must have been accumulated in the course of the investigation of a crime. If there is no criminal investigation, the documents cannot be withheld at the police or sheriff's department's discretion pursuant to the investigatory records exception." *Scales v. Warrick Cty. Sheriff's Dep't*, 122 N.E.3d 866, 871 (Ind. Ct. App. 2019).

Use of force by law enforcement is not inherently a crime. Certainly there are parameters around which use of force can be utilized, but officers are presumably trained on those parameters per department policy. Notably, IMPD—as a matter of policy—investigates every use of force that exceeds handcuffing without resistance.

Moreover, if an officer's use of force constitutes a potential criminal action, that would be a separate matter altogether. The two avenues of investigation are mutually exclusive. This indeed was the entire point of *Opinion of the Public Access Counselor*, 14-FC-135 (2014).

The Access to Public Records Act does not contemplate the concept of potential crime when allowing law enforcement to invoke the investigatory records exemption.

In fact, if an alleged or suspected crime is foreseen in a use of force situation, law enforcement would be required to develop and disclose the very information sought in the public records request. To wit:

An agency shall maintain a daily log or record that lists suspected crimes, accidents, or complaints, and the following information shall be made available for inspection and copying:

- (1) The time, substance, and location of all complaints or requests for assistance received by the agency.
- (2) The time and nature of the agency's response to all complaints or requests for assistance.
- (3) If the incident involves an alleged crime or infraction:
 - (A) the time, date, and location of occurrence;
 - (B) the name and age of any victim, unless the victim is a victim of a crime under IC 35-42-4 or IC 35-42-3.5;
 - (C) the factual circumstances surrounding the incident; and
 - (D) a general description of any injuries, property, or weapons involved.

The information required in this subsection shall be made available for inspection and copying in compliance with this chapter. The record containing the information must be created not later than twenty-four (24) hours after the suspected crime, accident, or complaint has been reported to the agency.

Ind. Code § 5-14-3-5(c). Under APRA, a police department cannot have it both ways. Either there is an investigation of

a crime and it is documented on a daily log, or it is non-criminal and subject to disclosure.

There is substantial probative value to the public having knowledge of how use of force situations are handled by their representative law enforcement. Transparency as to that process would seemingly go a long way in law enforcement establishing trust with the public it serves.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indianapolis Metropolitan Police Department should disclose any dataset or log documenting use of force incidents which exist consistent with the Complainant's request.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor