



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

**PUBLIC ACCESS COUNSELOR  
LUKE H. BRITT**

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)234-0906  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

November 7, 2016

Mr. Cory Havens  
South Bend Tribune  
225 West Colfax Avenue  
South Bend, Indiana 46626

*Re: Formal Complaint 16-FC-243; Alleged Violation of the Access to Public Records Act by the City of South Bend, South Bend Police Department*

Dear Mr. Havens:

This advisory opinion is in response to your formal complaint alleging the City of South Bend, South Bend Police Department ("SBPD") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. The City of South Bend has responded via Ms. Andrea Huntington, Esq. Her response is included for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 22, 2016.

## **BACKGROUND**

Your complaint dated September 22, 2016 alleges the South Bend Police Department and the City of South Bend (collectively referred to as the "City") violated the APRA by not providing you with the locations of suspected gunfire reported to the City through an auditory surveillance system. Secondly, you argue that all the reports from the system constitute a call for assistance or suspected crime and locations must be documented in a daily log form.

The City of South Bend utilizes a third-party investigatory tool called ShotSpotter. ShotSpotter works by reporting the location of loud reports to the City. This could be gunfire, or a car backfire, a firework or any other loud, sharp sound. The hardware picking up these sounds are placed around the City in strategic locations to maximize the surveillance efforts. The microphones are sensitive enough to distinguish between different types of sounds and report them to SBPD.

On June 23, 2016, Mr. Christian Sheckler ("Mr. Sheckler") submitted a public records request in the proper form to the City; his request stated, "I am requesting records of all SBPD calls for service related to gunfire in the following categories: shots fired (citizen calls), SST (ShotSpotter alert but not citizen call), SST/C (ShotSpotter alert and citizen call) from February 18, 2014 -present." The City timely

responded to request by email. On June 27, 2016, the Legal Department sent the “calls for service” list to Mr. Sheckler. Mr. Sheckler responded indicating 2014 records were missing. He was sent the remaining requested information on June 28, 2016.

On June 29, 2016, you sent email communication to Captain Hammer of the Police Department outlining your concerns of omitted information (locations); claiming they were not included in the information provided to Mr. Sheckler. Chief of Staff James Mueller advised you they would look into what other data might be able to be released. On August 31, 2016, you sent an email inquiring whether a discussion had occurred regarding releasing additional information. It is noted in emails there was not an additional request submitted for the locations of calls, but it is implied in your June 29, 2016 follow-up. On September 1, 2016, City attorney Andrea Huntington (“Huntington”) responded to Mr. Sheckler stating the information requested (locations) “would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack”, also noting the location for all calls is available each day in the SBPD daily call log and bulletin.

The City argues there was no official denial of the request, because the City had provided the requested records to Mr. Sheckler on June 28, 2016. Your complaint states you believe the arguments of locations of ShotSpotter sensors as a public safety concern contradicts the daily call log which has the locations of the shots fired calls. You believe the disclosure of the locations is information contained in an electronic public record, and the City is required to make efforts to include all disclosable data contained in those records.

Initially, the City has responded and believes your complaint is without standing and the City has provided Mr. Sheckler with the record responsive to his request. Secondly, your correspondence(s) with the City do not conform to the City’s APRA policies and did not constitute an APRA request. Thirdly, Mr. Sheckler was granted immediate access to inspect the South Bend Police Department daily bulletin, which outlines all reporting requirements in the APRA. Fourth, Mr. Havens lacks standing to file a formal complaint, because he has failed to do so within the strictly enforced time requirements of the APRA. Lastly, the disclosure of the information requested would have a reasonable likelihood of threatening public safety and is at the City’s discretion. Therefore, the City of South Bend believes they did not violate the APRA.

## ANALYSIS

The public policy of the 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.” *See Indiana Code § 5-14-3-1*. The City of South Bend is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy the City’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

A request for records may be oral or written. *See Indiana Code § 5-14-3-3(a); § 5-14-3-9(c)*. If the request submitted and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See Indiana Code § 5-14-3-9(b)*. A response from the public agency could be

an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

## **Standing**

The June 29, 2016 email between you and Captain Hammer clearly put the City on notice it was your expectation Mr. Sheckler's public records request include locations of ShotSpotter reports. I do not give credence to any argument in which your standing to file a formal complaint is compromised because you failed to follow-up on Mr. Sheckler's complaint in the proper form. The initial request was on the City's APRA form and triggered the responsibility to either provide the documentation or give a statutory justification for denial. Your follow-up communication simply advised the City the Tribune viewed the request as deficient and was missing information. The City, through its Chief of Staff accepted this email as valid and promised to look into the matter.

While there is no question the City can require a written form on the front end, you were merely clarifying Mr. Sheckler's request. If the City took exception to this informal clarification, Captain Hammer or the City's Chief of Staff should have told you at the time that any follow-up communication be on a form or a new request should be submitted.

In my opinion, the substantive denial occurred on September 1, 2016 in an email to you from Ms. Andrea Huntington, Esq. Based upon the information provided, your September 22, 2016 filing of a formal complaint to this Office is timely and this Opinion is issued pursuant to Indiana Code § 5-14-5-10.

## **Denial of ShotSpotter Locations**

The City's chief concern is the disclosure of ShotSpotter locations would compromise the primary objective of the program and render it useless. The hardware itself, if locations are known, could be subject to tampering. Additionally, criminals could avoid locations where the hardware is located and perform criminal acts outside of the 'earshot' of the devices. ShotSpotter is an investigatory tool. It gives law enforcement an additional automated resource to identify potential criminal activity. To my knowledge, these devices are not aimed at any particular individual or group of individuals and do not violate an expectation of privacy.

Similar to closed circuit cameras, ShotSpotter is a surveillance tool and may or may not be investigatory in nature. *Indiana Code § 5-14-3-4(b)(1)* gives law enforcement agencies the discretion to withhold or disclose investigatory records. An investigatory record is "information compiled in the course of the investigation of a crime." *See Indiana Code § 5-14-3-2(h)*. I have generally held there must be a specified or suspected crime in order for the investigatory record exception to apply. ShotSpotter alerts could be any number of things, but is not always the discharge of a firearm leading to potential criminal charges. I would not consider a list of dispatches to be inherently investigatory.

In any case, the City's sole statutory argument is that pursuant to *Indiana Code § 5-14-3-4(b)(19)* the locations would be a "record of a part of a record, the public disclosure of which would have a reasonable likelihood of threatening public safety by exposing a vulnerability to terrorist attack" and therefore, can be exempted from disclosure at the discretion of the public agency. Therefore, the City

implies that knowledge of ShotSpotter locations invites terrorism and puts the community at risk *simply because they exist*. Unlike an energy grid, airport infrastructure or a nuclear facility, the City is no more or less at risk of a terrorist attack without ShotSpotter as with it. The locations would not expose a vulnerability nor would it heighten the risk of a domestic terror attack. All crime is not terrorism and the Indiana Code definition of terrorism in section 35-47-12-1 refers exclusively to terror planned or committed with weapons of mass destruction. I do not agree with the City that this exemption applies to ShotSpotter data. While it may reduce crime due to the increased surveillance opportunities, it is the response of dispatched officers which deter crime, not inherently the system itself. The plain meaning of Indiana Code § 5-14-3-4(b)(19) speaks to terrorism and not crime generally, *an important distinction*.

*(Emphasis added)*.

Similarly, the City cites Indiana Code § 5-14-3-4(b)(10) as an applicable exemption. It states that administrative or technical information which would jeopardize a record keeping or security system is exempt from disclosure. From the information provided, the Shotspotter system is not a record keeping or security system, but rather a monitoring and surveillance tool. I believe the system is mutually exclusive from a traditional security system.

After discussions with the City on September 14 and 23, 2016, I believe the real underlying motivation for not wanting the locations discoverable is simply because the program is intended to be a clandestine surveillance tool and/or the hardware could be tampered with if criminals knew where the devices were placed.

The Tribune is not seeking the locations of the devices themselves. However, it is interested in knowing the locations where officers are dispatched. The ShotSpotter alerts are acoustically sensitive to a certain range, and the array of devices triangulates the sound to identify a gunfire report within a certain amount of feet. One of the arguments previously set forth by the City states the dispatch locations could be reverse engineered or triangulated to identify the location of the hardware. I share your skepticism regarding this argument. While I have discussed these considerations with the City and ShotSpotter personnel at length, there is a great deal of confusion as to how this is actually possible. The sensors have a limited and defined range of detection. By the City's logic, if the location of dispatch is available to the public it would enable an intuitive member of the public to infer the sensor locations. I find this argument to be lacking in clarity and application.

Even if the hardware placement could be extrapolated from dispatch locations, the City does not identify an applicable exemption to disclosure which would prevent release of documentation pinpointing the dispatch *or* hardware locations. Public safety policy considerations notwithstanding, if a report or record exists with the locations listed, it should be released. There is no general catch-all exemption for public safety or law-enforcement-sensitive information other than the investigatory record exception. The issue then becomes whether there is an affirmative duty on the part of SBPD to create such a record.

The SBPD contracts with ShotSpotter as a vendor to alert SBPD when shots are fired. To my knowledge, SBPD does not own the ShotSpotter equipment, but it does have a front-facing portal to access an information database relative to the data generated by the hardware. When ShotSpotter pings SBPD on an electronic map, it triggers dispatch to send an officer to the location. ShotSpotter is not an extension of the SPBD and is not undertaking an essential government function. While policing and

protecting public safety is a state action, the collecting of data is not. ShotSpotter is no more a state actor than a confidential informant would be. *However, there is no question that when the City generates a report from the ShotSpotter interface, a public record is created.*

*(Emphasis added).*

The City is correct Mr. Sheckler's original request did not include location data. To my knowledge, the City ran a report from the ShotSpotter database with the search parameters indicated in the request. It does not appear locations were redacted -they just were not included in the search query. Your follow-up to the City appended to Mr. Sheckler's request. Based on the foregoing, I consider this to be a valid request for additional information.

While I am fairly confident the City has the ability to pull a location list from the ShotSpotter portal, it is my opinion the APRA does not require it. The ShotSpotter data is not the City's, but is an internal proprietary database belonging to ShotSpotter. That SBPD could benefit for the information matters not; it is not created, received, retained, maintained, or filed by or with SBPD. The utility of the program is to increase response times for dispatch and not necessarily to be a data collection tool. SBPD generates reports from the database on an as-needed basis, and when it does, those reports become public record.

You argue that because it exists in the form of an electronic storage database, then reasonable measures should be taken to provide the data based upon Indiana Code § 5-14-3-4(d). If the database was an in-house data repository, then I would absolutely agree with this position. Similarly, if data storage or collection efforts were outsourced to a third-party, then I would agree a public agency having dominion over the information would be required to produce it. But there is a distinction between outsourcing data warehousing and the services ShotSpotter provides. The information does not become SBPD's until they pull it from ShotSpotter's database. It is a one-way flow of data. As noted above, this kind of data collection is not an inherent governmental function. ShotSpotter is essentially a high-tech witness. I believe there is a distinction between a live citizen request for assistance and an automated alert from a monitoring system.

To summarize the foregoing, if a report exists listing locations, then it should be produced. But there is no affirmative duty to create a list pursuant to a public records request.

### **Daily Log**

You also argue that the 'daily log' requirement in the APRA requires the SBPD to document every ShotSpotter ping. Indiana Code § 5-14-3-5(c) states:

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

SBPD documents this information in the form of a daily bulletin. The City has invited Mr. Sheckler to review the daily bulletins and extract information on his own. The issue is the daily log does not differentiate between ShotSpotter pings and other complaints or requests for assistance. That being said, it appears dispatch locations could be cross-referenced with the call for service list to determine which dispatches originated from ShotSpotter alerts.

Some ShotSpotter alerts result in a criminal investigation -but not all. You reason the discharge of gunfire within city limits is a crime and therefore *all* alerts would ostensibly result in an investigation. Nevertheless, the City argues not every alert is substantiated and only those alerts leading to an investigation are documented on the bulletin. While your argument is well taken, I am not sure every ShotSpotter alert would be proof positive of a suspected or alleged crime nor would I consider the intent of the daily log statute to cover every dispatch -especially from an automated system. Likewise, the law does not require an indication on the log that the dispatch originated from ShotSpotter versus a citizen call or complaint.

## **Conclusion**

Issues relating to predictive policing are tricky waters to navigate. I appreciate the role of the press as the fourth estate keeping an eye on government activity. I equally recognize the importance of public safety officials keeping sensitive information confidential so as not to compromise ongoing investigations. Novel approaches to law enforcement surveillance can greatly enhance communities' safety and security, however, there is also a balance regarding the public's right to know how they are being policed.

I have considered these competing interests and have determined the following: there does not appear to be an applicable exception to disclosure for ShotSpotter dispatch locations. While there may be valid public safety reasons to shield the locations of the devices themselves, the law does not codify them. Therefore, if there is a document or record listing dispatch locations, the document should be released. However, there is no affirmative duty to create a record or list pursuant to the Tribune's or any other request. Similarly, it is my opinion the law does not require a log entry for every ShotSpotter dispatch – only those resulting in an investigation of a crime.

Regards,

A handwritten signature in black ink, consisting of stylized initials 'LH' followed by a surname, with a long horizontal flourish underneath.

Luke H. Britt  
Public Access Counselor

Cc: Ms. Andrea Huntington, Esq.