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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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BOB SEGALL,  
*Complainant,*

v.

FISHERS POLICE DEPARTMENT,  
*Respondent.*

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Formal Complaint No.  
17-FC-274

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Fishers Police Department (“FPD”) violated the Access to Public Records Act<sup>1</sup> (“APRA”). The FPD responded to the complaint through attorney Christopher P. Greisl. 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 December 22, 2017.

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

## **BACKGROUND**

Bob Segall (“Complainant”), an investigative reporter for WTHR, filed a formal complaint alleging the Fishers Police Department violated the Access to Public Records Act by failing to produce video footage of an incident in a school compiled in the course of an investigation.

Complainant, an investigative reporter, has covered an alleged incident at Hamilton Southeastern School for the better portion of the past year. The School has been reluctant to provide any measure of detail to the Complainant and in the course of his investigation discovered that surveillance video existed depicting the incident.

On November 15, 2017, Complainant requested the video from FPD. It was denied on November 29 as being part of an investigation, albeit a closed one. Complainant takes exception to the denial as arbitrary and a misapplication of the exception. Complainant concedes the video may depict juvenile students with a expectation of privacy, however, redaction/blurring software is available at a reasonable expense to alleviate privacy concerns. Additionally, the Complainant contends he has consent from the mother of the subject of the video to obtain information. It is not clear whether the mother of the subject student has requested the video from the School or FPD.

FPD contends that it did not violate APRA because the video is an investigatory record of a law enforcement agency; and thus, it has an unequivocal right to withhold the footage.

## ANALYSIS

This formal complaint presents the issue of whether the Fishers Police Department had discretion to withhold the requested video footage of a school incident pursuant to APRA's investigatory records exception, codified at Indiana Code section 5-14-3-4(b)(1).

### 1. The Access to Public Records Act (APRA)

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 Fishers Police Department is a public agency for the purposes of the APRA, and subject to its requirements. Ind. Code § 5-14-3-2(n).

Therefore, any person has the right to inspect and copy the FPD's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. Ind. Code § 5-14-3-3(a).

#### 1.1 Statutory Interpretation

It should be noted outright that the Access to Public Records Act is not to be interpreted with strict construction – most particularly when it comes to the "discretionary" categories of public records listed in Ind. Code § 5-14-3-4(b). Discretion is inherently subjective by nature because it means the agency has a choice whether to disclose a piece of

information. Unlike confidential materials, which are black and white, discretion can be selective and applied on a case-by-case basis according to necessity. The General Assembly has mandated that the law “shall be liberally construed” in favor of transparency. *See* Ind. Code § 5-14-3-1. The Courts have recognized this tenet as well and called for non-disclosure exceptions to be narrowly and conservatively construed. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. App., 1995). When considering matters of statutory construction, the entirety of a statute is to be read in order to contextualize its individual provisions. Statutes relating to the same general subject matter are in *pari materia* and should be construed together so as to produce a harmonious system. *Indiana Alcoholic Beverage Commission v. Osco Drug, Inc.*, 431 N.E.2d 823 (Ind. App. 1982).

Although Indiana Code section 5-14-3-4(b)(1) does give discretion to law enforcement agencies to withhold investigatory records, that discretion is not an absolute luxury. It can and has been abused. Reading the entirety of the Access to Public Records Act as a system, Ind. Code § 5-14-3-9(g)(2) speaks to an arbitrary and capricious standard of applying discretion, which can be proven to overturn an agency’s discretion.

If the General Assembly intended for investigatory materials to be *de facto* “confidential,” it would have declared them so. To that end, this Office has offered a set of standards to appropriately apply that discretion. This was honed over many hours presenting and discussing with law enforcement officials.

## 1.2 APRA's "Investigatory Records" Exception

Under APRA, the term *investigatory record* means "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i).

Regardless if an investigation is open or closed, an investigatory record should be withheld and discretion applied if a document's release jeopardizes an investigation; if disclosure would violate a legitimate expectation of privacy; or if a piece of information were to be made public that would reasonably threaten public safety.

This Office is often asked by respondent agencies to make an absolute statement on what is and isn't disclosable. However, those determinations are made on a case-by-case basis within the vacuum of a set of facts. A standard of reasonableness is often employed to reach conclusions. This is not activism, nor is it legislating, but simply following the instructions of the Indiana General Assembly to apply the law consistent with its intent and purpose. While some of its provisions do indeed have plain meaning, this Office generally approaches each factual circumstance and resulting application of the law to be unique to that occurrence.

And so we must turn to the facts themselves to decide whether the exercise of discretion was appropriate. In the instant case, the video footage allegedly depicts a student altercation. It is unclear how many students were portrayed on the video, however, student identities are protected and an expectation of privacy is implicated. *See generally* the Family Education Rights and Privacy Act ("FERPA") 20

U.S.C. §1232g(a)(4)(A); 34 C.F.R. §§99.3, and the state analog at Ind. Code § 20-33-7-1.

The Complainant alleges it has consent of the parent of the student to obtain the video. This is important as the expectation of privacy argument is therefore eroded *as to that student*. If more than the one student is depicted, however, then the United States Department of Education suggests all students involved may need to give consent to depict an identity. Without going into the particulars of the guidance from DOE, at the very least, an expectation of privacy argument is reasonable. It does not appear as if a reasonable legal argument for the other two justifications for invoking the investigatory record exception exists as the investigation is closed and grievous public safety considerations do not seem to be at stake.

### **1.3 Requirement of a Daily Log**

Even if a privacy concern exists, it should further be noted that the statute speaks to an investigation of a crime and not just any police activity. FPD cites criminal activity as a basis for its investigation, but this contrasts the Hamilton County prosecutor's reluctance to file charges. It is unknown whether the police were actually called to investigate an alleged crime or just to review footage, however, an indicator of such activity would be the existence of the "daily log" which must be developed pursuant to Ind. Code § 5-14-3-5(c)(3). It states the following:

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:

(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.

Therefore, if the FPD compiled the video footage as part of a criminal investigation, then it has discretion to withhold the video from public disclosure under APRA's investigatory records exception. That also means the FPD is required to create and maintain a record with the information set forth above, including the factual circumstances surrounding the incident. This information is required to be made available for inspection and copying not later than twenty-four hours after the suspected crime has been reported to the agency.

As noted in *Informal Opinion of the Public Access Counselor*, 16-INF-09 (2016):

For daily logs, Indiana Code § 5-14-3-5(c) contemplates disclosure that is enough to explain the substance of the incident, but must give the reader an idea of what happened. Indiana Code 5-14-3-4(b)(1) provides discretionary release of records to protect the integrity of the investigation. Reading these two provisions together, a daily log should contain enough information to provide the public information about the general substance of the incident, but not so much as to impair law enforcement's ability to investigate. The information disclosed would be situation-specific, but the APRA generally contemplates as much information as possible.

The development and disclosure of a daily log entry for each suspected crime is not discretionary and must be disclosed in un-redacted form upon request.

It is clear that FPD considers the matter to have been potentially criminal in nature; and therefore, the daily log entry must exist and be released without exception. Conversely, if there exists no daily log entry associated with the incident depicted in the video, then the investigatory records exception does not apply.



## CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the video footage may be withheld for privacy concerns as an investigatory record so long as an acceptable daily log entry exists for the incident. If a daily log entry was not created, it cannot rely upon the investigatory record exception to withhold the footage and it should be released upon request.

A handwritten signature in black ink, appearing to read 'LH Britt', with a long horizontal flourish extending to the left.

Luke H. Britt  
Public Access Counselor