
OPINION OF THE PUBLIC ACCESS COUNSELOR

IVAN E. BODENSTEINER,
Complainant,

v.

OFFICE OF THE SECRETARY OF STATE,
Respondent.

Formal Complaint No.
19-FC-38

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Office of the Secretary of State violated the Access to Public Records Act.¹ Chief legal counsel Jerry Bonnet filed an answer to the complaint 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 May 13, 2019.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

This complaint involves a dispute over access to witness interview transcripts created as part of a multi-agency, including the Indiana Secretary of State, investigation of the 2018 general election in Porter County.

On March 14, 2019, Ivan E. Bodensteiner (“Complainant”) submitted a public records request to the Office of the Secretary of State (“SOS”) seeking the following:

All records and communications (both electronic and written), including video/audio recordings and notes, related to the Secretary’s investigation of the November 2018 election in Porter County, Indiana. This request includes, but is not limited to the following:

- a) All communications requesting the Secretary, or members of her staff, to conduct an investigation;
- b) Recordings and written notes/summaries of all interviews (including “video meetings”) conducted as part of the investigation;
- c) All “findings of fact” made as a result of the investigation;
- d) All communications from elected state or local government officials related to the investigation, and directed to the Secretary or members of her staff;
- e) All responses to any communications requested in part d), above; and
- f) All Secretary of State rules or guidelines governing investigations of County-operated elections

The SOS responded the same day by acknowledging the request. On April 29, 2019, the SOS notified Bodensteiner by letter that the agency located approximately 269 pages of

materials believed to be responsive to his request. The SOS enclosed copies of those records with the letter to Bodensteiner.

The SOS also noted that the agency's staff would continue to search for responsive records and would contact Bodensteiner if it located additional records.

The SOS confirmed that it interviewed 27 people in late January, which resulted in the creation of transcripts the agency used in the investigation. Although the SOS provided Bodensteiner an index that included a list of the interviewees, interview dates, and the number transcript pages, the agency denied access to the transcripts in accordance with Indiana Code sections 5-11-5-1(i) and 5-14-3-4(b)(1).

As result, on May 13, 2019, Bodensteiner filed a formal complaint alleging the denial of access to the transcripts violates the Access to Public Records Act ("APRA").

In its response the SOS's argument is a reprise of the agency's initial denial: the interview transcripts constitute "examination work papers and investigation records," which the agency has discretion to withhold from disclosure in accordance with Indiana Code sections 5-11-5-1(i) and 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 Office of the Secretary of State is a public agency for the purposes of the APRA; and thus, subject to the Act’s requirements. Ind. Code § 5-14-3-2(n).

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

2. Exemptions to Disclosure

The SOS asserts that the interview transcripts constitute “examination work papers and investigation records,” which means the agency has discretion to withhold the records from disclosure in accordance with Indiana Code sections 5-11-5-1(i) and 5-14-3-4(b)(1).

2.1 Investigatory Records Exception

The SOS relies, at least in part, on Indiana Code section 5-14-3-4(b)(1), commonly known as the investigatory record exception, as authority for withholding the disclosure of the interview transcripts.

Indeed, APRA contains a discretionary exception to disclosure for the investigatory records of law enforcement agencies. Ind. Code § 5-14-3-4(b)(1). “Investigatory record” means “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i).

Under APRA, law enforcement agency means:

an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders, such as the state police department, the police or sheriff's department of a political subdivision, prosecuting attorneys, members of the excise police division of the alcohol and tobacco commission, conservation officers of the department of natural resources, gaming agents of the Indiana gaming commission, gaming control officers of the Indiana gaming commission, and the security division of the state lottery commission

Ind. Code § 5-14-3-2(q)(6). Based on these statutory definitions, the SOS is not a law enforcement agency for purposes of APRA; and thus, the investigatory record exception is not available to the agency as a legal basis to withhold the disputed transcripts.

Even if the SOS was a law enforcement agency for purposes of APRA, the interview transcripts at issue here were not compiled in the course of the investigation of a crime. Nowhere in the agency's response to the complaint is there any mention of any potential crime or crimes in connection to the 2018 general election in Porter County.

Thus, APRA's investigatory records exception does not apply here.

2.2 Indiana Code section 5-11-5-1(i).

The SOS also relies, in part, on Indiana Code section 5-11-5-1(i) as authority for withholding the interview transcripts.

Indiana Code section 5-11-5-1(i) says:

Unless in accordance with a judicial order or as otherwise provided in this section, the state board of accounts or its employees, former employees, counsel, or agents, or any other person may not divulge the examination workpapers and investigation records of a deputy examiner, a field examiner, or a private examiner acting as an agent of the state examiner, except to:

- (1) employees and members of the state board of accounts;
- (2) the audit committee;
- (3) law enforcement officers, the attorney general, a prosecuting attorney, or any other legal representative of the state in any action with respect to the misappropriation or diversion of public funds;
- (4) an authorized representative of the United States;
- (5) a successor examiner or auditor, in accordance with applicable professional auditing standards; or
- (6) another individual for any other factor that constitutes good cause as set forth in criteria established by the state examiner and approved by the audit committee.

It is unclear from the SOS's response which agency conducted the interviews that resulted in the transcripts. In the SOS's response letter it asserts that the State Board of Accounts conducted the inter-

views. At the same time, two of the exhibits submitted by the SOS (i.e., Secretary Lawson’s letter to Rep. Soliday, Sen.Tallian, and Clerk Bailey; and the VSTOP report) expressly say the SOS conducted the interviews in question.

Regardless, Indiana Code section 5-11-5-1(i) applies to examination work papers and investigation records associated with an examination about accounting for public funds conducted by the State Board of Accounts (“SBOA”).

This office reached out to the State Board of Accounts and was informed that while SBOA assisted with elements of the investigation, it did not consider itself to spearhead the effort, but rather provided technical assistance and expertise.

Based on the information provided, without more, this office is not persuaded that the SOS can invoke this statute as authority for withholding the interview transcripts, especially if the SOS conducted the interviews.

2.3 Federal Lawsuit

As this issue progressed through this Office, the Public Access Counselor was made aware that a Federal lawsuit had been filed and a subpoena issued to the Secretary of State’s Office regarding these materials.

Although the subpoena was being reviewed by the Attorney General’s Office, the Federal Rules of Civil

Procedure may likely mandate their production, if the materials haven't been produced already. This would render this Opinion moot. *Kentner v. Indiana Public Employers' Plan, Inc.*, 852 N.E.2d 565 (Ind. App. 2006) contemplates the Federal Rules of Discovery potentially overriding APRA considerations.

CONCLUSION

Based on the foregoing, this office concludes that the Secretary of State has not carried its burden for the nondisclosure of the interview transcripts because the statutes the agency relied on do not apply. To the extent the subpoena for production of document has been fulfilled, this matter is moot.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor