
OPINION OF THE PUBLIC ACCESS COUNSELOR

JOHNNY W. ULMER,
Complainant,

v.

INDIANAPOLIS METROPOLITAN POLICE DEPT',
Respondent.

Formal Complaint No.
19-FC-73

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 Legal Counsel Melissa L. Coxey filed a response on behalf of IMPD. 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 22, 2019.

¹ Ind. Code § 5-14-3-1 to 10.

BACKGROUND

This case involves a dispute over access to records related to the Indianapolis Metropolitan Police Department's investigation into the death of Morgan C. Hart.

On March 22, 2019, Ulmer filed a request with IMPD seeking the following records:

...the full police report...as well as any memos, notes, drawing[s], videos, tapes, and diagrams of the crime scene. In addition I would like any witnesses' statements and/or any reports on any test that was performed on the firearm and/or on the alleged shooter of the firearm.

Six days later, IMPD denied Ulmer's request in accordance with Indiana Code section 5-14-3-4(b)(1), which is the disclosure exception for the investigatory records of law enforcement agencies under the Access to Public Records Act.

In a letter dated June 17, 2019, Ulmer asked IMPD to reconsider the agency's earlier denial. Four days later, Ulmer filed another records request with IMPD.² On June 27, 2019, IMPD denied Ulmer's second request in accordance with APRA's investigatory records exception. IMPD noted that the agency generally requires a subpoena for such records.

As a result, Ulmer filed a formal complaint with this office alleging the IMPD's denial constituted a violation of the Ac-

² Ulmer did not provide this office a copy of the second request. This office presumes the request is either identical to the first or substantially similar.

cess to Public Records Act (“APRA”). Essentially, Ulmer asserts that IMPD inappropriately applied APRA’s investigatory records exception to disclosure by denying his request. Specifically, Ulmer contends that the case closed without anyone being charged with a crime, and without a criminal information filing.

On September 9, 2019, IMPD filed a response to Ulmer’s complaint with this office. IMPD replicates its argument that the records at issue are investigatory records; and thus, the department has discretion to withhold the records from disclosure.

ANALYSIS

The primary issue in this case is whether the Indianapolis Metropolitan Police Department compiled the records requested by Ulmer in the course of the investigation of a crime, and thereby authorizing the department to deny disclosure under the Access to Public Records Act.

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.

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.” *Id.* The Indianapolis Metropolitan Police Department is a public agency for the

purposes of APRA; and thus, is subject to the act's requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy the ISP's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, "public record" means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the records requested by Ulmer are public records for purposes of APRA. Although public records are presumptively disclosable, APRA contains both mandatory and discretionary exceptions to disclosure.³

This case involves the applicability of one of APRA's discretionary exceptions to disclosure: the investigatory records exception.

2. Investigatory Records of Law Enforcement

APRA gives law enforcement agencies the discretion to withhold investigatory records from public disclosure. Ind. Code § 5-14-3-4(b)(1). Indeed, the IMPD is a law enforcement agency for purposes of APRA. *See* Ind. Code § 5-14-3-

³ Ind. Code § 5-14-3-4(a) and (b).

2(q)(6). That means the department has discretion under APRA to grant or deny a request for the agency's investigatory records.

Under APRA, "investigatory record," means "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i). Although APRA does not define "crime," our criminal code defines the term "crime" to mean "a felony or a misdemeanor." Ind. Code § 35-31.5-2-75.

Here, both sides agree that Ulmer requested records related to IMPD's investigation into the death of Morgan C. Hart. Conversely, the parties disagree about whether IMPD compiled the requested records in the course of the investigation into a felony or misdemeanor.

As a preliminary matter, it is worth mentioning that APRA places the burden of proof for the nondisclosure of a public record on the agency and not the person requesting the record. *See* Ind. Code § 5-14-3-1.

In this instance, IMPD offers nothing substantive to support its conclusion that the requested records were indeed accumulated in the course of the investigation of a crime. IMPD does not mention what crime, if any, it investigated in connection with Hart's death.

The Indiana Court of Appeals recently concluded "if there is no criminal investigation, the documents cannot be withheld at [the agency's] discretion pursuant to the investigatory records exception." *Scales v. Warrick County Sheriff's Department*, 122 N.E.3d 866, 871 (Ind. Ct. App. 2019).

If an agency is unable or unwilling to refer to the crime or potential crime it is investigating, this office cannot ratify its position in good faith.

3. Cooperation from Public Agencies

IMPD's response in this case is cursory to the point of being deficient. Stated differently, the department's response could have just as easily been: "the records are investigatory records *because we said so.*" That approach does not comport with the letter or the spirit of the law.

This is especially true in cases like this. While a requester is not necessarily entitled to a detailed explanation about why a record is exempt from disclosure, this office cannot simply take an agency's word for it at the administrative adjudicative level.

IMPD has not met its burden of demonstrating to the Public Access Counselor why the decision to withhold the record is not arbitrary. A response to a formal complaint challenging the applicability of an exemption should be sufficiently detailed to allow this office to make a determination.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the investigatory records exception does not apply to the records in this case. This office recommends the IMPD release the requested records in accordance with the Access to Public Records Act.

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

Luke H. Britt
Public Access Counselor