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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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SCOTT BURNHAM,  
*Complainant,*

v.

INDIANA STATE POLICE,  
*Respondent.*

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Formal Complaint No.  
19-FC-76

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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 Indiana State Police (“ISP”) violated the Access to Public Records Act.<sup>1</sup> ISP responded via Legal Counsel Cynthia Forbes. 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 26, 2019.

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

## **BACKGROUND**

This case involves a dispute over access to Indiana State Police records related to a 1977 cold case.

In 2018, Scott Burnham contacted the Indiana State Police seeking information about the agency's investigation into the 1977 homicide of Ann Harmeier. Burnham is Harmeier's cousin and says he and his family want to find out if there is any DNA or forensic evidence from the crime scene that could lead to an arrest.

Burnham asserts that ISP directed him to file a request for public records, which he did on August 29, 2018. In the initial request, Burnham says he asked for the status of the case, various records, and whether DNA had been recovered and preserved. Burnham asserts that ISP denied his request, claiming that the case file is an investigatory record and is exempted from public disclosure under Indiana Code section 5-14-3-4(b)(1).

Burnham says he spent the next year following up with various law enforcement officials for information without success.

On August 16, 2019, Burnham refiled his records request with ISP. ISP denied the request in accordance with the Access to Public Records Act's investigatory records exception. ISP contends that the agency offered to speak with Burnham about the case.

Burnham filed a formal complaint with this office asserting ISP's denial of his records request violates the Access to Public Records Act. In response, ISP disputes Burnham's

claim that the agency violated APRA. Specifically, ISP contends the requested records were gathered and kept as part of a homicide investigation; and thus, are investigatory records under APRA. ISP argues that it has discretion to withhold investigatory records from public disclosure under the law. Thus, ISP maintains that the agency was in full compliance with the APRA when it denied Burnham's records request.

### ANALYSIS

The primary issue in this case is whether the Indiana State Police had discretion under the Access to Public Records Act to withhold from public disclosure the records requested by Burnham, which are related to an unsolved homicide case.

#### 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 Indiana State Police 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 in-

spect 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 Burnham are public records for purposes of APRA. Although public records are presumptively disclosable, APRA contains both mandatory and discretionary exceptions to disclosure.<sup>2</sup>

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, ISP is a law enforcement agency for purposes of APRA. *See* Ind. Code § 5-14-3-2(q)(6). That means ISP has discretion under APRA to withhold the agency's investigatory records from public disclosure.

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<sup>2</sup> Ind. Code § 5-14-3-4(a) and (b).

Under APRA, “investigatory record,” means “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i). In other words, “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).

Here, both sides agree that Burnham requested records related to an unsolved 1977 homicide case. Although Burnham did not provide a copy of the request, ISP maintains that Burnham requested “all information related to the initial missing persons investigation as well as subsequent homicide investigation including, case report, leads, suspects, interviews, evidence regarding DNA, etc.”

ISP argues that the agency gathered and kept the records at issue here as part of the investigation into the homicide of Ann Harmeier, which means the agency has discretion to withhold the records from disclosure in accordance with APRA’s investigatory records exception.

Based on the information presented, this office agrees that the records in contention fall under the investigatory records exception.

There can be little doubt that the records accumulated by ISP during the course of a homicide investigation constitute investigatory records for purposes of APRA.

Burnham notes that the records he wants are related to an unsolved homicide that happened more than 40 years ago. Although that is a reasonable public policy argument, the statutory language of APRA does not limit the applicability

of the investigatory records exception based on the age of the records or the status of the investigation. Our courts have observed and recognized the the same. *See Lane-El v. Spears*, 13 N.E.3d 859 (Ind. Ct. App. 2014).

To be sure, the investigatory records exception is broad, but it is not absolute. In other words, the discretion given to law enforcement agencies to withhold investigatory records has limits.

For instance, Indiana Code section 5-14-3-9(e) establishes a cause of action that allows any person or organization who has been denied the right to inspect or copy a public record by a public agency to file an action to compel disclosure in the circuit or superior court of the county where the denial occurred.

Indiana Code section 5-14-3-9(g)(1)(A) and (B) sets forth the agency's burden of proof in determining whether it properly denied access to a record under APRA's discretionary exceptions, which includes the investigatory records exception.

In short, an agency must prove that the requested record falls into one of the discretionary exceptions under APRA and establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. Conversely, the person requesting the records meets their burden of proof by showing that the denial of access was arbitrary or capricious.

Stated differently, if an agency exercises its discretion to deny disclosure arbitrarily or capriciously, a petitioner can prevail in action to compel disclosure. The Indiana Court of

Appeals declared 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.), *transfer denied*, 86 N.E.3d 172 (Ind. 2017).

In this case, this office cannot—consistent with the law—conclude that ISP’s decision to withhold the records is patently unreasonable or without consideration of the facts and in total disregard of the circumstances and lacking any basis.

As a final aside, this office is sympathetic to Mr. Burnham and his family as they seek answers and justice in the Ann’s case.

## **CONCLUSION**

Based on the foregoing, it is the opinion of the Public Access Counselor that the Indiana State Police did not violate 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