
OPINION OF THE PUBLIC ACCESS COUNSELOR

GARY E. MCDIVITT,
Complainant,

v.

FOUNTAIN COUNTY PROSECUTOR'S OFFICE,
Respondent.

Formal Complaint No.
20-FC-14

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Fountain County Prosecuting Attorney violated the Access to Public Records Act.¹ Fountain County Prosecutor Daniel L. Askren filed a response with this office. 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 February 3, 2020.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over records related to a fatal car crash that happened in Fountain County in November 2018.

On November 25, 2019, Gary E. McDivitt (“Complainant”) went to the Fountain County Prosecutor’s Office to discuss the pending investigation into the car crash that killed McDivitt’s grandson and injured three others the year before. McDivitt asked the prosecutor’s office to provide him with the information obtained from the vehicle’s data recorder, pictures, and police reports.

The agency informed McDivitt that it would not at the current time share the information he requested.

McDivitt filed a formal complaint with this office on February 3, 2020, alleging the prosecutor’s office improperly denied him access to disclosable records.

On February 28, 2020, Fountain County Prosecutor Daniel L. Askren filed an answer to McDivitt’s complaint. Askren contends at the time of the discussion with McDivitt the crash was still under investigation and his office considered any information gathered up to that point to be an investigatory record, and not subject to disclosure in accordance with Indiana Code section 5-14-3-4(b)(1).

Prosecutor Askren notes that his office did not understand McDivitt’s inquiry in November to be a formal request for public records.

Askren maintains that once the investigation concludes and McDivitt submits a formal request, the Fountain County

Prosecutor's Office will provide the records that it is statutorily required to share.

ANALYSIS

1. The Access to Public Records Act

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 Fountain County Prosecutor's Office (Prosecutor) is a public agency for the purposes of APRA; and thus, is subject to the act's requirements. Ind. Code § 5-14-3-2(q). Unless otherwise provided by statute, any person may inspect and copy the department'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). Although public records are presumptively disclosable, APRA contains exemptions and discretionary exceptions to disclosure. *See* Ind. Code § 5-14-3-4(a)–(b).

2. Investigatory records

APRA gives law enforcement agencies the discretion to withhold investigatory records from public disclosure. Ind. Code § 5-14-3-4(b)(1). The Fountain County Prosecutor’s Office is a law enforcement agency for purposes of APRA. That means the Prosecutor has discretion under to withhold the agency’s investigatory records from public disclosure.

2.1 Defining investigatory record

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).

Although APRA does not define “crime,” our criminal code defines the term to mean “a felony or a misdemeanor.” Ind. Code § 35-31.5-2-75.

This office regularly receives complaints involving disputes over records associated with vehicle crashes. Motor vehicle crashes are not inherently criminal (e.g., a felony or misdemeanor) in nature. Undoubtedly, criminal culpability may arise in connection with an accident depending on the underlying facts.

Some cases are clearer than others. For instance, in 2019 this office issued an opinion addressing the applicability of the investigatory records exception to certain records related to a motorcycle crash.²

Ultimately, this office concluded the investigatory records exception did not apply to the disputed records in that case because—among other things—police crash investigators concluded and documented in the crash report that the crash was not criminal in nature. One investigator stated “[t]here is no need for criminal prosecution in this case.”

Although this office has limited information to review in this case, the involvement of the prosecutor’s office in the crash investigation at least implies the existence of a criminal investigation. Regardless, if there is no criminal investigation, APRA’s investigatory records exception does not apply.

2.2 Closed cases

McDivitt asserts that Prosecutor Askren informed him that the case is closed; and thus, the agency should release the records. Notably, the Prosecutor does expressly not dispute McDivitt’s claim that the case is closed.

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 same. *See Lane-El v. Spears*, 13 N.E.3d 859 (Ind. Ct. App. 2014).

² *Opinion of the Public Access Counselor*, 19-FC-68 (2019).

In other words, under Indiana law, a law enforcement's discretion to withhold investigatory records from public disclosure is contingent upon the records being accumulated during a criminal investigation. A criminal investigation's status as open or closed is irrelevant to the inquiry.

Our legislature granted law enforcement agencies a considerable amount of discretion to withhold sensitive material accumulated during criminal investigations through APRA's investigatory records exception. This scope of the exception is arguably the broadest APRA has to offer.

As an aside, this office sympathizes with McDivitt and others who experience personal tragedy and pursue related records unsuccessfully. Legal maxims do not always account for the person, whether motivated by a desire for knowledge or closure, who seeks the records of government. This is not to suggest widespread noncompliance with the law, but rather an acknowledgement of when the law's uniformity—even properly applied—functions as often unintentional indifference.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Fountain County Prosecutor's Office did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LH Britt', is positioned above the printed name.

Luke H. Britt
Public Access Counselor