
OPINION OF THE PUBLIC ACCESS COUNSELOR

OLIVER S. YOUNGE
Complainant,

v.

LAWRENCE POLICE DEPARTMENT,
Respondent.

Formal Complaint No.
21-FC-173

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Lawrence Police Department violated the Access to Public Records Act.¹ City Attorney Kaitlin Voller filed an answer on behalf of the department. 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 October 21, 2021.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

This case involves a dispute over the Lawrence Police Department's (LPD) application of the investigatory records exception and the disclosure of personnel records under the Access to Public Records Act (APRA).

On September 13, 2021, Oliver Younge (Complainant) filed a public records request with LPD seeking the following:

1. The 911 call, (pertaining to the incident and automobile crash involving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor, occurring on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon).
2. Radio traffic or chatter, (pertaining to the Lawrence Police Department activity at or near the incident and automobile crash involving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor, occurring on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon).
3. Police reports, (of or concerning the incident and automobile crash involving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor, occurring on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon).
4. Investigative reports, (pertaining to the Lawrence Police Department activity at or near the incident and automobile crash involving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor, occurring on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon).

5. Communications, (of, concerning, relating, or pertaining to the Lawrence Police Department activity at or near the incident and automobile crash in-volving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor, occurring on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon).
6. Computer aided dispatch (pertaining to the Lawrence Police Department activity at or near the incident and automobile crash in-volving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor, occurring on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon).
7. Dash cam video recordings (pertaining to the Lawrence Police Department activity at or near the incident and automobile crash in-volving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor, occurring on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon).
8. Body cam video recordings (pertaining to the Lawrence Police Department activity at or near the incident and automobile crash involving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor, occurring on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon).
9. Disciplinary records of the specific officers either involved in the pursuit ending in the crash involving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor that occurred on 9/3/2021 in the vicinity of Boone County Road 650 East and State Road 32, east

of Lebanon, OR on scene at any point in time on 9/3/21 in the vicinity of Boone County Road 650 East and State Road 32, east of Lebanon where the automobile crash involving Nazire Parks, Janiya Young, Destine Grant, Jeremiah Shanks, and Jacob Taylor took place.

10. Lawrence Police Department Pursuit Policy
11. Lawrence Police Department Dash Cam and/or Body Cam Policy

On September 22, 2021, LPD responded to Younge's request. LPD provided copies of the department's pursuit policy and dash cam/body cam policies but denied access to the rest of the requested materials. LPD told Younge that his requests for the 911 call, radio traffic, police reports, investigative reports, communications, and computer aided dispatch were denied in accordance with APRA's investigatory records exception.

Furthermore, the LPD refused to release any dash cam or body cam footage in accordance with Indiana Code section 5-14-3-5.2 and Indiana Code section 5-14-3-4(b)(27), which state that law enforcement recordings are not required to be provided to the public if disclosure may affect an ongoing investigation. Finally, LPD denied the request for officer disciplinary history based on Indiana Code section 5-14-3-4(b)(8), which LPD argues, allows for personnel files of public employees to be withheld from disclosure.

On October 21, 2021, Younge filed a formal complaint with this office arguing LPD's denial is a violation of APRA. First, regarding LPD's denial of items 1 through 8, Younge argues that these records do not fall into the category of investigatory records. Specifically, Younge contends that since the department previously denied investigating a

crime or engaging in pursuit of the vehicle on the date and time in question, items 1, 2, 3, 5, 6, 7, and 8 could not be classified as investigatory records.

Second, Younge asserts that LPD previously provided item 2 of his request to other requestors, which makes the department's denial plainly arbitrary and capricious. Specifically, Younge maintains that the City of Lawrence or the LPD provided an entire copy—or at the least portions—of the requested radio traffic to at least one news station; and thus, nullifying LPD's assertions that providing the requested radio traffic might interfere with a pending investigation.

Finally, Younge disputes the department's rationale for denying item 9 of his request. Younge states that “the relevant code exempts certain personnel records, but specifically makes disciplinary records available for inspection and copying.

On November 8, 2021, the LPD submitted a response denying Younge's allegations.

First, LPD argues that the records Younge requested were compiled during pursuit of the subject vehicle and during LPD's subsequent investigation into the crimes that resulted in and occurred during the pursuit. Toward that end, LPD contends that it appropriately invoked APRA's investigatory records exception.

Second, LPD maintains that neither the LPD nor the City of Lawrence has ever released the requested radio traffic recordings. Rather, the news station mentioned by Younge directly recorded those communications in real time. LPD

contends the recordings were not provided to any third party by any city agency.

Finally, LPD maintains that they were right to deny Younge his request for officer disciplinary history for those officers involved in the incident. The department contends that the APRA's requirement to produce disciplinary records is limited to records regarding formal charges and disciplinary actions resulting in suspensions, demotions, and discharges. There is no such information for the officers in question.

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 Lawrence Police Department (LPD) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy LPD's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a)—(b).

2. Investigatory records of law enforcement

APRA gives a law enforcement agency the discretion to withhold the agency's investigatory records from public disclosure. *See* Ind. Code § 5-14-3-4(b)(1). Indeed, LPD is a law enforcement agency for purposes of APRA. *See* Ind. Code § 5-14-3-2(q)(6). That means LPD has discretion to withhold its investigatory records from public disclosure.

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 “crime” to mean “a felony or a misdemeanor.” Ind. Code § 35-31.5-2-75.

Here, Younge contends LPD improperly withheld disclosable public records related to a motor vehicle accident. LPD argues the exception applies to the case report Younge requested because it involves the investigation of multiple felonies and misdemeanors against the driver of the vehicle.

Although LPD states its officers were not in pursuit at the time of the tragic crash, the situation escalated into criminal activity including fleeing law enforcement, criminal recklessness, failure to comply with a police officer, and other criminal offenses.

While there are other pieces of information that must be disclosed via a daily log,² the material requested conceivably falls into the investigatory records category and can be properly invoked.

2.1. Radio traffic

LPD also withheld requested radio traffic from disclosure in accordance with the investigatory records exception. Younge argues this is arbitrary and capricious as other media outlets have gained a copy.

While it is notable that LDP did not provide copies of the traffic, it was copied by the media in real time, Younge's argument has merit. If information is otherwise obtainable through alternative sources, it makes little sense why an exception to disclosure should be used to deny it.

The purpose of the investigatory records exception is undoubtedly to preserve the integrity of investigation methodology. But it makes little sense to invoke the exception with radio traffic broadcast over frequencies available by citizens. If anyone listening in can make a copy for their own use, but denied from the source, that certainly seems arbitrary, even if not for the reasons cited by the complainant.

For instance, in *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. The Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003), the Indiana Court of Appeals rejected the argument that a public agency cannot waive the exceptions under APRA on the basis the act contains no express waiver provision. The court observed that

² See Ind. Code § 5-14-3-5.

“[w]aiver is the voluntary and intentional relinquishment of a known right.” *Id.*

At least implicitly, the common availability of traffic over the airwaves could be construed as a waiver. To offset their efforts, this is presumably why much of the traffic is spoken in alphanumeric codes. In any event, the traffic, if recorded, should be disclosed.

2.1. Disciplinary records

Younge also seeks disciplinary records of the officers involved in the investigation. LPD contends those records simply do not exist.

APRA mandates disclosure of agency information relating to the status of any formal charges against an employee; and the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged. *See* Ind. Code § 5-14-3-4(b)(8)(B), -(C). All other types of discipline short of suspension, demotion and discharge need not necessarily be disclosed.

As an aside, it should also be noted that the personnel file statute prohibits disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

Irrespective of those considerations, a record must actually exist for the records to be disclosed. If they do not, an agency is not under any obligation to create them.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Lawrence Police Department did not violate the Access to Public Records Act by withholding the majority of the requested records in this case.

Nonetheless, this office recommends the disclosure of any recorded radio traffic germane to the request.

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

Luke H. Britt
Public Access Counselor