



# STATE OF INDIANA

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May 28, 2015

Mr. Douglas J. May  
Travelers Staff Counsel Office  
625 Eden Park Drive, Suite 510  
Cincinnati, OH 45202

*Re: Formal Complaint 15-FC-130; Alleged Violation of the Access to Public Records Act by the Washington Township Avon Fire Department*

Dear Mr. May,

This advisory opinion is in response to your formal complaint alleging the Washington Township Avon Fire Department ("AFD") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* AFD has responded to your complaint via Mr. Anthony Joust and Ms. Stephanie Chaudhary. Their response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on April 14, 2015.

## BACKGROUND

Your complaint dated April 10, 2015 alleges the Washington Township Avon Fire Department violated the Access to Public Records Act by failing to provide the records you requested.

You submitted an APRA request to AFD, seeking records pertaining to a fire investigation conducted relative to a fire at the Travelers Insured Property in Avon. Travelers requested information regarding the cause and origin of the fire. On January 28, 2015, you were denied access to those records. Avon informed you the records were deemed investigatory and it was exercising its discretion to withhold the documents.

On April 29, 2015, AFD responded to your complaint. AFD cites the opinion of a previous Public Access Counselor, which determined a fire department qualified as a law enforcement agency because it "conducted investigations" and "its personnel are designated by statute as assistants to the state fire marshal." *See Opinion of the Public Access Counselor 07-FC-96.*



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Counsel for AFD reiterates the position the records you requested are investigatory records. AFD cites *07-FC-28*, where a previous Counselor held a fire department's records "compiled in the course of an investigation of a crime ... may be withheld in the agency's discretion." See *Opinion of the Public Access Counselor 07-FC-28*.

Counsel also contends the records fall within the deliberative materials exception under Ind. Code § 5-14-3-4(b)(6). Counsel notes the records contain "the Department's opinions and speculation regarding the cause and origin of the fire" and "these opinions are directly to the decision making process."

In response, you allege AFD is extending the investigatory exemption beyond what is permissible. You contend AFD's use of a blanket exemption goes against the APRA and that AFD has failed to allege specific documents which are investigatory. You maintain that the failure to allege specific documents as investigatory causes AFD to waive any claim of exemption. You cite a previous *Public Access Counselor Opinion 07-FC-28*, which stated an investigatory agency "must specific the exemption" which applies to the case file.

## ANALYSIS

The public policy of the 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." See Ind. Code § 5-14-3-1. The Avon Fire Department is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy Avon's 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).

It stands to reason an element of a fire department's duties is to investigate potential criminal activity. While fires are not inherently criminal, some fires may be categorized as arson. Because the purpose of the "investigatory records" exception is to preserve the integrity of a criminal investigation, a fire department is within the nexus of law enforcement when investigating a suspicious fire.

That being said, a blanket invocation of the investigatory records exception leans against notions of transparency and openness. While the Courts have interpreted the exception broadly, its use should be applied judiciously and not arbitrarily. See Ind. Code § 5-14-3-



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9(g)(2). An arbitrary or capricious action disregards facts and context and lacks a basis which would lead a “reasonable and honest” person to the same conclusion. *Hetzel v Thomas* 516 N.E.2d 103, 106 (Ind. App 3 Dist. 1987). (The request for coroner’s files was not arbitrarily denied because it is reasonable the files could potentially be used in a criminal case, though criminal activity was not necessarily suspected at the time.) A record must have a legitimate nexus to a criminal investigation in order for the exemption to be appropriately applied.

So it is also with deliberative materials. While ideas, speculation, opinions and the like may be withheld if it were to compromise the decision-making process, not every piece of inter-agency communication falls under the rational use of withholding “deliberative” material. Again, an agency should invoke these exemptions only when there is a legitimate reason for doing so and not just because they are allowed to under the law.

Sometimes transparency is inconvenient and inefficient. But providing the public 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.

In any case, your formal complaint was filed well outside the thirty (30) day timeframe for filing under Ind. Code § 5-14-5-7. Therefore, I decline to issue a determination as to a violation and this Opinion is therefore educational only and should not be used as persuasive authority in any subsequent proceeding.

Regards,

A handwritten signature in black ink, appearing to read "LH Britt", written in a cursive style.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Anthony Joust  
Ms. Stephanie Chaudhary