



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 21, 2014

Mr. Carl L. Szulczynski
1381 Brighton Lane
Lake Villa, IL 60046

Re: Formal Complaint 14-FC-244 & 252 (consolidated); Alleged Violation of the Access to Public Records Act ("APRA") by the Salem Police Department and the Washington County Coroner

Dear Mr. Szulczynski,

This advisory opinion is in response to your formal complaint alleging the Salem Police Department ("Department") and the Washington County Coroner ("Coroner") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Police Department has responded via Troy Merry, Chief of Police. His response is attached for your review. The Coroner has responded via Mr. Thomas E. Scifres, Esq., attorney for the Coroner. His response is also attached 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 October 22, 2014.

BACKGROUND

On September 17, 2014, you, through a designated agent, made a public records request on the Washington County Coroner for his file regarding your deceased brother who passed in 2000. On September 19, 2014 the Coroner's file was given to your designee, however, you also requested photographs and an audio recording which the Coroner did not have in his possession or in his office. You allege the former Washington County Coroner denied you a records request in 2000 when he was in Office.

On October 11, 2014, however, you were advised the Salem Police Department may be in custody of the records you seek. You were unable to reach the attorney for the Department before you filed your complaint.

The Coroner responded to your complaint by simply alleging the present Coroner has given you everything in his possession relating to your brother's death. The Salem Police Department has responded by stating they are willing to provide you the copy of the

photographs you seek provided this Office recommend they do so. The audio tape, however, has not been located. The Department acknowledges its collection from the scene of your brother's death; however, there is no chain of custody or knowledge of its whereabouts.

DISCUSSION

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 Salem Police Department and the Washington County Coroner are public agencies subject to the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person would have the right to inspect and copy the Department's or the Coroner'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).

The Coroner appears to have searched for and produced all of the records in its possession which may be responsive to your request. There is indication the Coroner at the time retained custody of the audio tape you seek. Pursuant to the Indiana Local Government Retention Schedule found at www.in.gov/icpr/files/county_coroner.pdf, the Coroner is to keep evidence collected from a scene for 100 years. If the tape does not exist, the Coroner at the time would have violated the retention schedule, and consequently, the APRA provision found at Ind. Code § 5-14-3-4(h).

Although the retention schedule pertains to the Office and not to the individual Coroner, I hesitate to find the current Coroner in violation because former file-keeping systems are outside the scope of his control. The former Coroner would be in violation, however, as Mr. Scifres points out, the timeframe for filing a complaint with this Office is 30 days pursuant to Ind. Code § 5-14-5-7. Because you were denied the records in May of 2000, I cannot declare a violation.

As for the Salem Police Department, I implore the Chief to consider my recommendations found in *Informal Opinion 14-INF-18*:

The investigatory records exception to the APRA provides a law enforcement agency has the discretion to disclose or not disclose its investigatory records. See Ind. Code § 5-14-3-4(b)(1). An investigatory record is “information *compiled in the course of* the investigation of a crime.” Ind. Code § 5-14-3-2(i) (emphasis added).

The investigatory record exception is one of the broader APRA disclosure exceptions. Accordingly, it is also applied broadly by law enforcement agencies. Disclosure is discretionary, therefore the APRA defers to law enforcement to decide which pieces of information to release – the information is not generally confidential.

The Indiana General Assembly has clearly given law enforcement agencies the option to withhold the records you seek. However, in my opinion, the

APRA begins with the presumption of disclosure and carves out exceptions when warranted – not necessarily the other way around. It is not the role of the Public Access Counselor to tell law enforcement agencies when to disclose investigatory records and when not to, but I can certainly advocate for transparency.

Withholding an investigatory record is certainly fitting when the release could jeopardize the integrity of an investigation (even cold cases). It is also justifiable when release would have a detrimental effect on a victim, witness or minor. That being said, agency release of investigatory records is a choice. When release is harmful, it should certainly be withheld.

When a case is closed; so far in the past as to be no longer germane to a foreseeable investigation; or merely ancillary material captured in the course of any investigation, an agency should scrutinize their decision in a light favorable to transparency.

In no way am I criticizing the decision of the [agency] to withhold the records. They are the subject matter experts charged with handling their investigations in the pursuit of public safety. Rather, this opinion is aimed at all Indiana law enforcement agencies to encourage them to examine their records release practices to be consistent with the spirit of APRA and public interest.

My recommendation is to release the records to you. While this may not be the case with every investigatory record, I suggest the Department use the exception judiciously and provide the photographs you seek.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Public Access Counselor the Salem Police Department and the Washington County Coroner did not violate the Access to Public Records Act. Furthermore, it is also my Opinion the Salem Police Department release any records which may satisfy your request.

Regards,

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

Luke H. Britt
Public Access Counselor

Cc: Chief Troy Merry; Mr. Thomas E. Scifres, Esq.