OPINION OF THE PUBLIC ACCESS COUNSELOR

TIMOTHY EVANS,
Complainant,

v.

INDIANAPOLIS METRO. POLICE DEP'T,
Respondent.

Formal Complaint No.
18-FC-57

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indianapolis Metropolitan Police Department ("IMPD") violated the Access to Public Records Act[1] ("APRA"). The IMPD responded to the complaint through legal advisor Melissa L. Coxey. 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 May 15, 2018.

[1] Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Timothy Evans ("Complainant"), an investigative reporter for the *Indianapolis Star*, filed a formal complaint alleging the Indianapolis Metropolitan Police Department violated the Access to Public Records Act by failing to provide requested emails.

Around March 23, 2018, Marisa Kwiatkowski, a colleague of Evans, filed a public records request with IMPD seeking emails between three identified senders and recipients regarding a set of key words for approximately a six-month timeframe spanning late 2016 and early 2017. The subject matter appears to have been related to an investigation into USA Gymnastics coach Marvin Sharp and the fallout from his arrest and subsequent suicide in 2015.

On April 5, 2018, IMPD denied the public records requests via a paralegal claiming an exemption to disclosure pursuant to Indiana Code section 5-14-3-4(b)(1) as an investigatory record.

The Star's reporters take exception to the denial as the emails would have been created over a year after the death of the subject of the investigation and would not have been germane to the investigation itself, but rather criticism over press coverage of the investigation.

In its response, IMDP doubled-down on the investigatory records exception and relies on an eight-year-old opinion from this Office as justification for doing so.

ANALYSIS

This formal complaint presents the issue of whether the Indianapolis Metropolitan Police Department had discretion to withhold the requested emails pursuant to APRA's investigatory records exception, codified at Indiana Code section 5-14-3-4(b)(1).

1. The Access to Public Records Act (APRA)

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 Indianapolis Metropolitan Police Department ("IMPD") is a public agency for the purposes of the APRA, and subject to its requirements. Ind. Code § 5-14-3-2(n).

Therefore, any person has the right to inspect and copy IMPD's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. Ind. Code § 5-14-3-3(a).

1.1 Statutory Interpretation

It should be noted outright that the Access to Public Records Act is not to be interpreted with strict construction – most particularly when it comes to the discretionary exceptions to disclosure listed in Indiana Code section 5-14-3-4(b). Discretion is inherently subjective by nature because it means the public agency has a choice whether to disclose a piece of information. Unlike confidential materials, which are black and white, discretion can be selectively applied on

a case-by-case basis according to necessity. The Indiana General Assembly expressly declared that APRA "shall be liberally construed" in favor of transparency. *See* Ind. Code § 5-14-3-1. The Courts have recognized this tenet as well and called for non-disclosure exceptions to be narrowly and conservatively construed. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995). When considering matters of statutory construction, the entirety of a statute is to be read in order to contextualize its individual provisions. Statutes relating to the same general subject matter are in *pari materia* and should be construed together so as to produce a harmonious system. *Indiana Alcoholic Beverage Commission v. Osco Drug, Inc.*, 431 N.E.2d 823 (Ind. Ct. App. 1982).

Although Indiana Code section 5-14-3-4(b)(1) does give discretion to law enforcement agencies to withhold investigatory records, that discretion is not absolute. It can and has been abused. Reading the entirety of the Access to Public Records Act as a system, Indiana Code section 5-14-3-9(g)(2) speaks to an arbitrary and capricious standard of applying discretion, which can be proven to overturn an agency's discretion.

If our legislature intended for investigatory records to be *de facto* confidential, it would have declared them so. To that end, this Office has offered a set of standards to appropriately apply that discretion. This was honed over many hours presenting and discussing with law enforcement officials.

1.2 APRA's "Investigatory Records" Exception

Under APRA, the term *investigatory record* means "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i).

Regardless if an investigation is open or closed, an investigatory record should be withheld and discretion applied if a document's release jeopardizes an investigation; if disclosure would violate a legitimate expectation of privacy; or if a piece of information were to be made public that would reasonably threaten public safety.

This Office is often asked by respondent agencies to make an absolute statement on what is and isn't disclosable. However, those determinations are made on a case-by-case basis within the vacuum of a set of facts. A standard of reasonableness is often employed to reach conclusions. This is not activism, nor is it legislating, but simply following the instructions of the Indiana General Assembly to apply the law consistent with its intent and purpose. While some of its provisions do indeed have plain meaning, this Office generally approaches each factual circumstance and resulting application of the law to be unique to that occurrence.

And so we must turn to the facts themselves to decide whether the exercise of discretion was appropriate. In the instant case, the emails requested were created long after the subject of which the IMPD predicates its exemption to discuss died. Moreover, the Marion County prosecutor had long since dismissed the case effectively negating the necessity of an ongoing investigation.

Even if a sensitivity concern exists, it should further be noted that the statute speaks to information compiled in the course of the investigation of a crime and not just any police activity. There is no indication an investigation continued into 2016 and 2017 and therefore ***IMPD*** *was no longer in the course of the investigation of the crime*, as the statute contemplates.

Furthermore, even if some of the materials fall under the exclusion, there is an obligation on the part of any agency to separate disclosable material from the non-disclosable. *See* Ind. Code § 5-14-3-6. Additionally, there is no indication IMDP actually searched for emails responsive to the request, but rather preemptively dismissed the request as investigatory without expending any intellectual analysis to consider whether they truly were sensitive as to an investigation.

Note well the investigatory exemption mechanism is not a vehicle to jettison inconvenient or potentially uncomfortable records requests. It is to protect sensitive law enforcement information that could jeopardize public safety.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that IMPD revisit the request to determine whether the records at issue were truly compiled in the course of the investigation of a crime or were created after the fact and simply germane to an investigation but not investigatory in nature.

Luke H. Britt
Public Access Counselor