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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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LIDAN LIN,  
*Complainant,*

v.

INDIANA UNIV. | PURDUE UNIV. FORT WAYNE  
*Respondent.*

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Formal Complaint No.  
18-FC-72

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging that Indiana University-Purdue University Fort Wayne (“IPFW”) violated the Access to Public Records Act<sup>1</sup> (“APRA”). IPFW Associate Legal Counsel Christine M. Marcuccilli filed an answer to the complaint with this Office.

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<sup>1</sup> Ind. Code §§ 5-14-3-1 to -10

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 9, 2018.

### **BACKGROUND**

This case involves a public records dispute between a tenured professor of English and Indiana University–Purdue University Fort Wayne (“IPFW”), the institution where she teaches.

Dr. Lidan Lin (“Complainant”), a professor of English at IPFW, alleges the university violated the Access to Public Records Act (“APRA”) by wrongfully denying her request for access to two police reports.

On April 16, 2018, Lin submitted a written request for public records seeking the following records:

1. IPFW police report case # 18I000157;
2. IPFW police report case # 18I000101;
3. Complaint against me sent to HR (Dimple Smith, Christine Marcuccilli, etc.) on Feb. 26, 2018 by Damian Fleming.

Ten days later, IPFW, through Christine Marcuccilli, denied disclosure of the two police reports in accordance with Indiana Code section 5-14-3-4(b)(1), otherwise known as the investigatory records exception. The same day, Lin contested the denial on the grounds that the reports are not investigatory records because two incident reports in her possession were marked “no investigation” and are not marked confidential.

On April 30, 2018, Marcuccilli informed Lin that after re-reviewing the request that IPFW stood by its decision to

withhold the records. That same day, Lin attempted to contest the denial with Marcuccilli's supervisor, again challenging the legal basis for the decision. Once again, IPFW stood by the denial.

The next few days, Professor Lin made additional pleas with IPFW's Chancellor and two Vice Chancellors to reverse the denial of her request without success.

As a result, Lin filed a formal complaint with this Office alleging IPFW violated APRA by denying disclosure of the police reports. Essentially, Lin argues that the records are not investigatory records as defined under APRA; and thus, IPFW does not have any legal authority to withhold the records.

IPFW disputes that it violated APRA by denying disclosure of the two police reports as investigatory records of a law enforcement agency. The university argues that the plain meaning of the exception is straightforward, since a police report of a complaint of a crime is "clearly within the exception." Further, IPFW argues that APRA does not require an investigatory record to be confidential to trigger the discretionary non-disclosure of the reports.

## ANALYSIS

The key issue in this case is whether IPFW has discretion under the investigatory records exception to deny disclosure of the two police reports requested by Lin.

### 1. The Access to Public Records Act (“APRA”)

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. IPFW 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 Central Dispatch’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

APRA contains exceptions—both mandatory and discretionary—to the presumptive rule of disclosure. In particular, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

### 2. Investigatory Records of Law Enforcement

Under APRA, the investigatory records of law enforcement agencies may be excepted from disclosure at the discretion of the agency. Ind. Code § 5-14-3-4(b)(1). *Investigatory record*

means “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i). APRA does not statutorily define the term *crime*, but the Indiana criminal code generally defines *crime* as “a felony or misdemeanor.” See Ind. Code § 35-41-1-6.

Here, IPFW denied Lin’s request for two police reports associated with two separate incidents where IPFW police responded. The parties disagree about whether IPFW has discretion to withhold the reports as investigatory records.

Lin contends that the two police reports are not investigatory records as defined by APRA because the incident table documents she received from IPFW expressly state “No Investigation” and are not otherwise marked “confidential.”

IPFW describes these documents as “redacted cover sheets of the police reports...with the daily crime log information available to [Lin] under the APRA’s requirements.” IPFW also contends that nothing in APRA requires investigatory records be marked “confidential” to trigger the exception. Next, the university asserts that the absence of an active investigation does not limit the agency’s discretion to withhold investigatory records from public disclosure. Lastly, IPFW argues that the administrative note stating “no investigation” is not necessarily reflective of the status of an investigation.

As a preliminary matter, APRA places the burden of proof for the nondisclosure of a public record on *the agency*, not the requestor. See Ind. Code § 5-14-3-1 (emphasis added). That means IPFW must show that the investigatory records exception applies to the records requested by Lin, not the other way around.

In this case, IPFW's answer to the complaint does little to carry its burden of proof for the nondisclosure. Essentially, IPFW correctly recites the law and makes a conclusory statement that records at issue are "clearly" covered by the investigatory records exception.

Yet, the university makes no argument that establishes the content of the records at issue in this complaint are investigatory records. In other words, IPFW does not state *why* the records are investigatory records.

Critically, for APRA's investigatory records exception to apply, the information must be compiled, that is collected, during the investigation of a crime (e.g., a felony or misdemeanor). Oddly enough, in this case, IPFW does not argue that these two reports were indeed compiled during the investigation of a crime.

The two incident report cover sheets submitted to this Office describe the nature of the two complaints as "harassment" and "disturbance" respectively while naming Lin. The documents do expressly state the phrase "no investigation" in a data field designated as "Contact." IPFW contends these are redacted cover sheets from the daily crime log.

Under APRA, an agency must maintain a daily log or record that lists suspected crimes, accidents, or complaints, and make that information available for inspection and copying. Ind. Code § 5-14-3-5(c).

IPFW correctly notes that the statute does not distinguish between active (open) and closed investigations. Even so, there must be an investigation of a crime in order for the exception to apply.

Public agencies should remain mindful that in action to compel disclosure, a public agency meets its burden of proof for a denial under section 4(b) by proving that the record falls within one of the exempted categories and establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. *See* Ind. Code § 5-14-3-9(g).

Far be it from this Office to erode the conceptual ability of law enforcement to protect sensitive information, however, the legislature clearly states that the investigatory exception must be in the context of investigation of a crime and not all law enforcement activity generally. Anecdotally, Indiana colleges and universities went to great length distinguishing between routine “campus security” and “law enforcement activity” in lobbying the legislature and arguing before this Office and the judiciary in the matter presented in *ESPN v. Notre Dame*, 62 N.E.3d 1192 (2016). In short, campus police wear two hats when ensuring campus safety – student and workplace security which is mutually exclusive from traditional police work (investigation, apprehension, and arrest of criminal suspects). Based on the information provided, it appears as if this was simply a routine workplace disagreement falling short of a criminal investigation. Again, nothing in IPFW’s response is compelling toward that end.

Furthermore, even if the investigation was criminal in nature, discretion can be abused, intentionally or otherwise, in the name of keeping documents internal. There are mechanisms under the law to put a check on that discretion so that

it does not rise to the level of arbitrary and capricious<sup>23</sup>. This Office has opined on the matter many times. So long as the records in question would jeopardize an investigation, compromise a reasonable and serious expectation of privacy, or risk public safety at large, the records should be withheld. But if those elements do not exist and an agency is exercising discretion merely because they can, it could potentially rise to that level.

Therefore if the records were created simply in an effort to maintain and restore workplace civility pursuant to a non-criminal matter, those records would likely be defined as a personnel document. According to Indiana code section 5-14-3-4(b)(8) all personnel file information shall be made available to the affected employee.

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<sup>2</sup> Ind. Code § 5-14-3-9(g)(2)

<sup>3</sup> *Lane-El v. Spears*, 13 N.E.3d 859 (Ind. Ct. App. 2014)



## CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the records created by the IPFW do not appear to be criminal in nature and therefore an exception to disclosure would not apply.

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

Luke H. Britt  
Public Access Counselor