
OPINION OF THE PUBLIC ACCESS COUNSELOR

KEVIN GREENLEE,
Complainant,

v.

HENDRICKS COUNTY PROSECUTING ATTY.,
Respondent.

Formal Complaint No.
19-FC-27

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Office of the Hendricks County Prosecuting Attorney violated the Access to Public Records Act.¹ Prosecutor Loren P. Delp filed an answer on behalf of the office. 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 March 22, 2019.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

This case involves a dispute over investigatory records of a cold case.

On March 3, 2019, Kevin W. Greenlee (“Complainant”), an attorney conducting research on behalf of a client, filed a request for public records with the Hendricks County Prosecutor’s Office seeking the following:

...an opportunity to inspect or obtain copies of any records that you have related to the investigation of the murder of Mary Ann Higginbotham and the disappearance of Tim Willoughby.

Three days later Greenlee sent a second request for records to the prosecutor’s office for the following:

...copies of any records that you have related to the criminal history of Tim Willoughby. [I]ncluding the search warrant that resulted in his arrest in the spring of 1978, any records concerning his time in jail before being released on bond and any information his earlier offenses.

On March 11, 2019, Hendricks County Prosecutor Loren Delp emailed Greenlee confirming receipt of both requests. Delp concluded his response by stating:

I cannot confirm nor deny the existence of the records you are requesting.

As a result, Greenlee filed a formal complaint alleging the prosecutor’s reply constitutes a violation of the Access to Public Records Act. Greenlee takes exception to the prosecutor’s response because he contends the underlying case is

closed. Greenlee also asserts that APRA requires the prosecutor to state the provision of the law that allows him to deny access.

For his part, Prosecutor Delp responded to the complaint via email stating he considered the denial to be clear and consistent with the Access to Public Records Act. Delp reconsidered, and chose to revise his denial of Greenlee's request by invoking APRA's disclosure exception for the investigatory records of a law enforcement agency, codified under Indiana Code section 5-14-3-4(b)(1).

ANALYSIS

1. The Access to Public Records Act ("APRA")

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, 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." *Id.*

2. Refusing to Confirm or Deny Existence of a Record

Under APRA, if a law enforcement agency receives a request for records the agency considers exempt under Indiana Code section 5-14-3-4(b)(1) or 4(b)(25), the agency may deny the request or refuse to confirm or deny the existence of the record, regardless of whether the record exists or does not exist. Ind. Code § 5-14-3-4.4(a).

Notably, the agency's authority to refuse to confirm or deny a record's existence is only available if the fact of the record's existence or nonexistence would reveal information that would:

(A) impede or compromise an ongoing law enforcement investigation or result in danger to an individual's safety, including the safety of a law enforcement officer or a confidential source; or

(B) reveal information that would have a reasonable likelihood of threatening public safety

Ind. Code §§ 5-14-3-4.4(a)(2)(A), -(B). The subject matter in this case involves a tangential matter related to the disappearance of a woman in 1978. Although the matter is over forty years old, the case is still listed as pending, at least as it pertains to the Indiana State Police.

Here, Prosecutor Delp's discretion to refuse to confirm or deny the existence or nonexistence of a record is predicated on section 4.4(a)(2) being satisfied. Even so, APRA requires a public agency to cite the specific exemption or exemptions that authorizes a denial of a public records request. Ind. Code § 5-14-3-9(d) (2)(A).

A requestor need not take an agency's word for it and assume there is a statute applies. The Indiana Code requires a public agency to do its due diligence and cite an actual statute.

3. Investigatory Records

APRA defines investigatory records as "information compiled in the course of the investigation of a crime." Ind. Code § 5-14-3-2(i). Law enforcement agencies are bestowed with

authority to withhold investigatory records from disclosure at the discretion of the agency. Ind. Code § 5-14-3-4(b)(1). This discretion, however, is not absolute.

For instance, APRA establishes a cause of action to compel disclosure of records when an agency denies disclosure of public records. *See generally* Ind. Code § 5-14-3-9. In the case of discretionary exceptions to disclosure, the burden of proof is on the agency to show that the record falls within one of the categories of exempted records and establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. Ind. Code § 5-14-3-9(g)(1).

Conversely, the person requesting access to public records meets their burden of proof by proving the denial is arbitrary or capricious. In the context of a discretionary denial under APRA, the Indiana Court of Appeals observed that “[a]n arbitrary and capricious decision is one which is patently unreasonable and is made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion.” *Groth v. Pence*, 67 N.E.3d 1104, 1122 (Ind. Ct. App.) (internal quotations omitted).

That determination is not for this office, but ultimately for the courts. Still, it is my statutory obligation to provide guidance and advice to public agencies and the public on how to avoid that and similar pitfalls.

Here, based on the information provided, Greenlee raises a presumption that the decision to withhold the records he re-

quested could possibly be construed as an abuse of discretion. Prosecutor Delp does not set forth an argument that rebuts that presumption.

Although this office does some independent research to contextualize certain statements by the parties, the prosecutor offered nothing by way of application to justify the denial as appropriate under the law and seemed to be dismissive of the entire process. The denial may have been appropriate, but it is not the intention of this office to carry a public agency's water for it.

CONCLUSION

Based on the foregoing, it is the opinion of the Public Access Counselor that the Office of the Hendricks County Prosecuting Attorney violated the Access to Public Records Act by not including in the original denial a statement of specific exemption authorizing the withholding of the records.

Although the prosecutor subsequently rectified that omission, the agency has not carried its burden to justify why the withholding of certain records from a closed case file is not arbitrary or capricious.

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

Luke H. Britt
Public Access Counselor