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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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DONALD F. MATHIAS,  
*Complainant,*

v.

CITY OF MARION,  
*Respondent.*

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Formal Complaint No.  
19-FC-92

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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 a formal complaint alleging the City of Marion violated the Access to Public Records Act.<sup>1</sup> Corporation Counsel Thomas R. Hunt filed an answer on behalf of the city. 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 September 24, 2019.

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

## **BACKGROUND**

This case involves a dispute over access to certain police department records in the City of Marion.

Since late August, Donald F. Mathias (“Complainant”) has been requesting certain records related to a traffic stop conducted by the Marion Police Department.

Most recently on September 11, 2019, Mathias filed a public records request seeking: (1) radio dispatch audio between Officer Bowell #161 and Marion dispatch between 11:30 p.m. on August 21, 2019 and 12:20 a.m. August 22, 2019; (2) Any audio and video recordings captured by personal or department issued devices used by the officer pertaining to the traffic stop on August 22, 2019 at around 12:00 a.m.; (3) MPD’s policy on the use of personally owned video and audio recording devices including how the recordings are stored; and (4) MPD’s citizen complaint policy.

The city acknowledged the request by email the next day. On September 19, 2019, the city denied Mathias’s request by email. Corporation Counsel Thomas R. Hunt indicated the denial was in accordance with Indiana Code section 5-14-3-5.2(a)(2).

On September 24, 2019, Mathias filed a formal complaint with this office alleging the city’s denial of access is a public access violation. More specifically, Mathias notes that the most recent denial addresses the law enforcement recordings but not the other records he requested.

The City of Marion filed an answer to Mathias’s complaint on October 4, 2019. In essence, the City argues that it denied Mathias’s request for radio dispatch audio and body camera

footage in accordance with Indiana Code section 5-14-3-5.2(a)(2)(B), and (C). Moreover, the City contends that it denied the remainder of the request because MPD has no policy on keeping and storing law enforcement recordings or how citizens can make complaints to the department.

## 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 § 5-14-3-1.5-1.

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.” *Id.* The City of Marion is a public agency for the purposes of APRA; and thus, subject to the act’s requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy the city’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, “public record” means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic

or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, there's no dispute that the records in contention are public records as defined by APRA.

## **2. Mathias's Request**

### **2.1 Request for Dispatch Audio and Body Cam Footage**

Mathias requested both radio dispatch audio between the officer and dispatch and any audio or video recordings from the body worn camera the officer was wearing at the time.

MPD contends that it denied these requests in accordance with Indiana Code section 5-14-3-5.2(a)(2)(B), and (C).

As a preliminary matter, it is worth mentioning that MPD classifies audio recordings between dispatch and an officer, and body worn camera footage as law enforcement recordings.

Under APRA, "law enforcement recording" is precisely defined to mean:

...an audio, visual, or audiovisual recording of a law enforcement activity captured by a camera or other device that is:

- (1) provided to or used by a law enforcement officer in the scope of the officer's duties; and
- (2) designed to be worn by a law enforcement officer or attached to the vehicle or transportation of a law enforcement officer

Ind. Code § 5-14-3-2(k). This office interprets this definition as applicable to recordings captured by a body worn camera and by dash or vehicle mounted cameras. As a result, the definition of law enforcement recording would not reach audio recordings of dispatch.

With that framework in mind, we can turn to the request and the denial.

MPD argues that it denied Mathias's request for dispatch audio recordings and the body cam footage in accordance with Indiana Code section 5-14-3-5.2(a)(2)(B), and (C).

In general, the statute requires to permit any person to inspect or copy a law enforcement recording unless an exception applies. Ind. Code § 5-14-3-5.2(a).

Indiana Code section 5-14-3-5.2(a)(2) authorizes the agency to deny disclosure if the agency finds, after due consideration of the facts of the particular case, that access to or dissemination of the recording:

is likely to interfere with the ability of a person to receive a fair trial by creating prejudice or bias concerning the person or a claim or defense presented by the person; [or]

may affect an ongoing investigation, if the recording is an investigatory record of a law enforcement agency as defined in section 2 of this chapter and notwithstanding its exclusion under section 4(b)(1) of this chapter;

Ind. Code § 5-14-3-5.2(a)(2)(B),-(C).

Here, based on the information provided to this office, these two exceptions do not apply to the law enforcement recording requested by Mathias.

The underlying traffic stop resulted in the driver being cited for two infractions.<sup>2</sup>

As set forth above, an agency may withhold a law enforcement recording in accordance with Indiana Code section 5-14-3-5.2(a)(2)(C) if disclosure may affect an ongoing investigation, if the recording is an investigatory record of a law enforcement agency as defined in section 2 of this chapter and notwithstanding its exclusion under section 4(b)(1).

So, for this exception to apply the recording must be an investigatory record as defined under section 2 of APRA. Under APRA, “investigatory record” means “information compiled in the course of the investigation of a crime.” Ind. Code § 5-14-3-2(i). Although APRA does not define “crime,” our criminal code defines the term “crime” to mean “a felony or a misdemeanor.” Ind. Code § 35-31.5-2-75. Thus, an infraction is not a crime.

What is more, Indiana courts have long recognized that “[t]raffic infractions are civil, as opposed to criminal, proceedings in nature.” *Pridemore v. State*, 577 N.E.2d 237, 238 (Ind. Ct. App. 1991). Moreover, Indiana Code section 34-28-5-1 governs the prosecution of infractions.

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<sup>2</sup> Ind. Code § 9-25-8-2 (Operating a Motor Vehicle Without Financial Responsibility); and Ind. Code § 9-21-8-25 (Failure to Signal for Turn or Lane Change).

Since the footage at issue here was not compiled in the course of the investigation of a crime, section (a)(2)(C) does not apply.

Furthermore, section 5.1; 5.2; and 5.3 of the APRA apply exclusively to body worn cameras and dash cams only.

## **2.2 Request for MPD Policies**

Mathias requested two MPD policies. First, he asked for the department's policy on officers using personally owned video and audio recording devices including information on keeping and storing law enforcement recordings.

Although MPD did not address this specific request in its original denial, in its answer to this office MPD asserts that it has no such policy beyond what is required by statute.

Indeed, APRA contains provisions governing the retention of law enforcement recordings. *See* Ind. Code § 5-14-3-5.3. Since it appears MPD has not yet implemented body camera program, it is conceivable that the department would not have an internal policy on retention of law enforcement recordings. That stated, it make sense to have a policy if any officers are using body worn cameras in their official capacity that results in the creation of law enforcement recordings because the department's duty to retain those recordings is not limited to only department issued devices. *See* Ind. Code § 5-14-3-2(k).

In any event, if the MPD has a policy, it is disclosable under APRA upon request unless an exception applies. If the department does not yet have a policy, there would nothing responsive to Mathias's request.

Second, Mathias requested MPD's citizen complaint policy. Even though the city did not address this request in its denial, it addressed the issue in the city's response to this office by stating the city has "no policy about how complaints can be made."

MPD, in fact, does indeed have a policy and procedure for processing and investigating complaints against employees of the department.<sup>3</sup> **The department's full policy manual is available on the city's website**, which makes the city's initial denial and response to this office problematic.

In truth, this issue should have never made it to this office as part of a formal complaint proceeding. Marion should have either provided a copy of the policy or directed Mathias to the website where the document is available for inspection and download. Although it is possible, this office is unconvinced that Marion's corporation counsel did not have an understanding that this policy exists and is readily available for inspection on the City's website.

As a final aside, the City of Marion should be mindful of its duty under APRA to provide the public with access to records regardless if the City considers a requester an irritant.

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<sup>3</sup> Marion Police Department Policy Manual, No. 2.03, p.23, -25.



### **CONCLUSION**

Based on the foregoing, it is the opinion of this office that the City of Marion should release the records requested to the extent they exist. The exemptions to disclosure cited by the City are inapplicable in the instant case.

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

Luke H. Britt  
Public Access Counselor