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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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ANGELICA PICKENS (WPTA - ABC21),  
*Complainant,*

v.

CITY OF FORT WAYNE,  
*Respondent.*

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Formal Complaint No.  
22-FC-147

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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 that the City of Fort Wayne violated the Access to Public Records Act.<sup>1</sup> After receiving notice of the complaint the city declined to submit a response. 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 October 13, 2022.

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<sup>1</sup> Ind. Code § 5-14-3-1-10.

## BACKGROUND

This case involves a dispute over whether the City of Fort Wayne (City) violated the Access to Public Records Act (APRA) by denying a request for public records.

On October 9, 2022, Angelica Pickens, a reporter for WPTA – ABC21 (Complainant), submitted a public records request with Ft. Wayne seeking the following:

1. A copy of the Fort Wayne Police report filed Sunday 10/8/22 at 10:22p.m. relating to a traffic accident at 44 Old Mill Rd. in Fort Wayne Indiana.
2. Copies of any police body or dash cam or video related to the incident.
3. Any correspondence between Mayor Tom Henry and other city officials related to the matter.

On October 10, 2022, the City denied Pickens' request, claiming the requested records were investigatory records of a law enforcement agency; and thus, could be withheld from disclosure under APRA.<sup>2</sup>

Pickens disagreed. She argued since the mayor entered a guilty plea in the case that the related police records would no longer be considered investigatory.

On October 13, 2022, the City sent Pickens another denial letter arguing that APRA's investigatory records exception is applicable to the requested records regardless of the status or age of the investigation.

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<sup>2</sup> Ind. Code §§ 5-14-3-4(b)(1); and 5-14-3-5.2(a)(2)(c).

Ft. Wayne also reasoned that access to, or dissemination of the recording could interfere with the ability of a person to receive a fair trial or may affect an ongoing investigation.<sup>3</sup> The City concluded its denial by stating that FWPD does not release investigatory records without a subpoena.

The same day, Pickens filed a formal complaint with this office alleging the City of Ft. Wayne violated APRA by refusing to disclose public records and improperly applying the law's investigatory records exception.

Specifically, Pickens maintains that since Mayor Henry pleaded guilty two days after his arrest, the City's refusal to disclose the requested records constitutes a violation of APRA.

This office notified Fort Wayne of the complaint and provided an opportunity to respond. The City declined to submit an answer to the allegations in the complaint.

## 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

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<sup>3</sup> Ft. Wayne Mayor Tom Henry pleaded guilty on October 10, 2022. The court issued final judgment in the case on November 3, 2022.

public officials and employees, whose duty it is to provide the information.” *Id.*

The City of Fort Wayne 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 the City’s public records during regular business hours. Ind. Code § 5-14-3-3(a). Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

## **2. Investigatory records**

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). Notably, APRA does not define the term crime, but the Indiana Code generally defines crime as “a felony or misdemeanor.” *See* Ind. Code § 35-41-1-6.

Pickens requested a copy of the police report detailing the arrest of Fort Wayne’s mayor for operating a vehicle while intoxicated. While the report qualifies as an investigatory record, there should be an accompanying accident record as well because there was a crash. *See* Ind. Code § 9-26-2-2. It is unknown if an accident report exists in this case. Even so, that is not part of this complaint.

In any event, the City adopts a rather draconian position regarding incident records. It argues that APRA does not place any kind of bookend or parameter to law enforcement

investigatory documents and the only way to obtain them is via a subpoena.

As a preliminary matter, APRA places the burden of proof for the nondisclosure of a public record on the agency. *See* Ind. Code § 5-14-3-1. For the purposes of this proceeding, that means the City must justify that the investigatory records exception applies to the records requested by Pickens.

What Fort Wayne fails to acknowledge is the discretion to withhold records under APRA is not absolute, even if the records fit into a category allowing the agency to choose whether to disclose or withhold.

A law enforcement agency must be conscious of the fact that, upon review of the denial of access, a requester can sue and provide proof that the agency's denial was "arbitrary and capricious" under Indiana Code section 5-14-3-9(f).

The City correctly recites the law and makes a conclusory statement that records at issue are covered by the investigatory records exception.

Although an agency does not have to justify its denial to a requester, conclusory statements are insufficient to carry APRA's burden of nondisclosure with this office. In this case, the City's failure to answer to the complaint does nothing to carry its burden of proof for the nondisclosure.<sup>4</sup>

Simply put, unless the agency can cite a credible and justifiable reason for exercising discretion, it should release

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<sup>4</sup> Public agencies are statutorily obligated to cooperate with the public access counselor in investigations. *See* Ind. Code § 5-14-5-5. On October 13, 2022, this office invited the City of Fort Wayne to provide an answer to the complaint. The city declined to do so.

records. Some reasons for withholding include, but are not limited to, any expectation of privacy on the part of a witness or victim, a legitimate public safety reason, or whether disclosure could jeopardize an investigation.

None of those factors are at play here.

What is more, an unyielding policy requiring a subpoena for the disclosure of any investigatory record effectively shifts the burden to the public from the outset and nullifies the presumption of disclosure. Not every public records request for investigatory records necessitates litigation in order for an agency to comply with the spirit and letter of the law.

This policy should be amended *post haste* and records requests approached by the City on a case-by-case basis.

### **3. Law enforcement recordings**

A similar analysis applies to body worn and dash camera footage although discretionary factors are more explicit in the statute addressing law enforcement recordings. Notably, for purposes of APRA, a law enforcement recording is not an investigatory record. *See* Ind. Code § 5-14-3-4(b)(1).

Under APRA, law enforcement recordings—like other public records—are presumptively disclosable. *See* Ind. Code § 5-14-3-5.2. In other words, a public agency must permit any person to inspect or copy a law enforcement recording unless an exception to disclosure applies.

The exception cited by the City in its denial states that disclosure of the footage would be:

... 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

Ind. Code § 5-14-3-5.2(a)(2)(B). Here, the subject of the body worn camera footage—the mayor of Fort Wayne—pleaded guilty prior to the request. No subsequent trial was foreseeable by the time the request was submitted.

What is more, APRA, along with its presumption of disclosure, references public interest as a factor in the release of body worn camera footage. It would be difficult to imagine a scenario wherein the public interest is greater than a public official running afoul of the law and being held accountable by responding officers.

Simply put, no credible policy or legal justification has been raised for withholding an incident report or body worn camera footage for a mayor who has already pleaded guilty, been sentenced, and continued his role as city executive. Political or reputational harm is not a legal basis found in APRA, either expressly or tacitly.

As a final aside, the third portion of the request—correspondence between the mayor and city officials—was not substantively addressed in the complaint; and thus, will not be addressed here.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the City of Fort Wayne violated the Access to Public Records Act by failing to disclose the incident report and body worn camera footage upon request.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the name of the Public Access Counselor.

Luke H. Britt  
Public Access Counselor

Issued: December 6, 2022