



# STATE OF INDIANA

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**RE: 23-INF-11; Closed investigatory files**

Dear Mr. McDevitt,

This informal opinion concerns a request submitted to the Indiana State Police for information on the 1972 Erie Canal Soda Pop Festival and the production of heavily redacted documents.

## BACKGROUND

For the better part of a decade, you have been seeking information related to the 1972 Erie Canal Soda Pop Festival, a chaotic rock music festival held near the Illinois-Indiana border. Notably, the festival was held on Bull Island, a strip of land in Illinois, but on the Indiana side of the Wabash River. Technically, the Indiana State Police (ISP) does not have geographical jurisdiction on Bull Island. Even so, ISP had a presence at the festival.

In 2013, you contacted this office for assistance in obtaining video footage captured from undercover ISP officers at the festival. At the time, this office convinced ISP to release the footage to you on the grounds that the video did not have investigatory value and that portions of the video had already been publicly broadcast.

Nevertheless, you continue to seek documentation related to ISP activity on Bull Island. Toward that end, ISP released 43 pages of material to you, however, 20 pages were completely redacted, and others had pinpoint redactions. While the limited pinpoint redactions are not at issue here, your inquiry asks whether the comprehensive redactions were consistent with the letter and spirit of the law. ISP subsequently supplied this office with both redacted and unredacted versions of the documentation for an *in camera* review.

## ANALYSIS

### 1. The Access to Public Records Act

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. The Indiana State Police is a public agency for purposes of APRA; and therefore, subject to the law’s 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 ISP’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Notably, APRA contains exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a), to -(b). This inquiry involves the applicability of APRA’s investigatory records exception. *See* Ind. Code § 5-14-3-3(b)(1).

#### 1.1 Investigatory records

The crux of this case is determining whether withholding the documentation as investigatory records complies with APRA. Notably, the burden of proof for nondisclosure of a public record falls on the public agency responsible for the denial. Ind. Code § 5-14-3-1. In other words, it is up to ISP to show why APRA’s investigatory records exception applies to the requested records.

To be sure, the investigatory records of law enforcement agencies may be withheld from disclosure at the discretion of a public agency. *See* Ind. Code § 5-14-3-4(b)(1). Under APRA, investigatory record means information compiled in the investigation of a crime. Ind. Code § 5-14-3-2(i).

Here, ISP claims that nondisclosure is appropriate because the records detail arrests of individuals for marijuana possession. ISP argues there is no time limitation to claim the exception. Even though the festival took place 51 years ago, ISP argues APRA does not provide a backstop where investigatory records automatically lose their discretionary release status.

All of this is a true and accurate representation of the law. Nonetheless, the analysis does not stop there. The purpose of this office is, in part, to interpret the public access laws vis-à-vis the advisory opinion process. In doing so, the office not only considers the black letter law, but when there is an ambiguous term, to seek out other relevant authority. It also considers the legislature’s intent by taking the entirety of the statute into account.<sup>1</sup>

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<sup>1</sup> The legislative intent behind a statute “may be identified and effectuated by examining the act as a whole, the law existing before its passage, changes made to the law since enactment and the reasons for those changes.” *Miller Brewing Co. v. Bartholemew Cnty. Beverage Co.*, 674 N.E.2d 193, 205 (Ind. Ct. App. 1996), trans. denied; *Const. & Remodeling, Inc.*, 994 N.E.2d 1215,

Here, it is important to note that the release of investigatory records is discretionary, meaning a law enforcement agency has the choice whether to withhold or disclose. The Indiana General Assembly could very well have qualified investigatory records as confidential, however, it declined to do so.

ISP's response seemingly implies that if a record is merely eligible as investigatory, it may be kept undisclosed in perpetuity without regard to any underlying considerations.

We disagree.

This office interprets the totality of the statute in an alternative manner. Under APRA, records have the presumption of disclosure unless an exception applies.<sup>2</sup> But not only must an exception apply, it must not be applied arbitrarily or capriciously.<sup>3</sup>

In many cases, this office defers to the judgment of law enforcement agencies on public safety matters, however, there are some outliers where it is appropriate to weigh in on legal or policy issues. This is such a case.

There is no question that Indiana's investigatory records exception is one of the broadest in the nation. Indiana law enforcement agencies famously have extensive discretion to exempt material from disclosure. This office recognizes this and proceeds accordingly. Nevertheless, the arbitrary and capricious limitation ensures that even the broadest discretion is not abused.

While the term "arbitrary" is not defined in APRA, even ISP concedes the judiciary's definition in its response:

[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. 2017).

In this case, a review of the material indicates 51-year-old criminal records with minor substantive value and zero investigatory value. The unredacted narratives contain nothing by way of investigatory methodology or unique fact-gathering tactics or procedure. They read like probable cause affidavits or charging information. The statute of limitations for any underlying criminal proceedings has long since elapsed, and there is no reasonable expectation of privacy for individuals who allegedly commit crimes in public.

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1218 (Ind. Ct. App. 2013) (citations omitted) (noting, where meaning is uncertain, "the courts will look also to the situation and circumstances under which [the statute] was enacted").

<sup>2</sup> *Evansville Courier & Press v. Vanderburgh Cnty. Health Dep't.*, 17 N.E.3d 922, 929 (Ind. 2014)

<sup>3</sup> Ind. Code § 5-14-3-9(g)(2). When prudent to do so, this office similarly has adopted this standard to evaluate disputes in order to provide guidance and avoid unnecessary litigation, consistent with the legislature's express intent found at Ind. Code § 5-14-3-1.

Even the Federal Freedom of Information Act recognizes that investigatory material should be withheld *only to the extent that production of the document could reasonably be expected to interfere with law enforcement proceedings.*<sup>4</sup>

To be sure, there are scores of legitimate reasons why law enforcement agencies choose to exercise discretion to withhold records of older or cold cases. The library of PAC opinions is littered with these reasons. But there are none present in the case at hand. A blanket policy of withholding records just because it qualifies as investigatory is arbitrary itself because it does not consider underlying circumstances on a request-by-request basis.

### CONCLUSION

This office remains unconvinced that the material in question is the type of information that the General Assembly intended for law enforcement agencies to withhold. Without more, it is the opinion of the public access counselor that the entirety of the material should be provided in its original unredacted form.



Luke H. Britt  
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<sup>4</sup> 5 U.S.C.A. § 552(b)(7)(A).