STATE OF INDIANA

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October 8, 2014

Mr. Kenneth W. Davidson
7407 Montana Avenue
Hammond, IN 46323

Re: Formal Complaint 14-FC-199; Alleged Violation(s) of the Access to Public Records Act ("APRA") by the Lake County Commissioners' Office

Dear Mr. Davidson,

This advisory opinion is in response to your formal complaint alleging the Lake County Commissioners Office, Mr. David Hamm, in care of Ms. Peggy Holinga Katona, Lake County Auditor violated the Access to Public Records Act ("APRA") Ind. Code § 5-14-3-1 *et. seq.* The Commissioners' Office has responded to your complaint via Tramel Raggs; accordingly, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 29, 2014.

BACKGROUND

Your complaint dated September 4, 2014, alleges the Lake County Commissioners' Office ("Commissioners) violated the Access to Public Records Act ("APRA") by improperly denying you access to complete and legible copies of emails sent and received by County Commissioners Roosevelt Allen and Michael Repay, as well as, emails sent and received by County Council member David Hamm. Additionally, you allege the Commissioners violated APRA by having inadequate procedures in place to assist members of the public in obtaining documents. Further, you claim an APRA violation because (1) County Council member David Hamm uses an email not provided by Lake County and (2) the Lake County Council's procedure of having its attorney respond to public records requests, by its nature, prevents timely response and is unduly burdensome to taxpayers.

On October 1, 2014, the Commissioners responded to your formal complaint. The Commissioners claim their office did not violate the APRA because the individual members of the board do not constitute a public agency for the purposes of APRA and thus, are under no obligation to provide access to the emails you requested. The Commissioners also claim the emails they individually send are not public records under the scope of APRA.

ANALYSIS

The public policy of the 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." See Ind. Code § 5-14-3-1. The Lake County Commissioner's Office is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Commissioners public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

A request for records may be oral or written. See Ind. Code § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. See Ind. Code § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

You submitted your request in person on Friday, August 29, 2014. The deadline for a response would have been Tuesday, September 2, 2014, as Monday was Labor Day Holiday. You did not receive an acknowledgement from the Commissioners' counsel until September 4, 2014. Based on these deadlines, your request was constructively denied. The September 4, 2014 acknowledgement also served as a denial as counsel claimed the Commissioners had no records responsive to your request.

The Commissioners rely on two Public Access Counselor Opinions from 2000 and 2002 to support their claim individual members of a public agency are not subject to the APRA – only the board as a collective is subject to access laws. I strongly disagree with this analysis. When a civil servant is acting in his or her official capacity as a public figure, any documented record received or generated by the public official is a potentially disclosable public record. Individuals are most definitely subject to the APRA. This is reinforced by the General Assembly's legislation in 2013 to attach personal liability to individual public employees for willful violations of the access laws. See Ind. Code § 5-14-3-9.5(c).

At issue in the present case is the use of private email accounts used to conduct public business. In my travels around the state speaking to public officials, members of the media, and interested citizens, I have made it a point to make known my philosophy on private email accounts. There is no settled case law on the matter and the statutes are silent as to private email accounts. However, the spirit of the APRA and a liberal reading of the statute (as is mandated by law) makes it clear memorialized or documented communication from individuals acting in their official capacities as public servants is public record.

When a public official avails himself of any communication medium, whether it is phone, email or text message, he is availing himself of the Indiana access laws *when communicating in his official capacity*. The entire account is not subject to the APRA – some of the communications are private and personal. But those messages containing public business are potentially disclosable. Some may be withheld if they contain confidential or deliberative material, however, the burden is on the individual or the individual's agency to claim an exception to disclosure or assert a privilege.

Email has become ubiquitous in the past couple of decades and is the preferred method of communication for most public officials. It is true some small towns and counties do not have a dedicated email server. So when conducting public business over those means, a public employee should be particularly mindful APRA will apply.

Now as a matter of practicality, admittedly it would be logistically difficult to enforce this. The hardware used to access the email account is not public and belongs to the individual. The individual public employee would not be required to turn over the actual machine for inspection or allow the public to go through an official's home computer or smart phone. The public official is basically on the honor system to either produce the requested emails or identify an APRA exception to disclosure. But this should not be a difficult burden to bear. If the agency does not have a dedicated public server, an individual could create a "public business" folder or even establish a new account for public business – councilmansmith@yahoo.com for example. That being said, the public official could make a good faith response to a request. It has been opined by Public Access Counselors in the past that up to 90% of all email communication is deliberative. I do not necessarily disagree. However, it is still the burden of the public official to make that argument when emails are requested.

I decline to declare a conclusive violation of the APRA and am treating this Opinion as a learning exercise to put the Commissioners on notice that individual's emails should be considered to fall under the access laws. The best transparent practice would be to implement a policy where email communication on private accounts dealing with public business is considered potentially disclosable public record.

Regards,

Luke H. Britt
Public Access Counselor

Cc: Tramel Raggs