
OPINION OF THE PUBLIC ACCESS COUNSELOR

CARFAX, INC.,
Complainant,

v.

INDIANA STATE POLICE,
Respondent.

Formal Complaint No.
17-FC-202

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana State Police (“ISP”) violated the Access to Public Records Act¹ (“APRA”). ISP responded through its Legal Counsel Cynthia Forbes. 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 August 21, 2017.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

CARFAX, Inc. (“Complainant”) filed a formal complaint alleging that ISP violated the Access to Public Records Act (“APRA”) by improperly denying access to public records, denying access to electronic records, imposing an unreasonable fee, and entering into a contractual arrangement with a vendor that is inconsistent with APRA’s requirements.

On July 7, 2017, CARFAX submitted a public records request to ISP for the following:

[S]pecified, non-privileged data fields from police reported vehicle accident information as maintained pursuant to Ind. Code § 9-26-2-2. The scope of the request encompasses specified fields associated with police reported accidents for the period beginning on November 7, 2016 and ending on December 7, 2016.

CARFAX also included an exhibit with the request specifying the following data fields:

Reporting Agency	Vehicle Model	Towing
Crash Incident ID	Vehicle Year	Unit Number
Crash Date	Vehicle Plate	Vehicle Type
Color	Plate State	Vehicle
Report Number	Airbag	Vehicle Reg Year
City	Damage	Manner of Collision Code
County	Extraction	Sequence of Events
VIN	Fire	Damaged Areas
Vehicle Make	Point of Impact	

On July 19, 2017, ISP responded to CARFAX's request via email, which stated the following:

ISP has no record responsive to your request. Crash data is maintained [by] a third party contractor, LexisNexis. You may contact their office to run a query for you.

CARFAX argues that ISP's response constitutes an improper denial under APRA. Specifically, it argues that the alleged denial (1) is contrary to Ind. Code § 5-14-3-3(a) regarding the right of any person to inspect and copy the public records of any public agency; (2) denies access to public records maintained in an electronic data storage system under Ind. Code § 5-14-3-3(d); and (3) imposes an unreasonable fee for public access; and (4) is based on a contract which (i) interferes with the right to access public records under Ind. Code § 5-14-3-3(b), (ii) is contrary to Ind. Code § 5-14-3-3(g), (iii)

ISP disputes that an APRA violation has occurred in this case. First, ISP argues that it has not denied CARFAX access to public records. Second, ISP argues that the fees assessed are reasonable and comply with Ind. Code § 9-29-11-1(c).²

Pursuant to Ind. Code § 9-26-2-2, a police officer must forward an accident report to the Indiana State Police within 24 hours. This report is not confidential and is available to the public.

² This statute has been repealed and replaced by Ind. Code § 9-26-9-3(c).

In order to make the accident reports available to the public, ISP entered into a contractual agreement with private contractors to create and maintain the Automated Record Information Exchange System (“ARIES”). The public-facing portal www.buycrash.com allows a public records requester to obtain an accident report uploaded through ARIES. The ISP Superintendent sets the public cost for an accident report. Currently, that cost is \$12 per report. Ind. Code § 9-26-9-3(c) mandates the cost to be no less than \$5 per report. A charge for inspection and copying of report-related data must also be no less than \$5 per report.

The administration of ARIES does not cost ISP or state or local government. The benefit of the bargain for the third-party administrator is the ability to aggregate the data and package it to subcontractors who use the raw data for commercial use. CARFAX is one of those subcontractors. The benefit for ISP, of course, is the outsourcing of the administration of accident reports, a volume of records reaching the hundreds of thousands annually.

Eventually the stewardship of ARIES was assumed by LexisNexis. Under the previous third-party administrator, Appriss, CARFAX enjoyed a subcontractor arrangement that allowed them each data set at a substantially reduced price. LexisNexis amended that arrangement to charge a higher fee for those data sets, although the cost per data set is still well below the [buycrash.com](http://www.buycrash.com) price for a report. CARFAX still takes exception to the new fee.

As a remedy for the increased cost, CARFAX requested the records directly from ISP. The request was for data fields and not for any individual accident report. ISP denied the request as it is not maintained in that form. CARFAX

argues the denial is unjustified as the contract constitutes an unreasonable barrier to access in violation of Ind. Code § 5-14-3(d) which states:

A public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval

Furthermore, CARFAX takes exception to a clause in its agreement which restricts use of the data in the form of a non-compete clause. To that end, it cites Ind. Code § 5-14-3-3(g) which states:

A public agency may not enter into or renew a contract or an obligation:

(1) for the storage or copying of public records;
or

(2) that requires the public to obtain a license or pay copyright royalties for obtaining the right to inspect and copy the records unless otherwise provided by applicable statute;

if the contract, obligation, license, or copyright unreasonably impairs the right of the public to inspect and copy the agency's public records.

ISP, and by extension Lexis Nexis, – who also filed a response – argues the data collected is repurposed to the point that it no longer takes the form of a public record by the time

it is aggregated and repackaged to an end user such as LexisNexis. Therefore, the APRA would not apply to the subcontract between LexisNexis and its subcontractors. The data is fundamentally different and no longer public record. Both also claim the fee is reasonable.

ANALYSIS

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 the purposes of the APRA. Ind. Code § 5-14-3-2(n). Therefore, any person has the right to inspect and copy the ISP’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. Ind. Code § 5-14-3-3(a).

By definition, ISP contracts for the maintenance of public records in an electronic data storage system. The ARIES agreement simply means that LexisNexis (and prior contractors) are the custodians of information that ISP “owns.” As mentioned in both parties’ arguments, the Indiana Court of Appeals decision in *Knightstown Banner, LLC v. Town of Knightstown*, 838 N.D.2d 1127 (Ind. Ct. App. 2005) stands for the proposition that a public agency cannot obfuscate access by transferring a public record to a private party.

Other than the accident data uploaded by its own state troopers, ISP does not “touch” the accident data. It is uploaded directly to LexisNexis’ servers. Arguably, an accident report does not actually exist until it is requested, when the data is then pulled from the ARIES database and aggregated into a .pdf form for public inspection. The information is statutorily mandated to be collected by ISP, regardless of the form in which it is uploaded. Therefore ISP has dominion over the collection process and how the data is disseminated. By ISP’s own admission, “crash reports are clearly public records and by going to an electronic system so is the data collected.”

But for the ARIES arrangement, LexisNexis would be similarly situated in relation to CARFAX. LexisNexis only enjoys the benefit of the ability to aggregate the data for different purposes and sell it for profit because of the contract between ISP and LexisNexis. This arrangement does not inherently violate any access law. To my knowledge, the data is not transformed or altered, but simply sorted into fields for the convenience of the end user. The information is still public record as the information is simply pulled from the database LexisNexis maintains pursuant to its agreement with ISP. The end user pays an excess of \$5 to inspect the information (but not individual accident reports such as the Buycrash.com .pdfs) and pays for the method of sorting – likely a programmed query or algorithm. The application of the query does not, however, make the information “new” or proprietary. While the formula to extract the data may belong to LexisNexis, the underlying data does not; it belongs to the public.

APRA expressly states that a public agency may not deny or interfere with the exercise of the right to inspect and copy public records. Ind. Code § 5-14-3-3(b). Furthermore, public agencies cannot unreasonably impair access to public records through contractual storage arrangements with private individuals pursuant to Ind. Code § 5-14-3-3(g). In short, LexisNexis is operating as the data collection arm of ISP for the purposes of accident report and associated data. This conclusion is consistent with *Knightstown*.

Indeed, this Office does not have jurisdiction to weigh in on non-access-related contracts. So long as LexisNexis contractors are paying greater than \$5 on the whole for inspection of accident report related data, I cannot comment on the specific per-dataset pricing. The only caveat to this is that I consider the data fields requested to be mutually exclusive from an individual report.

Any reasonable particularity argument often falls short with databases as it is relatively easy to extract and sort data into fields by running a simple query. In the current case, that query is programmed and exists. Therefore specificity is not an issue and the open-ended nature of the request clearly does not place an unreasonable burden on any party.

The end user restrictions, however, fall squarely into those matters authorized to be addressed by this Office. The sub-contract attempts to set parameters around the manner in which public information is used. If these conditions are not agreed to, the end user is denied the record. In my opinion, this is an unreasonable barrier to access.

Public access should be unfettered insofar as being free from restrictions of use. Because the data is collected via a statutory mechanism, the information associated with accident reports are State Police records, irrespective of LexisNexis' involvement. If the records were collected in-house – and data extraction was requested directly from ISP – the agency would be obligated to make reasonable efforts to provide the data pursuant to Ind. Code § 5-14-3-3(d) *sans* restrictions. And so it is by extension, LexisNexis must also make the data available to a requester free from superfluous conditions, pricing notwithstanding.

RECOMMENDATION

Based on the foregoing, it is the Opinion of the Public Access Counselor that ISP direct its contractor to provide the information as before without restrictions of use. The pricing is an issue to be determined by the parties and is outside the scope of this Office.

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor