

July 10, 2002

Mr. Ron Shawgo
Assistant Metro Editor
The Journal Gazette
600 W. Main Street
Fort Wayne, IN 46802

Re: *Advisory Opinion 02-FC-23*;

Alleged Violations of the Access to Public Records Act by the Allen County Prosecuting Attorney's Office for Failing to Provide Electronic Records in a Particular Format and Related Copying Fees.

Dear Mr. Shawgo:

This is in response to your formal complaint, which was received on June 11, 2002. You have alleged that the Allen County Prosecuting Attorney's Office ("Prosecutor's Office") has violated the Indiana Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, you claim that the Prosecutor's Office has violated the APRA with respect to a request for copies of electronic records from its case management system. Mr. James P. Posey, attorney for the Prosecutor's Office, responded to your complaint and a copy of his response is enclosed for your reference.

For the reasons stated below, it is my opinion that the Prosecutor's Office may withhold items that are nondisclosable under Indiana Code sections 5-14-3-4(b)(1) and (b)(2) if those items are investigatory records of that agency or work product of an attorney. Under the APRA, it is my opinion that the public agency makes the determination on how to provide information under Indiana Code section 5-14-3-3(d), and whether reprogramming is required to separate disclosable from nondisclosable information under Indiana Code section 5-14-3-6(c). Direct cost may include costs of development and labor, and the estimated charges provided by the Prosecutor's Office appear to fall within those parameters. Finally, it is my opinion that Indiana Code section 5-14-3-7(a) does not require the Prosecutor's Office to provide the information to you in PDF format.

BACKGROUND

According to your complaint, Ms. Laura Emerson, a reporter for the *Journal Gazette* hand-delivered a written request on March 11, 2002 requesting the opportunity to inspect and copy the following public records maintained by the Prosecutor's Office:

Any and all electronic records pertaining to felony criminal cases disposed of between January 1, 1990 and the present. The records should include, but not be limited to, the defendant's name, case number, charge(s), class of each offense (A, B, C or D), prosecuting attorney's name,

defense attorney's name, charges convicted of (including class of charge), sentence imposed, sentencing date and how the case was disposed (plea, trial or dismissal.)

In a letter dated March 12, 2002, Mr. Jack Roebel, Chief Deputy Prosecuting Attorney, responded in writing that the Prosecutor's Office does not maintain electronic records "pertaining to felony criminal cases disposed of" during the time period Ms. Emerson requested.

On April 4, 2002, after meeting with Prosecutor's Office staff, Ms. Emerson hand-delivered a second request to inspect and copy the following public records maintained by the Prosecutor's Office:

Any and all electronic records pertaining to the disposition of criminal cases between January 1, 1995 and the present. The records should include, but not be limited to, the defendant's name, race, gender, case number, charge(s), class of each offense (A,B,C, or D), prosecuting attorney's name, defense attorney's name, charges convicted of (including class of charge), sentence imposed, sentencing date and how the case was disposed (plea, trial or dismissal).

In a letter dated April 9, 2002, Prosecuting Attorney Robert Gevers responded to Ms. Emerson's April 4th request. Mr. Gevers first informed Ms. Emerson that the information compiled by the Prosecutor's Office is for internal office use, may not be accurate and does not constitute the official public record for such matters, so he provided a disclaimer to that effect.¹ Mr. Gevers stated that the information requested is contained in the Office case management system, which contains two modules, the charging module and the main case module. The information² Ms. Emerson requested resides in one of the two modules. Ultimately, Mr. Gevers stated that his Office would provide the information requested on a disk, at a cost of \$1,328.28, which includes the cost of programming, filtering, and extracting the information. The Prosecutor's Office will also provide a code key to help interpret the codes used. Finally, Mr. Gevers stated that he denied Ms. Emerson access to any information from the case management system that constituted investigatory records of a law enforcement agency under Indiana Code section 5-14-3-4(b)(1) or attorney work-product under Indiana Code section 5-14-3-4(b)(2).

On April 17, 2002, you sent Mr. Gevers a response to his April 9th correspondence. In that letter, you stated that you disagreed with the Prosecutor's Office response to Ms. Emerson's request, in particular, the cost estimate. Based upon the software used by the Prosecutor's Office for their case management system, it was your opinion that the Office should be able to share the information without resorting to the costs identified. You stated that *Journal Gazette* could provide technical assistance to the Prosecutor's Office to determine whether this would be possible and provided specific programs that would be compatible with the newspaper's computer system. You also challenged Mr. Gever's inclusion of consultation and instruction charges and record layout charges identified in the estimate of costs provided. Finally, you asked that no information be withheld under Indiana Code sections 5-14-3-4(b)(1) and (2) since the Prosecutor's Office has discretion over the release of such information.

Mr. Posey, attorney for the Prosecutor's Office, supplied, via facsimile on May 22, 2002, a written response to your April 17th correspondence. Mr. Posey restated the factual background that has been

laid out in the previous paragraphs. In addition, Mr. Posey stated that in order for the Prosecutor's Office to separate the disclosable from the nondisclosable information in their case management system, a "program will be required to extract the requested information" and that this is permissible under Indiana Code section 5-14-3-6. Further, Mr. Posey stated that the Prosecutor's Office, therefore, is allowed to recoup the direct cost, as defined at Indiana Code section 5-14-3-2 for doing so. Since some of the information in the case management system is nondisclosable, it would not be workable for a *Journal Gazette* staff member to review the system on your behalf. The Prosecutor's Office, according to Mr. Posey, has also indicated its intention to ensure that the public records of the Office are protected from loss, alteration, or destruction under Indiana Code section 5-14-3-7. As a result, Mr. Posey informed you in this letter that the information would be provided in a form that cannot be changed, PDF format, which is widely available. After receiving Mr. Posey's response, you then filed your formal complaint with this Office.

In response to your complaint, Mr. Posey stated that the Prosecutor's Office has not denied access to public records with respect to Ms. Emerson's April 4th request. The case management system in question has approximately 45,000 records, for which there are up to 6,000 fields of information per record. Some of the fields of information are nondisclosable under the APRA, and while the Prosecutor's Office will disclose those fields that are disclosable, they will separate or redact the nondisclosable information under Indiana Code section 5-14-3-6. Since the Prosecutor's Office has no operational basis for separating this information, a computer program must be written to do so and that the direct cost, as defined at Indiana Code section 5-14-3-2 and provided in the estimate provided with Mr. Gever's April 9th response, is appropriate.

The Prosecutor's Office and not the *Journal Gazette*, according to Mr. Posey, is charged with the sole responsibility of complying with the APRA and Indiana Code section 5-14-3-6 "authorizes and commands" the Office to extract the disclosable from the nondisclosable information contained in the case management system. He also stated that Software Unlimited Corporated, the vendor for the case management system does not agree with your assertions that other programs can be used to avoid costly reprogramming. Mr. Posey also defends the position of the Prosecutor's Office to provide the information in PDF format under Indiana Code section 5-14-3-7, which provides that a public agency must protect public records from alteration, destruction or mutilation, including information provided in electronic form. Finally, Mr. Posey states that the *Journal Gazette* is not entitled under the APRA to receive information in the format they desire-the decision as to format in which the disclosable information will be produced is to be made by the public agency, not the requestor.

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." Ind. Code § 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

The Prosecutor's Office is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Public records are defined under the APRA to include any material that is created, received or maintained by a public agency, including electronically stored data. Id. As a general rule, any person is entitled to inspect and copy public records concerning the Prosecutor's Office business unless the records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code §5-14-3-3(a). The issues raised by your complaint are addressed in the following paragraphs.

Requests for Copies of Electronic Records, Redaction and Decisions as to Whether Reprogramming is Necessary under the APRA

Under the APRA,

a public agency that maintains 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 if the medium requested is compatible with the agency's data storage system.

Indiana Code §5-14-3-3(d). With respect to your complaint, there is no claim by the Prosecutor's Office that they are unwilling to provide the disclosable information from the case management system to the *Journal Gazette*. The medium you requested, a disk, is apparently not incompatible with the Prosecutor's Office's data storage system. The issue is whether the Prosecutor's Office is required to supply the information to you in a format that you requested, rather than PDF format.

Under Indiana Code section 5-14-3-3(d), the Prosecutor's Office is required to make reasonable efforts to provide a copy of disclosable information to you from its case management system. From my review of the materials provided with your complaint, and Mr. Posey's response, it is my opinion that the Prosecutor's Office has made reasonable efforts to provide you with a copy of the information that is disclosable.

The Prosecutor's Office is only required to produce disclosable information from the case management system. Mr. Gevers notified Ms. Emerson that she would not be supplied with information that is considered to be exempt from disclosure under Indiana Code section 5-14-3-4(b)(1), for investigatory records of a law enforcement agency, and Indiana Code section 5-14-3-4(b)(2), the work-product of an attorney. Since the Prosecutor's Office is a law enforcement agency under Indiana Code section 5-14-3-2, and is an office that employs lawyers as well, the claim of these exceptions is, as a threshold matter, legitimate. The burden lies with the Prosecutor's Office to show that the information that is withheld is subject to these exceptions. It is my opinion that so long as the information meets either of these two exceptions, the Prosecutor's Office has the discretion to withhold it from other information provided to you from the case management system under the APRA.

You have stated that the APRA provides you with the ability to request not only the medium for the disclosure of this information, but also the programming format. While I consider it reasonable for you

to offer options to costly reprogramming, nothing in Indiana Code section 5-14-3-3(d) addresses this topic. There is also no case law on the subject, but the APRA appears to place the responsibility for making a determination on the production of this information in the hands of the public agency, not the requestor.

Under Indiana Code section 5-14-3-6(a), upon request for a public record, a public agency shall separate or redact disclosable from nondisclosable information. When the information is stored on a computer record system, the public agency

may charge a person who makes a request for disclosable information the agency's direct cost of reprogramming a computer system if:

* * *

The public agency is required to reprogram the computer system to separate the disclosable information from nondisclosable information.

Indiana Code §5-14-3-6(c).[Emphasis added.] The question raised by your complaint is whether the Prosecutor's Office is required to reprogram the case management system in order to separate the disclosable information from the nondisclosable information.

Since there is no case law interpreting Indiana Code section 5-14-3-6(c), we must, as a court reviewing this term would do, apply the rules of statutory construction to determine its meaning.

(U)ndefined words and phrases in a statute must be given their plain, ordinary and usual meaning. Words and phrases in a statute are given their plain and ordinary meaning unless they are technical words and phrases having a peculiar and appropriate meaning in the law requiring definition according to their technical import. In order to determine the plain and ordinary meaning of words, courts may properly consult English language dictionaries.

Walling v. Appel Service Company, Inc. 641 N.E.2d 647, 649 (Ind. App., 1994) [Citations omitted.] quoting *Ashlin Transportation Services., Inc. v. Indiana Unemployment Ins. Board*, 637 N.E.2d 162, 167 (Ind.App., 1994).

The word "required" is defined as "to call for as suitable or appropriate" or "to demand as necessary or essential." MERRIAM-WEBSTER ON-LINE DICTIONARY. Under Indiana Code section 5-14-3-6 (c), the Prosecutor's Office must determine that reprogramming is appropriate or necessary to supplying the information to you from the case management system.

You advised the Prosecutor's Office that reprogramming of the case management system would not be necessary since there are modern software programs readily available to the *Journal Gazette* that would assist in the extraction and preparation of the information. In Mr. Posey's reply he indicated that the Prosecutor's Office considers this to be the appropriate course of action to provide the information to

you. In addition, Mr. Posey stated that they have consulted the software vendor for the case management system, Software Unlimited Corporation, and they do not agree with your contention that these other programs can be used in lieu of programming. Ultimately, under the APRA public agencies are required to make the determination as to whether any reprogramming, not the requestor. For this reason, it is my opinion that the Prosecutor's Office may collect the direct cost of reprogramming to separate disclosable from nondisclosable information from its case management database pursuant to Indiana Code section 5-14-3-6(c).

Direct Cost

In your complaint, you also raise the issue of whether the proposed estimate of costs of reprogramming are appropriate, not as to the amount, but for the inclusion of the costs of consultation/instruction charges and record layout charges. Indiana Code section 5-14-3-2 defines "direct cost" as follows:

One hundred five percent (105%) of the sum of the cost of:

1. The initial development of a program, if any;
2. The labor required to retrieve electronically stored data; and
3. Any medium used for electronic output;

for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval . . . for reprogramming a computer system under section 6(c) of [the APRA.]

The question raised by your complaint is whether consultation/instruction charges or record layout charges fall within the meaning of "direct cost." As there is no case law to guide us on this issue, we must once again look to the rules of statutory construction to determine the General Assembly's intention in enacting this statute. Words are to be given their plain and ordinary, dictionary meaning unless otherwise directed in the statute. *Walling v. Appel Service Company, Inc.*, at 649.

The term "development" is defined as "the act, process or result of developing." MERRIAM-WEBSTER ON-LINE DICTIONARY. The term "labor" is defined as "the human activity that provides goods or services in an economy." *Id.* Applying these definitions to the definition provided in Indiana Code section 5-14-3-2 for "direct cost," it is my opinion that consultation would be part of development, while instruction and record layout charges would be labor related to reprogramming. For these reasons, it is my opinion that including these charges within the estimate of direct cost for the reprogramming by the Prosecutor's Office does not violate the APRA.

Indiana Code section 5-14-3-7(a) and PDF format

As for the argument that under Indiana Code section 5-14-3-7(a) that the Prosecutor's Office must provide the disk to you in PDF format in order to avoid any mutilation or destruction of public records, I disagree. Certainly, the Prosecutor's Office is obligated to protect the public records maintained in that agency to ensure that there is no alteration, loss, destruction or mutilation. Copies of those public records

that are produced and provided to persons under the APRA are no longer the official public records of a public agency, but the personal copy of the requestor. Once a copy is in the hands of a requestor, whether on paper or in electronic form, the requestor may alter the information.

The value of receiving information in electronic form would be greatly diminished if a requestor were not able to manipulate the data. The official public records maintained by the Prosecutor's Office, however, would not be altered by virtue of the fact that a requestor had altered his or her own copy. For these reasons, it is my opinion that Indiana Code section 5-14-3-7(a) does not support the position that the information must be provided in PDF format. As you state in your complaint, this would be no more useful than obtaining a paper copy of each of these records. I recommend that the Prosecutor's Office supply the information in a user-friendly format in order to ensure that the policy and purpose of the APRA is effectuated.

CONCLUSION

It is my opinion that the Allen County Prosecuting Attorney's Office may withhold items that are nondisclosable under Indiana Code sections 5-14-3-4(b)(1) and (b)(2) if those items are investigatory records of that agency or work product of an attorney. Under the APRA, it is my opinion that the Prosecutor's Office makes the determination on how to provide information under Indiana Code section 5-14-3-3(d), and whether reprogramming is required to separate disclosable from nondisclosable information under Indiana Code section 5-14-3-6(c). Direct cost may include costs of development and labor, and the estimated charges provided by the Prosecutor's Office appear to fall within those parameters. Finally, it is my opinion that Indiana Code section 5-14-3-7(a) does not require the Prosecutor's Office to provide the information to you in PDF format.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: James Posey, Attorney for ACPO w/o enclosures

¹ Mr. Gevers noted the official public records for the information requested are housed in the Allen County Clerk's Office and that Ms. Emerson could independently verify the accuracy of his Office's information against those records.

² Mr. Gevers also noted that while the case management system contains information about felony and

misdemeanor cases, the Prosecutor's Office does not maintain information on all misdemeanor cases.