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Jim Sparks
Indiana Office of Technology
100 North Senate Avenue Room N551
Indianapolis, Indiana 46204

Re: Informal inquiry 09-INF-5 regarding electronic maps

Dear Mr. Sparks:

This is in response to your informal inquiry dated February 2, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is issued based on the provisions of the Access to Public Records Act and the GIS Mapping Standards statutes. I would provide the caveat that I do not have a technical background in this area and as such make some assumptions and generalizations related to technical aspects of the records at issue.

You are the State of Indiana Geographic Information System Officer and write on behalf of the Indiana Office of Technology (hereinafter "State"). You present a number of questions related to your work with the Indiana Map and some difficulty the State has reconciling the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) and the Indiana Geographic Information Systems ("GIS") Mapping Standards statutes, found at Ind. Code 4-23-7.3.

The questions have arisen because some Indiana public agencies (specifically, Indiana counties) are resisting providing framework data (as defined in I.C. § 4-23-7.3-3) to the State for use in the statewide base map (defined in I.C. § 4-23-7.3-11). You believe the resistance is grounded in two factors: what a political subdivision may charge the State for providing such data and the State's provision of the data it receives to third parties at no cost. You ask me to confirm the basic information to be provided is in fact public record, provide my opinion regarding what an "electronic map" is and how it interfaces with the framework data and State Map, and provide my analysis of what a political subdivision may charge the State for providing such information. You have presented a five-page inquiry, which includes background information regarding the issue. I have incorporated your document at the end of this opinion, and rather than reiterate your background information and questions, I will refer to your document and answer the queries in the following paragraphs.

The public policy of the APRA states, "(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." I.C. § 5-14-3-1. To that end, I.C. § 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA.

> 'Public record' means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.
> I.C. § 5-14-3-2(n).

The Indiana Court of Appeals has added to the definition of public record those records created for or on behalf of a public agency. See *Knightstown Banner v. Town of Knightstown,* 838 N.E.2d 1127 (Ind. Ct. App. 2005).The records at issue are electronic maps created for or on behalf of Indiana counties and maintained either by or for those public agencies. In my opinion, the electronic maps are public records subject to the disclosure provisions of the APRA.

The APRA defines an electronic map as "copyrighted data provided by a public agency from an electronic geographic information system." I.C. § 5-14-3-2(e).

As I understand your first question, which appears in about the middle of page 3 of your document, you assume the information maintained by each county constitutes an "electronic map," notwithstanding the copyright question. Assuming such, you inquire whether the disclosure of the information must be consistent with the requirements of I.C. § 5-14-3-3(g) and not unreasonably impair the right of the public to inspect or copy. Or, you inquire, are I.C. § 4-23-7.3-20(a) and I.C. § 5-14-3-8(j) applicable statutes to which I.C. § 5-14-3-3(g) refers?

First, I.C. § 5-14-3-3(g) provides the following:

> (g) 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.
> *Id.*

I.C. § 5-14-3-8(j) provides the following:

> Except as provided in subsection (k), a public agency may charge a fee, uniform to all purchasers, for providing an electronic map that is based upon a reasonable percentage of the agency's direct cost of maintaining, upgrading, and enhancing the electronic map and for the direct cost of supplying the electronic map in the form requested by the purchaser. If the public agency is within a political subdivision having a fiscal body, the fee is subject to the approval of the fiscal body of the political subdivision.
> *Id.*

Finally, I.C. § 4-23-7.3-20 provides the following:

> (a)Except as provided in subsections (b), (c), and (d), a political subdivision maintains the right to control the sale, exchange, and distribution of any GIS data or framework data provided by the political subdivision to the State through a data exchange agreement entered into under this chapter.
> (b) A political subdivision may agree, through a provision in a data exchange agreement, to allow the sale, exchange, or distribution of GIS data or framework data provided to the State.
> (c) Subsection (a) does not apply to data that is otherwise required by State or federal law to be provided by a political subdivision to the State or federal government.
> (d) As a condition in a data exchange agreement for providing State GIS data or framework data to a political subdivision, the State GIS officer may require the political subdivision to follow the State GIS data standards and the Statewide data integration plan when the political subdivision makes use of the GIS data or framework data as provided by the State.
> *Id.*

Essentially, I.C. § 5-14-3-3(g) provides that an agency may not enter into a data storage contract which would require a requester to pay copyright royalties to inspect and copy the records unless otherwise provided by statute. You inquire whether disclosure of the electronic map framework data must be consistent with section 3(g). In my opinion, it must. I do not believe I.C. § 4-23-7.3-20(a) is a statute which provides otherwise.

I.C. § 4-23-7.3-20(a) provides that "a political subdivision maintains the right to control the sale, exchange, and distribution of any GIS data or framework data. . ." But it is important that within the same chapter is a provision indicating that language does not supersede the APRA. *See* I.C. § 4-23-7.3-22. And the APRA contains the provision which prohibits an agency from entering an agreement that would require a requester to pay royalties to inspect and copy a record. Based on the foregoing, it is my opinion that because the GIS mapping statute defers to the APRA, the GIS mapping statute is not a statute that would grant an agency a waiver of the I.C. § 5-14-3-3(g) requirements.

You also inquire about the relationship of I.C. § 5-14-3-8(j) to I.C. § 5-14-3-3(g). I.C. § 5-14-3-8(j) provides that an agency may charge a fee uniform to all purchasers for providing an electronic map. I.C. § 4-23-7.3-20(a) provides that the "political subdivision maintains the right to control the sale, exchange, and distribution of any GIS data or framework data provided by the political subdivision to the State through a data exchange agreement entered into under this chapter." In my opinion, the general APRA statute requires any fee to be uniform to all purchasers. The GIS mapping statute clarifies that where the recipient of the GIS data or framework data is the State, the public agency has the right to control the sale, exchange or distribution of the data to the State. In other words, no outside entity has the right to control the sale, exchange or distribution. Further, I think this clarifies that even if the data is exchanged, the political subdivision retains the right to sell, exchange or distribute the information to other entities, as allowed by law. Finally, I think these provisions work together to provide that the political subdivision may enter into a data-sharing or other exchange agreement with the State. In my opinion, a data exchange agreement would remove the State from the general "purchaser" category, and as such a fee charged, if any, would not necessarily be the fee charged uniformly to all purchasers.

In my opinion, I.C. § 4-23-7.3-20(a) clarifies that the agency may enter into an agreement with the State to exchange data. But the statute does not allow the agency to enter into any similar such data exchange agreement with any other entity. I believe this addresses your first set of queries posed at the top of page 5 of your document as well. In this type of data exchange situation, the State is not a purchaser. It is also important to note that I.C. § 4-23-7.3-20(a) is permissive. The statute allows a public agency to enter into a data sharing agreement with the State, but it does not require the agency to do so. If a public agency (here, a county) refuses to enter into a data sharing agreement, the State then becomes a purchaser, and as such the State must pay the fee established under I.C. § 5-14-3-8(j).

In my opinion, it would be reasonable and appropriate for the agencies to charge a lower rate for only a small portion of the electronic map rather than charging the uniform fee established for purchase of the entire map when the requester seeks only a small portion of the map. I.C. § 5-14-3-8(j) provides that the fee for providing an electronic map should be "based upon a reasonable percentage of the agency's direct cost . . ." You question whether the State is a purchaser under I.C. § 5-14-3-8(j) if the State only requests a small component of the electronic map. Although I am not familiar with the technical aspects of the GIS maps, I would note that the APRA definition of "electronic map" is "copyrighted data. . ." Here, the State requests a small portion of the data constituting a much larger record. In my opinion the State is a "purchaser" since the State requests some of that copyrighted data. It is also my opinion that a county should set the cost for providing a small portion of the entire map at a "reasonable percentage" of the agency's direct cost associated with the map. It is my opinion this "reasonable percentage" provision would prohibit an agency from charging the same amount for a small subset of data as it charges for the entire map or data set.

If the map data maintained by an agency is not copyrighted, it would be my opinion that information must be provided in accordance with the general provisions of the APRA. The definition of "electronic map" is "copyrighted data provided by a public agency from an electronic geographic information system." *See* I.C. § 5-14-3-2(e). If the data is not copyrighted, the record is treated like any other public record. In that case, the fee provisions of I.C. § 5-14-3-8(g) would apply.

In summary, it is my opinion a county may not, under I.C. § 5-14-3-3(g), require the State or any requester to obtain a license or pay copyright royalties to obtain a copy of the GIS mapping data. A county may, pursuant to I.C. § 4-23-7.3-20(a), enter into a data exchange agreement with the State. If the county refuses to do so, the State may request, and the agency must provide, access to the electronic map pursuant to the general disclosure provisions of the APRA. Under that arrangement, the county could charge the State a fee established pursuant to I.C. § 5-14-3-8(j) for a copy of the electronic map. If the data is not copyrighted, the agency could charge fees based on I.C. § 5-14-3-3(g).

Your next query is whether the State is seeking actual programs or codes from the county agencies. The APRA provides a discretionary exception to disclosure for, among others, the following:

> Computer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility.
> I.C. § 5-14-3-4(b)(11).

Here, the data at issue are not "electronic maps entrusted to a public agency by a utility." You argue the State does not seek computer programs, codes or software. Instead, the State seeks underlying data, or as you characterize it, framework data that is run by a program. While I am no expert in this area, it is my opinion and understanding that the information the State seeks does not constitute computer programs, codes or software. As such, I do not believe a county can withhold the information on the basis of I.C. § 5-14-3-4(b)(11).

Next, you inquire about the application of I.C. § 5-14-3-3(d) to the present issue. This subsection provides the following:

> (d) Except as provided in subsection (e), 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 if the medium requested is compatible with the agency's data storage system. This subsection does not apply to an electronic map.
> *Id.*

You inquire whether the last sentence of subsection 3(d) is meant to relieve an agency of the requirement to make a reasonable effort to supply its disclosable electronic map data or whether it excludes electronic map data because an electronic map is, by definition, already in electronic retrieval form. As with the other queries you present, I find no case law or previous opinions from this office on the issue.

Based on the public policy statement of the APRA (*See* I.C. § 5-14-3-1), I cannot find that I.C. § 5-14-3-3(d) would exclude electronic maps from the requirement that an agency must make reasonable efforts to provide a copy to a requester. Instead, it is my opinion this statement excepting electronic maps from the provisions of subsection 3(d) was likely included because electronic maps are addressed elsewhere in the APRA. Including electronic maps in this provision would have caused even more confusion. It is my opinion the omission of electronic maps was not meant to relieve an agency of a duty to provide access to electronic maps in an electronic format.

Your final inquiry relates to I.C. § 5-14-3-3(e):

> (e) A State agency may adopt a rule under IC 4-22-2, and a political subdivision may enact an ordinance, prescribing the conditions under which a person who receives information on disk or tape under subsection (d) may or may not use the information for commercial purposes, including to sell, advertise, or solicit the purchase of merchandise, goods, or services, or sell, loan, give away, or otherwise deliver the information obtained by the request to any other person for these purposes. Use of information received under subsection (d) in connection with the preparation or publication of news, for nonprofit activities, or for academic research is not prohibited. A person who uses information in a manner contrary to a rule or ordinance adopted under this subsection may be prohibited by the State agency or political subdivision from obtaining a copy or any further data under subsection (d).
> *Id.*

You inquire whether a county ordinance prohibiting the sale of information for commercial purposes would apply where the State will be using it in the State Map, which does not restrict commercial use. You ask whether subsection 3(e) even applies to an electronic map since the information which is the subject of (e) is "information on disk or tape under subsection (d)," which does not include an electronic map. In my opinion, this is a straightforward issue: if the data you receive is an electronic map, subsection 3(e) would not apply. As you indicate, subsection 3(e) specifically addresses information received under subsection 3(d). Electronic maps are specifically excluded from subsection 3(e), and I find no analogous provision related to electronic maps. As such, if the information the State receives is information from an electronic map, the political subdivision may not limit the State's use or dissemination of the information.

Please do not hesitate to contact me if I can provide any further assistance.

Best regards,

Heather Willis Neal
Public Access Counselor

Cc: Susan Gard, Office of the Indiana Attorney General