STATE OF INDIANA

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October 3, 2012

Casey B. Cox
110 W. Berry Street
Suite 1100
Fort Wayne, Indiana 46802

Re: Informal Inquiry 12-INF-42; GPS Monitoring Systems

Dear Mr. Cox:

This is in response to your informal inquiry regarding personnel records. Pursuant to Ind. Code § 5-14-3-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.*

BACKGROUND

The Allen County Board of Commissioners ("Commissioners") is considering installing global positioning monitors ("GPS") in most county-owned motor vehicles. The county owns approximately ninety (90) vehicles. The vehicles are used by various departments, including but not limited to the department of health, highway, law enforcement, and probation. The vehicles are typically assigned to an individual employee for his or her particular employment related use, though the county does to a limited extent have "pool cars" that are used by a cross-section of employees.

The GPS system in consideration by the county produces information related to the use and location of a given vehicle; and, therefore the activities of a given employee may be identifiable by way of a review of the records produced by the GPS system. The county has some concern that the records produced by the GPS system under a public records request may reveal sensitive information relating to the activities of county employees, particularly with regard to the possible revelation of the whereabouts of juvenile offenders due to probation visits that occur in such vehicles and in general, the use of law enforcement officials.

You provide that while GPS records that are created and maintained by a law enforcement agency in the course of the investigation of a crime would be exempt by way of exception to disclosure found under I.C. § 5-14-3-2(h), however the exception would only apply under circumstances relating to information compiled in the course of

an investigation of a crime, and not have any application to other county departments. Misuse of county cars as disclosed by GPS records would subject individual employees to discipline, up to and including discharge, and for this reasons the Commissions have considered placing the records in the employees personnel files. Further, based on previous opinion of the counselor, it appears that the records could fall under the exception to disclosure found at I.C. § 5-14-3-4(b)(10), for those records consisting of "administrative or technical information that would jeopardize a record keeping or security system." *See Opinion of the Public Access Counselor 09-INF-20.*

As such, the Commissioners request an informal opinion as to the following:

(1) To the extent that GPS records created by an employee's use of a county owned vehicle are made part of that employee's personnel file by way of the county's employment policy, would such records be within the discretionary exception to disclosure found at I.C. § 5-14-3-4(b)(8)?
(2) Regardless of the answer to question (1), would the exception to disclosure under I.C. § 5-14-3-4(b)(1) regarding "administrative and technical information that would jeopardize the recordkeeping or security system" provide a discretionary exception to the disclosure of GPS records of county-owned vehicles?

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* I.C. § 5-14-3-1. Accordingly, any person has the right to inspect and copy a public agency's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

As a way of background as it relates to the APRA and GPS systems, in 2009 Counselor Neal addressed the issues of whether GPS activity logs, either in paper or electronic format, would be subject to disclosure under the APRA and whether an agency would be required to provide "real-time" access to the GPS monitoring system. *See Informal Opinion of the Public Access Counselor 09-INF-33.* As to the former, Counselor Neal opined that the records would be considered public records under the APRA and would be required to be disclosed, minus an applicable exception. *Id.* If the logs were created and maintained by a law enforcement agency *and* were compiled during the course of an investigation of a crime, the law enforcement agency could exercise its discretion pursuant to I.C. § 5-14-3-4(b)(1) to deny disclosure of the records. *Id.* Counselor Neal compared such records to 911 call recordings and in-car video recordings, to which could only be exempt from disclosure pursuant to (b)(1) if the record was compiled during the investigation of a crime. *Id. See also Opinions of the Public Access Counselor 07-FC-274 and 09-FC-71.* Counselor Neal further provided that the agency would likely be able to sustain a denial of access to the GPS logs pursuant to I.C. § 5-14-3-4(b)(10). *See Informal Opinion of the Public Access Counselor 09-INF-*

33. Finally, the opinion provided that the APRA would not require an agency provide "real-time" access to the GPS system. *Id*.

Your initially inquire to the extent that GPS records, created by an employee's use of a county owned vehicle, are made part of that employee's personnel file by way of the county's employment policy, would such records be within the discretionary exception to disclosure found under I.C. § 5-14-3-4(b)(8). The APRA provides that certain personnel records may be withheld from disclosure:

> (b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:
>
> (8) Personnel files of public employees and files of applicants for public employment, except for:
> (A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
> (B) information relating to the status of any formal charges against the employee; and
> (C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.
>
> However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. § 5-14-3-4(b)(8).

It should be noted that I.C. § 5-14-3-4(b)(8), by itself, does not make any record maintained in an employee's personnel file confidential. In other words, the information referred to in (A) - (C) must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at its discretion.

I am not aware of any prior case law, advisory opinion issue by the Public Access Counselor's Office or statute that definitively provides what type of records can, may, or shall be kept in an employee's personnel file. The Indiana Commission on Public Records' general retention schedule that is applicable to all state agencies defines a personnel file as:

> [a] state agency's documentation of the employee's working career with the state of Indiana. Typical contents could include the Application for Employment, PERF forms, Request for Leave, Performance Appraisals, memos, correspondence, complaint/grievance records, miscellaneous notes, the Add, Rehire, Transfer, Change form from the Office of the Auditor of State, Record of HRMS Action, and/or public employee union information. Disclosure of these records may be subject to IC 5-14-3-4(b)(2)(3)(4) & (6), and IC 5-14-3-4(b)(8). *See* Records Retention and Disposition Schedule, State Form 5 (R4/ 8-03).

While the language is not necessarily binding as applied here, it is instructive for discerning the types of information and documentation that are typically included in a public employee's personnel file.

As applicable to your inquiry, I do believe that in certain instances the county could deny a request for GPS records of a certain employee and/or vehicle pursuant to I.C. § 5-14-3-4(b)(8). By way of example, assume that the county suspects that employee John Doe has been acting in violation of the county's policy for personal use of county-owned vehicles. The county in turn creates a report from the GPS monitoring system, which provides the location and travel of Mr. Doe's county-owned vehicle for the last thirty days. The county uses the report as part of its inquiry into Mr. Doe's alleged misconduct and said report is kept in Mr. Doe's personnel file. In such circumstances, the county could exercise its discretion and deny a request pursuant to I.C. § 5-14-3-4(b)(8) for the GPS report maintained in Doe's personnel file. I would note that the county would still be required to comply with I.C. § 5-14-3-4(b)(8)(C), should the employee be suspended, demoted, or discharged after final action has been taken.

I think its key to point out that the GPS report must have already been created prior to the receipt of the APRA request *and* the report must be kept in the employee's personnel file. If the county received an APRA request for the GPS report for employee John Smith's vehicle and prior to the request, the county had not created any report regarding his vehicle's usage, the county in such circumstances would not be able to deny a request pursuant to I.C. § 5-14-3-4(b)(8). Further, if a GPS report was created solely to assess and compare the gas mileage rates of certain vehicles, such a report could not be considered "personnel" in nature and would not be kept in any particular employee's personnel file. As such, only those GPS reports that are part of the employee's personnel file at the time of the request may be denied solely pursuant to I.C. § 5-14-3-4(b)(8).

You next inquire to the applicability of I.C. § 5-14-3-4(b)(10) in regards to records or reports generated by the GPS system. Counselor Hurst provided the following summary of I.C. § 5-14-3-4(b)(10):

Indiana Code 5-14-3-4(b)(10) provides that "[a]dministrative or technical information that would jeopardize a record keeping or security system" shall be excepted from the disclosure requirements of the APRA at the discretion of the public agency. Because the public policy of the APRA requires a liberal construction in favor of disclosure (*see* IC 5-14-3-1), exemptions to disclosure such as the security system exemption at issue here must be construed narrowly. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995). However, a liberal construction of the APRA does not mean that the exemptions set forth by the legislature should be contravened. *Hetzel v. Thomas*, 516 N.E.2d 103, 106 (Ind. Ct. App. 1987).

In *City of Elkhart v. Agenda: Open Government*, 683 N.E.2d 622, 626-27 (Ind. Ct. App. 1997), the Indiana Court of Appeals addressed the security system exemption and found that it was not applicable to restrict disclosure of telephone numbers. In that case, a newsletter editor sought the 1993 cellular telephone bills for the Mayor of Elkhart and other city department heads. The city responded that an earlier and similar request resulted in the requestor misusing the Emergency 911 system by running the numbers through the system to obtain the identities of the persons belonging to the numbers. The city declined to produce the telephone records without assurances from the newsletter editor that no such misuse would occur with the records produced in response to the most recent request. The city relied upon the security system exemption to avoid production of the cellular telephone bills of the city officials. The city argued that the Emergency 911 system was a security system, and that the phone records of the city officials contained "technical" or "administrative" information (the phone numbers themselves) that if disclosed would jeopardize that Emergency 911 system. That is to say, if the requestor misused the system to trace the origin of the numbers, the security system would be jeopardized. The court found this argument unconvincing. Relying on common definitions of "technical" and "administrative," the court found that telephone numbers in and of themselves constitute neither technical nor administrative information. Applied to the Emergency 911 security system underpinning the city's argument, the court characterized the telephone numbers as "innocuous," and stated:

> [A]ny prior alleged misuse or speculated future misuse of information *which is innocuous on its face* is irrelevant. Section 4(b)(10) provides a discretionary exception for public records containing a "type" of information due to its nature and not because of a speculated "use" of the information would jeopardize a record keeping or security system. *City of Elkhart*, 683 N.E.2d at 627 (emphasis added).

> In *City of Elkhart*, the telephone numbers being sought by the newsletter editor were not part of the security system their disclosure was said to endanger. While they could be used, or misused, to burden and jeopardize that system, they were in and of themselves unrelated technically, administratively, or otherwise to the security system and like any number of things that could have had that same effect. They were not a "type" of technical or administrative information related to the security system that would, if disclosed, jeopardize the system.

In applying the analysis provided by the Court of Appeals to security videotape maintained by the Indiana Department of Correction, Counselor Hurst advised that:

> Here, unlike the telephone numbers at issue in *City of Elkhart*, the videotape cannot be characterized as 'innocuous" or not of the "type" of technical or administrative information that due to its nature if disclosed would jeopardize the record keeping and security system the Department utilizes at the Miami Valley Correctional Facility. The videotape is part and parcel of the security system utilized by that facility. . . it also represents information of the sort fully contemplated by the legislature when it codified the security system exemption. . . The quality of the videotape and clarity of images projected may certainly be characterized as "technical information" regarding the security system that, if disclosed, could jeopardize that system. . . From such information as the camera angles, an offender may determine from the videotape where they can hide from camera detection, and from that information avoid monitoring and commit infractions or offenses against corrections personnel and other inmates. The videotape may also reveal the operational times and operation status of specific cameras. In my opinion, such information relating to the administration of the security system would, if disclosed, jeopardize the security system and render the security provided by the cameras non-existent. *See Opinion of the Public Access Counselor 03-FC-126.*

Counselor Neal agreed with Counselor's Hurst analysis in a subsequent opinion as it related to video footage maintained by the Indiana Gaming Commission. *See Opinion of the Public Access Counselor 08-FC-144.* As provided *supra*, Counselor Neal opined that that GPS logs would be similar to the video footage as such, an agency would likely be able to sustain a denial of access to the GPS logs pursuant to I.C. § 5-14-3-4(b)(10). *See Informal Opinion of the Public Access Counselor 09-INF-33.*

In response to your second inquiry, it is my opinion again that the county could in certain instances cite to I.C. § 5-14-3-4(b)(10) to deny a request for a report generated from the GPS system. I do not think however that the county could use (b)(10) as a blanket denial to all requests for GPS reports. The issue of how disclosing the report and its affect the recordkeeping or security system would be a question of fact that the county

would have the burden to establish. While it is likely the county would be able to meet this burden as it relates to law enforcement, I believe it would have a much more difficult time in demonstrating that GPS reports generated for vehicles maintained for example by the highway department or other non-law enforcement related personnel would have the same effect. In essence, I agree with Counselor Neal's opinion in that it is likely the county would be able to sustain the denial, with the caveat that the burden would be on the county to demonstrate the applicability of (b)(10) to the requested GPS report and the exemption will not be applicable to all reports that are generated.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

Joseph B. Hoage
Public Access Counselor