



STATE OF INDIANA

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November 27, 2013

Mr. Alex Kalla
Healthy Dubois County, Inc.
PO Box 222
Jasper, IN 47547

Re: Informal Inquiry 13-INF-61; Electronic Records

Dear Mr. Kalla:

This is in response to your informal inquiry regarding Electronic Records of the City of Jasper ("City"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

You inquiry requests an Opinion on the following topics:

1. Is a computer and/or its hard drive and/or data storage medium, containing data, which consists of public records stored on that computer, etc., stored thereon as a result of City officials acting in the course of their office duties, in its physical self a public record;
2. Is a web page, created by a City or its agent, posted and accessible to the public online, itself a public record;
3. Did the City of Jasper, IN, violate the Access to Public Records Act when it destroyed the computer used by its ex-mayor Schmitt;
4. Did the City of Jasper, IN, violate the Access to Public Records Act when it destroyed, apparently, numerous [amounts of content] of its formerly extant web pages?

The City of Jasper addressed these concerns in a letter to this Office on November 23, 2013. Portions of that letter will be referenced herein.

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 City of Jasper is a public agency for the purposes of the APRA. *See* Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise non-disclosable under the APRA. *See* Ind. Code § 5-14-3-3(a).

1. Is a computer and/or its hard drive and/or data storage medium, containing data, which consists of public records stored on that computer, etc., stored thereon as a result of City officials acting in the course of their office duties, in its physical self a public record?

And,

3. Did the City of Jasper, IN, violate the Access to Public Records Act when it destroyed the computer used by its ex-mayor Schmitt?

The City is correct in citing Ind. Code § 5-14-3-2(o) as defining public records as 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. Clearly, the information stored on the hard drive of the computer in question is unequivocally public record and is subject to the retention schedule set forth by the Indiana Commission on Public Records. http://www.in.gov/icpr/files/county_general.pdf

Your question raises the concern of whether the computer or hard drive itself constitutes a public record. Computer towers, monitors, laptops and hard drive discs are metal and plastic which constitute the means by which data is recorded. The legislature surely did not intend pieces of hardware to be public record. It is true public records can often be found on unusual and unorthodox material (I recall the Indiana Department of Health once received comments on a sewer project from concerned citizens on rolls of toilet paper they maintained in storage as public record). But I find it doubtful a Jasper city official actually wrote on the computer tower or hard disk itself.

It is the *data* that is important. Every piece of information contained on that hard drive must be kept as public record unless it falls under an exception (See Ind. Code § 5-15-5.1-1 - non-record materials). A public agency must establish necessary safeguards against the removal, alteration, or loss of records; safeguards shall include notification to all officials and employees of the agency that records in the custody of the agency may not be alienated or destroyed. Ind. Code § 5-15-5.1-10(6).

The computer hardware is a City *asset* akin to a filing cabinet or a bookshelf or a folder. The destruction of assets is at the discretion of the public agency. You mention the computer was run over by a bulldozer by a city works department. It can be disposed of, repurposed, or recycled or as long as the data associated with it is retained.

It should be noted, however, that I have been advised by the Indiana Commission of Public Records (“ICPR”) that electronic transfer of data sometimes loses the “metadata” associated with the original records. Metadata, as I understand it, are tiny pieces of information which indicate when a record was originated, altered or sent. The City has advised it used a third-party vendor to transfer the data. That vendor has stated the transfer program is not “metadata aware”, however, that does not necessarily mean the metadata was lost.

You speculate the transfer of electronic transfer is susceptible to data loss. I concede this is a potential issue. Consider the ICPR Electronic Records Policy #12-01:

Information technology has transformed the way governmental entities create, use, share, and store records. Although electronic records offer many advantages, preserving them for long-term access is increasingly complex as they can be easily deleted, changed and manipulated. Maintaining trustworthy records is essential for a governmental entity to meet its legal and internal business needs, as well as its responsibilities to the public. The purpose of this policy is to ensure that governmental entities create and maintain trustworthy electronic records that demonstrate *authenticity, reliability, integrity, and usability*.

But transfer alone is not indicative of poor retention policies. An agency could just as easily lose or destroy paper copies. The authenticity, reliability, integrity and usability of the data are the important concepts to keep in mind.

The City has indicated they have provided all records responsive to a previous request. It is my sincere hope all of the information provided to you was accurate and free from alteration. I cannot reasonably find any violation of the APRA.

The second concern raised in your inquiry regards the City’s website:

2. Is a web page, created by a City or its agent, posted and accessible to the public online, itself a public record;

4. Did the City of Jasper, IN, violate the Access to Public Records Act when it destroyed, apparently, numerous [amounts of content] of its formerly extant web pages?

I have held previously any form of electronic communication of any sort generated by a public official in the course of public business constitutes a public record. This would include, but not limited to, a website, Facebook account and comments, Twitter feed,

Craigslist ad, iPhone app, or PayPal portal (all actual examples of online mediums used by Indiana public agencies).

Cities are not required to have websites. It is certainly encouraged as a means to provide information and keep the public apprised of the goings-on of their government officials. The City has provided a limited history of the genesis of the website. As technology has evolved, so has every public agency's ability to keep up with it. Websites, host servers, bandwidth and web developers are all costly and sometimes unruly to maintain. The City has revamped its website to make it more user-friendly and accessible. I have browsed it – it is indeed well-maintained.

But it is unreasonable to expect every link, graphic, font, button or index remain identical in perpetuity. The City argues that every bit of information on the previous website has been maintained in an accessible and appropriate manner fully obtainable by any member of the public. This is the important consideration and why a violation does not exist. The webmaster of the site can add and delete content at their discretion, as long as the original document is retained either on paper or by another electronic means, however designated by the City.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

cc: Ms. Renee J. Kabrick