STATE OF INDIANA

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Hoosier State Press Association
Steve Key, Executive Director & General Counsel
41 E Washington St., Suite 301,
Indianapolis, IN 46204 *Via email to: skey@hspa.com*

Re: Informal Opinion 18-INF-14; Fees for Electronically-Stored Court Records

Dear Mr. Key:

This informal opinion is in response to your inquiry about whether Indiana courts should make electronically-stored records available via email with no copying fee imposed on the requestor under the Access to Public Records Act ("APRA"). In accordance with Indiana Code section 5-14-4-10(5), I issue the following informal opinion to your inquiry.

BACKGROUND

During the 2018 legislative session, the Indiana General Assembly enacted Senate Enrolled Act 392—Public Law 171-2018, which amended two sections of the Access to Public Records Act.

First, the legislature added a new subsection to Indiana Code section 5-14-3-3 that provides the following:

> This subsection applies to a public record that is in an electronic format. This subsection does not apply to a public record recorded in the office of the county recorder. A public agency shall provide an electronic copy or a paper copy of a public record, at the option of the person making the request for the public record. This subsection does not require a public agency to change the format of a public record.

Ind. Code § 5-14-3-3(j). Essentially, the new subsection empowers a requestor to choose between receiving a requested record electronically or on paper if the requested record is in already in electronic format, not recorded with a county recorder, and does not require the agency to change the format of the record.

Since this informal opinion exists in electronic format (e.g., PDF), if requested, this Office must provide the records in PDF format at the option of the requestor. Although email is arguably the most efficient method for an agency to provide an electronic copy of a public

record to a requestor, the statute does not expressly require the agency to provide electronic copies in that manner. Conceivably an agency could provide copies of electronic records on a USB flash drive or some other storage medium. Undoubtedly, any agency concerned with efficiency ought to provide electronic records via email. It makes the most sense.

Second, the legislature amended Indiana Code Section 5-14-3-8(b)—APRA's general prohibition on fees—by adding the following language:

> (3) To provide an electronic copy of a public record by electronic mail. However, a public agency may charge a fee for a public record transmitted by electronic mail if the fee for the public record is authorized under:
>
> (A) subsection (f) or (j);
>
> (B) section 6(c) of this chapter; or
>
> (C) IC 36-2-7-10 or IC 36-2-7-10.1 concerning records of the county recorder.

In other words, a public agency may not charge a fee for providing an electronic copy of a public record by email unless the fee is authorized under provisions set out in subsections (b)(3)(A), (b)(3)(B), or (b)(3)(C) which deal with certifications, maps, computer reprogramming and, plainly, recorders.

DISCUSSION

The Access to Public Records Act ("APRA") and Administrative Rule 9

The Access to Public Records Act ("APRA") expressly states that "it is the public policy of the [State of Indiana] that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Ind. Code § 5-14-3-1. In general, APRA governs access to public records in Indiana. What is more, public records are presumptively disclosable unless an exception applies.

Indeed, the Indiana Supreme Court has broad discretion to provide oversight of the judiciary in ways consistent with the administration of justice. To that end, Indiana Administrative Rule 9, promulgated by the Indiana Supreme Court, governs public access to, and confidentiality of, court records. Critically, except as provided by Administrative Rule 9, access to court records is governed by APRA. In other words, if Administrative Rule 9 is silent on an open records issue, then APRA controls public access.[1]

Public access is a universal government maxim. It applies equally to all branches of government – executive, legislative, administrative and judicial. While there is certainly nuance affecting each branch differently, any outlying distinctions specific to a particular branch should be addressed with care and always with transparency providing a balance to deviations from the APRA.

[1] Indiana Administrative Court Rule 9(A)(1).

A close reading of the APRA, specifically Indiana Code section 5-14-3-9.5(d), appears to give a court discretion to order fees in excess of the APRA's fee schedule. This would seem to also potentially preclude the new "free email" provision. Therefore, technically, a court could simply order that any method of production of records – electronically or otherwise – will be accompanied by a fee.

This Office's respectful recommendation, however, is that courts apply the matter of fees consistent with the General Assembly's intent for the remainder of government units: to recoup costs when *necessary* and avoid fees becoming a barrier to access. It stands to reason that electronic records that can be transmitted electronically do not incur cost on the part of a court and therefore should be produced free of charge unless exceptional circumstances apply.

Please do not hesitate to contact me with any questions.

Best regards,

Luke H. Britt
Public Access Counselor