

January 23, 2008

Mark Neff
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Re: Your informal inquiry regarding electronic mail messages

Dear Mr. Neff:

This is in response to your informal inquiry dated November 9, 2007. I apologize for the delay in the response. Upon taking office July 1, 2007, I found a backlog of informal inquiries. I am currently endeavoring to address the backlog and issue opinions in response to the inquiries, pursuant to I.C. §5-14-4-10(5).

BACKGROUND

You made your inquiry on behalf of the Warrick County School Corporation ("School"). You pose a series of questions related to the electronic mail ("email") messages sent and received by an employee of the School. The School has received a request, submitted pursuant to the Access to Public Records Act ("APRA")(Ind. Code 5-14-3), for copies of all emails of a particular employee. The requester submitted a USB storage device so the School could provide the records electronically. You pose the following questions:

1. Are all emails to be disclosed?
2. Is the student information to be disclosed?
3. Is school work to be disclosed under the open door/public access statute?
4. Are personal emails, get-wells, 'my-sister-is-a-punk'-type emails to be disclosed?
5. How do we bill for electronically downloading documents? How do we redact info from electronic downloads without having to download it twice – once for redaction and then again for copying electronically?

ANALYSIS

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. Any

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

A “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. I.C. §5-14-3-2.

In answer to your first four questions, email messages certainly can be public records, if the email was created, received, retained, maintained or filed by or with a public agency. I.C. §5-14-3-2. Whether and for how long each email message must be retained by the agency is a records retention issue, which falls outside the purview of this office. Each county has a county commission on public records, which establishes retention schedules for local agencies. Ind. Code 5-15-6. The Indiana Commission on Public Records email retention policy can be found at <http://www.in.gov/icpr/policyemailandguidelines.pdf>.

Since email messages are public records, they must be disclosed upon request unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a). In other words, if an email contains information excepted from disclosure under the APRA, the agency would either be required to withhold the information from disclosure or be allowed the discretion to withhold the information from disclosure, depending on the type of exception applicable to the records. I.C. §5-14-3-4. To the extent a record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the disclosable material and make it available for inspection and copying. I.C. §5-14-3-6(a).

In the case of student information, depending on the type of information contained in the emails, some of the material may be declared confidential under state statute or federal law, which would except those portions of the emails from disclosure. I.C. §5-14-3-4(a). The burden of proof is on the agency to sustain its denial of access. I.C. §5-14-3-9(f).

In answer to your fifth question, the agency can charge the agency’s direct cost of supplying the information in the form of a computer tape, disc, or analogous record system. I.C. §5-14-3-8(g). If the requester provides the USB drive and the School is able to download the records to the USB drive in the form they currently exist, it is my opinion there would be no associated cost. If, however, some of the emails must be redacted and the School does not have reasonable access to redaction software or some other method to provide the redacted materials electronically, it is my opinion the School would print those records, redact the nondisclosable information, and charge the requester the per page cost established by the fiscal body pursuant to I.C. §5-14-3-8(d).

Best regards,



Heather Willis Neal
Public Access Counselor