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OFFICIAL OPINION 2019-2

Doneisha L. Posey, Esq.
Deputy Director and General Counsel
Indiana Civil Rights Commission
100 N. Senate Ave., Rm. N300
Indianapolis, IN 46204

RE: Use of Digital or Electronic Signatures for Pleadings in Commission Proceedings

Dear Ms. Posey:

QUESTION PRESENTED

The Indiana Civil Rights Commission (ICRC or Commission) requests, pursuant to Ind. Code § 4-6-2-5, the opinion of the Office of the Attorney General (OAG) as to whether the ICRC has the authority to utilize electronic or digital signatures on complaints filed with it.

SHORT ANSWER

The ICRC does have the authority to transact business electronically, and may accept complaints and other pleadings signed electronically and filed with it under applicable Indiana law.

BACKGROUND

The ICRC is created under Ind. Code § 22-9-1-4. The Commission investigates complaints alleging discriminatory practices, but it cannot conduct a hearing "in the absence of a complaint." Ind. Code § 22-9-1-6(d). A "complaint" is, *inter alia*, a "written grievance that is...sufficiently complete and filed by a complainant with the commission." The "complaint" is required to be "signed and verified by the complainant." Ind. Code § 22-9-1-3(o)(1). In addition to more generally stated discriminatory practices and acts, the ICRC also investigates allegations of discriminatory housing practices. A complaint filed with the Commission regarding alleged discriminatory housing practices is required to be "in writing," "under oath," and "in the form prescribed by the commission." Ind. Code § 22-9.5-6-1(b).

The Commission has the authority to promulgate rules, Ind. Code § 22-9-1-6(b), and has done so. The ICRC's rules at Title 910 of the Indiana Administrative Code require anyone "aggrieved by a discriminatory practice or act contrary to the provisions of the Indiana Civil Rights Law" to "make, sign, and file a complaint with the commission." 910 IAC 1-2-3(a).

Such a complaint can be filed in person or by mail, but the ICRC also allows a complainant to discuss by telephone the complainant's grievances with the ICRC. The ICRC, in turn, reduces this information into a complaint format and sends "the completed complaint form to the aggrieved person to be signed and affirmed[.]" 910 IAC 2-6-2(d)(2).¹ The signature requirement is not confined to complaints. All pleadings, motions, briefs or other documents that may be filed by a party "shall be signed by the party, the party's representative, or the attorney representing the party and must include the signer's address and telephone number." 910 IAC 2-7-4(b).

All hearings conducted by the Commission are subject to the Administrative Orders and Procedures Act (AOPA), Ind. Code Chpt. 4-21.5.² Neither the Civil Rights Act, Ind. Code Art. 22-9, the Fair Housing Act, Ind. Code Art. 22-9.5, nor AOPA address whether required signatures must be in ink or may be digital or electronic.³

The ICRC's practice has been to obtain the original or ink signature of a complainant, including those complainant's who contact the ICRC by telephone for assistance in preparing a complaint. Under such circumstances, the ICRC has been mailing the proposed complaint to the complainant who may or may not timely return the signed, affirmed document. This has resulted in some complaints not being timely filed with the Commission. The Commission now inquires whether it may obtain digital or electronic signatures in lieu of more traditional ink signatures.

ANALYSIS

While Indiana courts have long recognized that a signature need not be "pen and ink" in order to be legally sufficient,⁴ advances in technology have made transacting business via computers and internet connectivity common. In 2000, our General Assembly adopted the Uniform Electronic Transactions Act, Ind. Code Chpt. 26-2-8 ("UETA"), which gives legal recognition to electronic business transactions and establishes the legal validity of such transactions.

The UETA, at Ind. Code § 26-2-8-104, requires that the parties agree to conduct business electronically; it does not mandate that business be conducted in such a fashion:

¹ 910 IAC 2-6-2(e)(1) requires each complaint to "be in writing" and "affirmed by the aggrieved person." The affirmation statement is required to state, "I declare under the penalty of perjury that the foregoing is true and correct."

² AOPA does not apply to "[a] determination of probable cause or no probable cause by the civil rights commission" or any "determination in a factfinding conference of the civil rights commission." Ind. Code § 4-21.5-2-5(2), (3). AOPA would apply otherwise to Commission adjudicative procedures.

³ AOPA does not address signatures at all, except in the mediation provisions, Ind. Code Chpt. 4-21.5-3.5.

⁴ See e.g. *Johnson v. State*, 622 N.E.2d 172, 174 (Ind. 1993); *James v. State ex rel. Com'r of Motor Vehicles*, 475 N.E.2d 1164, 1166 (Ind. Ct. App. 1985); 1906-1908 *Op. Ind. Att'y Gen.* at p. 155 (April 9, 1907).

Sec. 104. (a) This chapter **does not require** that a record or signature be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter only applies to transactions between parties **each of which has agreed to conduct transactions electronically**. An agreement to conduct transactions electronically is determined from the context and surrounding circumstances, including the parties' conduct.

(emphasis added). The Indiana Court of Appeals recently summarized the scope and use of the UETA:

Indiana's Uniform Electronic Transactions Act ("UETA") "applies to electronic records and electronic signatures that relate to a transaction." Indiana Code § 26-2-8-103(a). An "electronic record" means a "record created, generated, sent, communicated, received, or stored by electronic means." Indiana Code § 26-2-8-102(9). An "electronic signature" is an "electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record." Indiana Code § 26-2-8-102(10). The UETA applies to transactions among parties that have agreed to conduct transactions electronically. A customer and a business are presumed to have agreed to conduct transactions electronically unless the governing documents of a business limit or prohibit such action or the business entity expressly states another method of conducting business. Indiana Code § 26-2-8-104(b). A signature may not be denied legal effect or enforceability solely because it is in electronic form. Indiana Code § 26-2-8-106(a). If the law requires a signature, the law is satisfied with respect to an electronic record if the electronic record includes an electronic signature. Indiana Code § 26-2-8-106(d). "An ... electronic signature is attributable to a person if it was the act of the person. The act of the person may be proved in any manner" Indiana Code § 26-2-8-108(a).

Poythress v. Esurance Insurance Co., 96 N.E.3d 663 (Table), 2018 WL 794066 at *5 (Ind. Ct. App., February 9, 2018).

The UETA, at Ind. Code § 26-2-8-106, specifically addresses the legal recognition to be afforded electronic records and signatures:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record or electronic signature was used in its formation.

(c) If a law requires a record to be in writing, or provides consequences if it is not, an electronic record satisfies the law.

(d) If a law requires a signature, or provides consequences in the absence of a signature, the law is satisfied with respect to an electronic record if the electronic record includes an electronic signature.

In short, “under Indiana law, electronic signatures have the same force and effect as written signatures.” *Borjas v. State*, 946 N.E.2d 1230, 1232 (Ind. Ct. App. 2011).

If a governmental agency wishes to conduct some or all of its business electronically, it is authorized to do so by Ind. Code § 26-2-8-202:

(a) Except as otherwise provided in section 111(f) of this chapter [Ind. Code § 26-2-8-111(f)], each governmental agency shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

Should the Commission decide to establish such a process and rely upon electronic records and electronic signatures,⁵ the Commission, “giving due consideration to security, may specify:

- (1) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for such purposes;
- (2) if electronic records must be electronically signed, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;
- (3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and
- (4) any other required attributes for electronic records that are specified for corresponding non-electronic records or reasonably necessary under the circumstances.”

Ind. Code § 26-2-8-202(b).

If the ICRC chooses to conduct business electronically, the OAG recommends that it develop a policy document addressing the matters described in subsections (b) (1) – (4) above in order to ensure the integrity of the process. Please note in particular that a security procedure is necessary⁶ in order to authenticate an electronic signature. As provided at Ind. Code § 26-2-8-108(a):

An electronic record or electronic signature is attributable to a person if it

⁵ Other than for retention of records in some circumstances, this Act “does not require a governmental agency to use or permit the use of electronic records or electronic signatures.” Ind. Code § 26-2-8-202(c).

⁶ “Security procedure,” per Ind. Code § 26-2-8-102(18), means “a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.”

was the act of the person. The act of the person may be proved in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

ICRC should also note that the UETA, at Ind. Code § 26-2-8-203, speaks to interoperability among agencies:

Standards adopted by a governmental agency under section 202 [Ind. Code § 26-2-8-202] of this chapter must encourage and promote consistency and interoperability with similar requirements adopted by:

- (1) other governmental agencies;
- (2) other states;
- (3) the federal government; and
- (4) nongovernmental persons interacting with governmental agencies.

If appropriate, those standards must specify differing levels of standards from which governmental agencies may choose in implementing the most appropriate standard for a particular application.

“Interoperability” is drawn to your attention for two reasons. First, the Indiana Department of Administration has adopted a uniform standard for the electronic approval of contracts under Ind. Code § 4-13-2-14.1.⁷ Although your question does not involve approval of contracts, IDOA’s process is illustrative of how an agency may adopt specific protocols for specific transactions. The contract approval process is interoperable across all agencies. Second, if you are required to interact electronically with your federal counterparts, ICRC may wish to explore whether those agencies utilize electronic transactions and whether ICRC needs to be interoperable with those standards.

In your request for an OAG opinion, you also referred to the 1997 Electronic Digital Signature Act, found at Ind. Code Art. 5-24. Ind. Code § 5-24-3-1, which pre-dates the UETA, provides that:

A digital signature on a document received by or filed with the state shall be effective if it meets the following criteria:

- (1) It is unique to the person using it.
- (2) It is capable of verification.
- (3) It is under the sole control of the person using it.
- (4) It is linked to data in such a manner that if the data are changed, the digital signature is invalidated.
- (5) It conforms to the rules adopted by the state board of accounts.

A “digital signature” is a specific type of electronic signature and is defined at Ind. Code § 5-24-2-1:

⁷ IDOA’s policy on electronic approvals of contracts is found at https://www.in.gov/idoa/files/Electronic_Contracting_Authority_Memo.pdf.

“Digital signature” means an electronic signature that transforms a message using an asymmetric cryptosystem such that a person having the initial message and the signer’s public key can accurately determine whether:

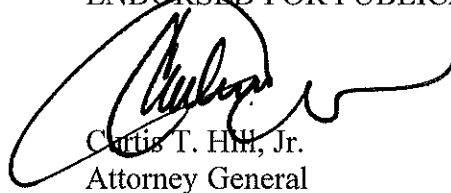
- (1) the transformation was created using the private key that corresponds to the signer’s public key; and
- (2) the initial message has been altered since the transformation was made.

Digital signatures are created by implementing specific signature technology in creating an electronic signature. Digital signatures require a third-party certification authority and typically involve per-transaction costs, making them unattractive for many government transactions. Indiana Code Art. 5-24 does not require digital signatures be used in lieu of electronic signatures. Rather, it describes the technology that must be used if one is using a digital signature. It is not used frequently by state agencies in the conduct of governmental business.

CONCLUSION

The Indiana Civil Rights Commission may conduct business electronically and accept electronic signatures, including with respect to administrative complaints filed with it and any pleadings related thereto. This process will satisfy the current requirements under law that such documents be in writing and signed, even though the process may be entirely electronic. The Uniform Electronic Transaction Act, Ind. Code Chpt. 26-2-8, is better suited for this purpose than the Electronic Digital Signature Act found in Ind. Code Chpt. 5-24.

SUBMITTED, and
ENDORSED FOR PUBLICATION:


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