



STATE OF INDIANA

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Mr. Cam Clark
Indiana Department of Natural Resources
Via email: cclark@dnr.in.gov

Re: *Informal Inquiry 11-INF-54; I.C. § 5-14-3-4*

Mr. Clark,

In 08-FC-141, a request was made of the City of Kokomo for electronic access/copy for a database of properties. Counselor Neal found that the City's reliance on subsection (f) to deny access was unfounded due to the request went beyond a list of names and addresses:

Regarding the City's reliance on I.C. § 5-14-3-3(f) to deny electronic access and instead allow only inspection of the record, I would note that I.C. § 5-14-3-3(f) applies not to all lists maintained by an agency but only to lists of names and addresses.

Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under the statute. I.C. § 5-14-3-3(f).

Further, the City makes reference to the prohibition in I.C. § 5-14-3-3(f) on the use of lists for commercial purposes, and I would note that prohibition extends only to the three types of lists in subsections (1) through (3). None of those is applicable here.

It is my understanding the record requested is more than merely a list of names and addresses. I understand the list to be a database containing a number of types of information, including names and addresses. Because the record is more than merely a list of names and addresses, it is my opinion that I.C. § 5-14-3-3(f) does not apply. *Opinion of the Public Access Counselor 08-FC-141.*

In the same opinion, Counselor Neal found that subsection (d) would be the applicable section of the APRA in regards to the request made:

Here, you have requested an electronic copy of a record maintained by the City. While the City in its initial response to you made a reference to I.C. § 5-14-3-3.6, it is not my understanding this is a record to which the City has provide enhanced access (e.g. through its computer gateway). Rather, it is a record created and maintained by the City which is maintained in an electronic format. As such, it is the type of record contemplated by I.C. § 5-14-3-3(d). In other words, it is maintained in an electronic database. As such, the City must make reasonable efforts to provide a copy of the record in the medium requested if the medium requested is compatible with the City's data storage system. *See* § 5-14-3-3(d). *Opinion of the Public Access Counselor 08-FC-141.*

2008 must have been the year for formal complaints dealing with electronic databases, because via 08-FC-146, Counselor Neal held the following in a similar factual scenario, where a request was made of a police department for a copy of a database relating to initial incident reports filed by law enforcement:

Here, you have requested an electronic copy of a database maintained by the Department; you have requested the copy in a particular format. If the requested record is a record created and maintained in an electronic format, it is the type of record contemplated by I.C. § 5-14-3-3(d). As such, the Department must make *reasonable efforts* to provide a copy of the record in the medium requested if the medium requested is compatible with the Department's data storage system. *See* § 5-14-3-3(d). It is my understanding the Department is now investigating what efforts will be required to provide you the records in the format requested. *Opinion of the Public Access Counselor 08-FC-146.*

I have searched through the relevant advisory opinions for an exception that DNR would site in response to a request. I would note that information related to information found on a Driver's License is cloaked with a degree of confidentiality via I.C. 9-14-3.5 (<http://www.in.gov/legislative/ic/code/title9/ar14/ch3.5.html>) but I could not find anything corresponding to licenses issued by the DNR.

Again in 08-FC-141, which dealt with a database request, Counselor Neal provided the following about the City's reluctance to turn over the information contained in the database:

The City raises concerns regarding the privacy of individuals whose addresses are contained in the record. While I appreciate the City's concern, the APRA does not contain a privacy provision. Nor does the APRA afford a public agency the opportunity to balance the needs of a requester with the privacy interests of owners whose addresses are

contained in a public record. Further, as the City points out, the Indiana Court of Appeals has held that simple fear of misuse is not grounds for nondisclosure. *City of Elkhart v. Agenda: Open Government Inc.*, 683 N.E.2d 622 (Ind. Ct. App. 1997). Instead, the APRA requires the disclosure of a public record unless an exception to disclosure is present. I.C. § 5-14-3-3. Based on the information provided by the City, I find no exception to disclosure applicable to this record. *Opinion of the Public Access Counselor 08-FC-141*.

This is another excerpt supporting this premise found under 08-FC-34, where the request was made of the Indiana Gaming Commission for address and telephone numbers for those persons employed by Caesar's and licensed by the Commission. The opinion also deals with the time that will be required of it to respond to the request:

The Commission has cited the Fair Information Practices Act ("FIPA"), Ind. Code 4-1-6, for the proposition that the address information is confidential. My predecessor addressed this issue in *Opinion of the Public Access Counselor 05-FC-145*:

To clear up any confusion, FIPA does not confer confidentiality on any record. FIPA sets out guidelines for the use, maintenance, and intra-agency exchange of records regarding personal information in a "personal information system." While FIPA provides for the secure handling of confidential information, it does not specifically declare a record confidential. The confidentiality of the records must be established by some other statutory authority. *Id.*

I agree with Counselor Davis -- the FIPA does not confer confidentiality to any record. As such, the FIPA cannot be used to withhold records or information from disclosure. While the Commission provides compelling privacy concerns regarding the information, the APRA does not contain a privacy clause. Any records not excepted from disclosure must be provided upon request. I.C. § 5-14-3-3. Because no statute declares the address information confidential, the Commission must provide the address information you have requested.

I understand the Commission's argument that compiling the requested information will take a considerable amount of time. While a public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees (see I.C. § 5-14-3-7(a)), section 7 does not operate to deny to any person the rights secured by section 3 of the APRA. I.C. § 5-14-3-7(c). Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. If a list of licensee home addresses does not exist, the

Commission is not required to create a list. *Opinion of the Public Access Counselor 08-FC-34.*

Now, in regards to fees, if DNR would have to run a query of the database that has never been performed in the past, then the cost that DNR could charge WTHR would be the agency's direct cost of supplying the information. If there has not been a prior attempt to provide the information, with all the identified requested by WTHR, DNR would be guided by 5-14-3-2(c) in determining the applicable fee.

To the extent your complaint is intended to address the fee the Assessor has indicated he will charge for a CD containing the record, the Assessor may charge a fee, uniform to all purchasers, for providing a duplicate of a computer tape or disc that does not exceed the sum of the following:

1. The agency's direct cost of supplying the information in that form.
2. The standard cost for selling the same information to the public in the form of a publication if the agency has published the information and made the publication available for sale.

I.C. § 5-14-3-8(g).

Direct cost means 105% of the sum of the cost of

1. The initial development of a program, if any;
2. The labor required to retrieve the electronically stored data; and
3. Any medium used for electronic output.

I.C. § 5-14-3-2(c).

The Assessor must be able to show that the fee is in line with those provided in the APRA for providing a copy of the record in the medium you requested. *Opinion of the Public Access Counselor 08-FC-55.*

Here's a similar issue from 2007, 07-FC-50, that deals with the issue of a request where social security numbers are part of the database and had to be redacted prior to issuing a records response.

With respect to the electronically stored records, the APRA sets forth several provisions with respect to the fee for providing the records. A public agency may charge a person who makes a request for disclosable information the agency's direct cost of reprogramming a computer system if:

- (1) the disclosable information is stored on a computer tape, computer disc, or a similar or analogous record system; and
- (2) the public agency is required to reprogram the computer system to separate the

disclosable information from nondisclosable information. IC 5-14-3-6(c). "Direct cost" means one hundred five percent (105%) of the sum of the cost of:

- (1) the initial development of a program, if any;
- (2) the labor required to retrieve electronically stored data; and
- (3) any medium used for electronic output;

for providing a duplicate of electronically stored data onto a disk, tape, drum, or other medium of electronic data retrieval under section 8(g) of this chapter, or for reprogramming a computer system under section 6(c) of this chapter. IC 5-14-3-2(c).

Accordingly, if the Town must reprogram the computer to separate the social security numbers from the records it may charge you the direct cost of reprogramming the computer. It is not clear to me why the hard copy back-up version of these records does not contain social security numbers. I recommend that the Town explain to you why it must reprogram the computer to separate the social security numbers when the hard copies do not contain social security numbers.

In addition, the Town may charge its direct cost for providing a duplicate of a computer tape, computer disc, microfilm, or similar or analogous record system containing information owned by the public agency or entrusted to it. The fee must be uniform to all purchasers, and may not exceed the sum of the following:

- (1) The agency's direct cost of supplying the information in that form.
- (2) The standard cost for selling the same information to the public in the form of a publication if the agency has published the information and made the publication available for sale. IC 5-14-3-8(g). *Opinion of the Public Access Counselor 07-FC-55.*

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

Best regards,



Joseph B. Hoage
Public Access Counselor