

January 4, 2008

John Rowe
The Rowe Law Firm, LLC
RR 1, Box 988
Linton, Indiana 47441

Dear Mr. Rowe:

This is in response to your informal inquiry dated July 2, 2007. I apologize for the delay in the response. Upon my appointment by Governor Daniels effective July 1 of this year, I found a backlog of informal inquiries. I am currently endeavoring to address those inquiries and issue an opinion in each matter pursuant to Indiana Code §5-14-4-10(5).

BACKGROUND

In your inquiry, you ask whether the police commissioner's internet history report is a public record and therefore required to be disclosed pursuant to request under the Access to Public Records Act ("APRA")(Ind. Code 5-14-3). This issue has not previously been addressed by an Indiana court or by this office.

ANALYSIS

Indiana Code §5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. 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.

One exception to disclosure listed in the APRA allows an agency to use its discretion to withhold from disclosure "[c]omputer programs, computer codes, computer filing systems, and other software that are owned by the public agency or entrusted to it and portions of electronic maps entrusted to a public agency by a utility." I.C. §5-14-3-4(b)(11). Based on my rudimentary knowledge of information technology and computer hardware and software, it is my understanding that an "internet history report" is not a computer program, computer filing system or computer software. As such, I do not believe it could be withheld under the exception cited.

On the other hand, it is my opinion the internet history from a public official's or employee's computer may not be a public record. As I understand it, the internet history on a machine may be scheduled to delete after a certain period of time. Further, the cache containing information related to each site may or may not be set to clean out at regular intervals to allow space for future information to be stored. The question here would be whether and when a record is created. No state policy exists regarding the internet history contained in a public computer, and I know of no policy of a local commission on public records regarding internet history.

Access laws generally do not keep up with ever-changing technology, so when working with technology not addressed in the APRA, we must consider the nature of the information being requested and the intent of the law. I am not aware of any public agency that currently creates a permanent record of and/or maintains logs of computer internet history. Although it may exist, I am not aware of any software that does or could create a report of computer internet history on an automated or regular basis. Even if such software does exist, I do not have any information regarding the associated costs to a public agency.

As such, my opinion is that if an agency does somehow proactively create a record containing the internet history from a public employee's computer (e.g. printing out or electronically saving a regular report), that would likely constitute a public record disclosable under the APRA unless an exception to disclosure regarding the subject matter exists in section 4 of the APRA. It is further my opinion that as a general rule the internet history from a public employee's, official's, or agency's computer is not a public record for purposes of the APRA. While a public official's or employee's usage of a public computer may be a public integrity question, such issues are not within the purview of this office.

Best regards,



Heather Willis Neal
Public Access Counselor