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OPINION OF THE PUBLIC ACCESS COUNSELOR

**REVISED<sup>1</sup>**

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GREGORY E. MANTELL,  
*Complainant,*

v.

MARION COUNTY PROSECUTOR'S OFFICE,  
*Respondent.*

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Formal Complaint No.  
23-FC-103

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to the formal complaint alleging the Marion County Prosecutors Office violated the Access to Public Records Act.<sup>2</sup> Chief Counsel Celita Scott filed an answer on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to

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<sup>1</sup> See page 4

<sup>2</sup> Ind. Code § 5-14-3-1-10.

the formal complaint received by the Office of the Public Access Counselor on October 10, 2023.

## **BACKGROUND**

This case involves a dispute over access to a deleted social media post made by the Marion County Prosecutor's Office.

At some point prior to July 13, 2023, Gregory Mantell (Complainant) submitted a public records request to the Marion County Prosecutor's Office for a deleted social media post on X (formerly known as Twitter). After a lack of a response, Mantell asked for a status update of his request on October 6, 2023. The agency denied the request on grounds that it had no documents responsive to the request.

Although Mantell was able to find a screenshot of the post, he still insisted on an original copy from the Prosecutor. As a result, he filed his formal complaint on October 6.

On November 16, 2023, the Prosecutor filed an answer to Mantell's complaint. The Prosecutor's Office argues that it does not archive deleted social media posts and "public access rules do not require the agency to download data from a third party in order to satisfy a request."

This opinion will explore the fallacy of that position.

## **ANALYSIS**

### **1. The Access to Public Records Act**

The Access to Public Records Act (APRA) states that "(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.” Ind. Code § 5-14-3-1. The Marion County Prosecutor’s Office is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the Prosecutor’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b). This case involves the applicability of APRA to a deleted social media post.

## **2. Social Media and Retention**

Under APRA, the definition of public record includes:

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 and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine-readable media, electronically stored data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). While social media is not explicitly referenced in APRA, this office considers social media material created by a public agency to be covered by the definition of public record. Notably, however, for a post, tweet, picture, or page to be considered a public record, a public official or agency must create the documentation in the scope of their official capacity.

Here, there appears to be no dispute that the Prosecutor created the post on an official social media page.

~~Inasmuch, the material created on its social media account is subject to the local and county government retention schedule.<sup>3</sup>~~

~~Social media posts and affiliated documentation falls under the retention category “General Files” (i.e., GEN 10-14), which has a retention period of three years. This means that the records must be preserved in a manner that enables anyone to potentially inspect and copy them in their entirety consistent with the law.<sup>4</sup>~~

What is more, APRA requires a public agency to protect public records from loss, alteration, or destruction. *See* Ind. Code § 5-14-3-7(a). Here, it appears as if record germane to this discussion was deleted and the agency refuses to retrieve it.

This is not sufficient from a public records standpoint. Communication of this sort shall be produced in its unaltered form upon request.<sup>5</sup> Social media presence is voluntary on the part of an agency, but once an account and content are

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<sup>3</sup> [https://www.in.gov/iara/files/county\\_general.pdf](https://www.in.gov/iara/files/county_general.pdf)

<sup>4</sup> PAC edit 3/7/2024: After publication of this advisory opinion, it was brought to the PAC’s attention that prosecuting attorneys are exempt from the general county and local retention schedules due to their designation as judicial agencies. While social media content is still subject to IC 5-14-3-7(a), prosecutors need not strictly follow the promulgated retention schedules set by the Indiana Archives and Records Administration. Instead, agencies that do not qualify as subject to those retention schedules should set internal policies consistent with good governance and best public record safekeeping practices.

<sup>5</sup> Exceptions can be made for posts revised for typographical mistakes or inadvertent errors so long as the final form is produced.

created, it follows that the agency must be mindful of the laws governing public records. These are not merely informal rules as the prosecutor suggests, but mandatory statutes enacted by the Indiana General Assembly.

In fact, several third-party vendors exist for exclusive purpose of assisting larger agencies in the archiving and curation of social media content.

To that point, social media content should be stewarded to the degree that retrieval of material can be effectuated with ease, convenience, and efficiency.

If it can do so, it should be produced to Mantell as soon as possible. If it cannot, then the Prosecutor has stored (or allowed to be stored) records in a manner inaccessible to the public and the Prosecutor has run afoul of the Access to Public Records Act.

## CONCLUSION

Based on the foregoing, it is the opinion of this office the Marion County Prosecutor's Office must provide the deleted social media post consistent with the law and this opinion.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the printed name of the signatory.

Luke H. Britt  
Public Access Counselor

Issued: December 6, 2023