OPINION OF THE PUBLIC ACCESS COUNSELOR

DERRICK DOUGHERTY,
Complainant,

v.

VERMILLION COUNTY COMMISSIONER TIM YOCUM,
Respondent.

Formal Complaint No.
22-FC-103

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging that Vermillion County Commissioner Tim Yocum violated the Access to Public Records Act.[1] Attorney Jon Spurr filed an answer on behalf of Commissioner Yocum. In accordance with Indiana Code § 5-14-5-10, I issue the

[1] Ind. Code § 5-14-3-1–10.

following opinion to the formal complaint received by the Office of the Public Access Counselor on June 27, 2022.

BACKGROUND

This case involves a dispute about whether an elected official's list of people blocked on social media is accessible under the Access to Public Records Act (APRA).

On April 23, 2022, Derrick Dougherty (Complainant) emailed Vermillion County Commissioner Tim Yocum requesting "screenshots of all the people you have blocked on Facebook."

After not receiving the information requested, Dougherty filed a formal complaint with this office. Dougherty argues that public figures are prohibited from blocking critics and constituents on social media platforms. Dougherty requested the screenshots to inform the public about who is blocked by Commissioner Yocum on Facebook. Dougherty cites an article published by the ACLU with new case law concerning public officials and social media.

On July 14, 2022, Commissioner Yocum, through legal counsel, filed an answer to Dougherty's complaint. Yocum denies that he violated APRA by refusing to provide the requested screenshots.

Yocum argues that the privacy settings and the act of blocking a person on Facebook does not create a document that must be provided under APRA. Additionally, Yocum contends that his Facebook page should not be subject to the same scrutiny as an official public agency's page. Yocum asserts that he alone does not make up a "public agency" as defined under APRA.

Moreover, Yocum states that the blocking of Dougherty was a result of incidents of defamatory and threatening language, and not his opinions.

ANALYSIS

1. The Access to Public Records Act (APRA)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1. Further, 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." *Id.*

Vermillion County 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 county'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).

2. Social media and public records

As it relates to qualifying social media accounts as public record, the definition of public records under the APRA is relatively all-encompassing. Under APRA, "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 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). It is true that social media is not always "created, received, retained, maintained, or filed by or with a public agency" when an individual or employee has unilateral dominion over an account or record. There can be no doubt, however, that when an individual employee or official creates a record of official business in their official capacity, they are acting as an agent of the government unit. *See Opinion of the Public Access Counselor*, 16-FC-150 (2016); (concerning private email accounts). Additionally, the Indiana Supreme Court tangentially addressed this issue in *Citizens Action Coalition v. Koch*, 51 N.E.3d 236 (2016). In *Koch*, Justice David, writing for the majority, acknowledged that APRA applies to members of a governing body in their individual capacity.

Further buttressing this position is the definition of public record as stated in the Indiana Records and Archives Administration statute.

For instance, Indiana Code section 5-15-5.1-1(o) provides:

> "Record" means all documentation of the informational, communicative, or decision making processes of state and local government, its agencies and subdivisions made or received by any agency of state and local government *or its employees* in connection with the transaction of public business or government functions, which documentation is created, received, retained, maintained, or filed by that agency or local government or its successors as evidence of its activities or because of the informational value of the data in the documentation…

(*Emphasis added*). Even though social media is not specifically addressed in the statute, there is no genuine dispute that social media content— if germane to public business— can qualify as public record under APRA's definition. Whenever a public employee or official memorializes public business, in writing, regardless of medium, the result is a public record. Public business means any function upon which the employee is empowered or authorized to take official action. This includes, but is not limited to, statements, official positions, opinions, and declarations related to their representative capacity. Tweets, posts, retweets, likes, or replies would all qualify.

There exists one critical caveat to this discussion. This analysis only applies to a social media account that a public official holds out to be the government account of that official or employee. For example, if a public employee has a personal social media account exclusively for friends or family, they may keep that account private. Access would only be

required if the account is presented as one where the employee or official conducts public business

Here, based on his publicly facing posts, Yocum's page appears to blend personal, campaign, and public business on his timeline. There is indeed no bright line as to what would cross the line from personal to public.

One of the operative questions is whether the public business material can also be found elsewhere. If that is the case, and Dougherty can access the public business posts from a town page or another site, Yocum can administer his social media site however he chooses.

If, however, a commissioner posts public business in a manner where the sole repository for that information is on a restricted access page (or if select constituents are blocked), there may be a problem.

3. Facebook "block lists"

This office does not have jurisdiction to address any constitutional issues related to social media. Even so, a social media post created by a public official or employee in the course of public business is a public record. This is true regardless of forum.

Therefore, even if Dougherty was blocked – for reasons legitimate or otherwise – he can still submit a public records request for material germane to public business. If a fact-finder were to qualify Yocum's Facebook page as public, a block list would be subject to a public records request. It is not, as Spurr suggests, a record that needs to be created. It is a simple thing to navigate (e.g., Settings>Audience and

Visibility>Blocking). The block list appears there, and a screenshot can easily be taken.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the block list sought by the complainant can be rightfully considered a public record if the commissioner's page is used for public business in any measurable way.

If that is the case, the complainant is entitled to posts germane to public business, including blocked constituents. If there are individuals on that list that are blocked for personal reasons, those names can be redacted.

Luke H. Britt
Public Access Counselor

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