
OPINION OF THE PUBLIC ACCESS COUNSELOR

CURT NISLY,
Complainant,

v.

KOSCIUSKO COUNTY CLERK,
Respondent.

Formal Complaint No.
23-FC-91

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to the formal complaint alleging the Kosciusko County Clerk violated the Access to Public Records Act.¹ Attorney Adam D. Turner filed an answer on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on August 30, 2023.

¹ Ind. Code § 5-14-3-1-10.

BACKGROUND

In this case we revisit the issue of access to cast vote records.

On September 2, 2022, Curt Nisly (Complainant), filed a public records request with the Kosciusko County Clerk (Clerk) for a record termed a “Cast Vote Record” for the 2020 Primary and General Election.

By way of background, a Cast Vote Record (CVR) is an amorphous term encompassing any number of data sets and formats, which may or may not be available depending on the election office or the voting machine used in that county.

In September 2022, this office published a position statement on CVRs, observing that the term meant many different things to many different people and CVR was a catch-all term for those who were seeking to collaterally attack the legitimacy of an election.²

In that informal opinion, we reasoned that the public access process to request CVRs was not an appropriate way to challenge an election unless and until we received legislative or judicial clarification as to what the term may mean in practice.

Ultimately, we deferred to Election Division of the Indiana Secretary of State’s office who determined that the closest analog to a CVR was a ballot or other election material deemed to be statutorily confidential.

Nonetheless, Nisly filed another public records request to the Clerk for CVRs from the 2022 primary election. It was

² *Informal Opinion of the Public Access Counselor, 22-INF-7 (2022).*

denied on August 29 for reasons set forth in the Informal Opinion as well as the Election Division's guidance.

Nisly filed his complaint on August 30, 2023. Implicitly through his legal counsel, Nisly appears to argue that his attorney has obtained CVRs from other counties. Additionally, the Indiana Senate attempted to define confidential electronic material in 2023 but it did not make it out of committee. Inversely, Nisly argues CVRs are therefore not currently excluded from public disclosure.

The Clerk filed a response on October 3, 2023. The Clerk contends CVRs, whatever they may be, are excluded from disclosure under Indiana Election law because they are akin to a ballot, which are confidential by statute. *See* Ind. Code section 3-10-1-31.1(b). This mirrors the Election Division's position as well.

Additionally, this office reached out to counsel for Nisly asking for a definition of CVR. While counsel was unsure how to define them, she did say they are a printed capture of each vote cast without any identifying information about the voter. She indicated other clients have received them from other counties.

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 Kosciusko County Clerk’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 Clerk’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 intersection of APRA and election law and revisits the issue of Cast Vote Records.

2. Disclosure of election material

Prior to 2022, this office had not addressed the issue of Cast Vote Records (CVR). This is seemingly because the esoteric term entered the zeitgeist from certain modern electronic voting machines under fire by those challenging the 2020 election. Notably, Indiana election officials do not use the type of machines in the national conversation.

Instead, the term CVR was projected onto the types of election machines used here in Indiana. This caused significant confusion among election officials who were left stymied by the term.

After a thorough investigation, this office determined that a submission using the term “CVR” was simply not enough to give election officials the requisite information to act on a public records request. Attempts to transmogrify “CVR” into disclosable material proved to be a challenging, if not impossible task.

Several things can be true at once in this context: some counties may interpret CVR to include election material that does not run afoul of confidentiality provisions in Indiana law; different voting machines can yield different types of documents; and the public access process is a misplaced vehicle for a wholesale audit of an election.

Public access requests can be useful to find an individual’s voter registration status. It can be beneficial when seeking a tally of votes. It will be advantageous in seeking notices, agendas, and minutes of election board meetings.

But it is certainly a poor substitute for challenging elections on a broad scale.

The CVR requests reviewed by this office in 2022 were generic lists of data sets that not every county could produce or contained even more cryptic terms specific to other machines or jurisdictions. Some sought individual, yet redacted, ballots.

Simply put, other than by way of an enhanced access agreement, the Access to Public Records Act does not stand for the premise that a determined researcher can crack into a system and extract all the data convenient to satisfy an individual’s curiosity. APRA is a mechanism to seek a known record or set of records that is identified by reasonable particularity with commonly known terms.

Furthermore, the manner and methods in which elections can be challenged and contested is an area of the law of which this office does not have jurisdiction. Similarly, the public access counselor is not able to legislate by defining terms of which another agency has subject matter expertise and knowledge. Therefore, we defer to the Election Division of the Secretary of State's Office's judgment.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Kosciusko County Clerk did not violate the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LHB', is positioned above the name of the Public Access Counselor.

Luke H. Britt
Public Access Counselor

Issued: December 5, 2023