



STATE OF INDIANA

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Via email transmission

November 23, 2016

Ms. Andrea Huntington, Esq.
C/o City of South Bend Legal Department
1200 County-City Building
227 West Jefferson Boulevard
South Bend, Indiana 46601

Re: Informal Inquiry 16-INF-30; Text Messages

Dear Ms. Huntington:

This is in response to your informal inquiry regarding whether text messages are subject the Access to Public Records Act ("APRA"). Pursuant to Indiana Code § 5-14-5 et. al., I issue the following informal inquiry response.

BACKGROUND

You seek a determination as to whether text messages sent by public employees are subject to the APRA and any accompanying retention considerations. You ask whether there is a distinction between messages sent by city-owned phones versus personal cell phones and whether they are both public business messages and personal messages which should be retained.

ANALYSIS

Whenever a public employee or official is memorializing public business, in writing, by whatever medium, the resulting document becomes a public record. Pursuant to Indiana Code § 5-14-3-2(o), the very definition of public record leaves no doubt text messages are indeed public business records:

"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.

The Indiana Archives and Records Administration (IARA) has confirmed there is no specific retention schedule published by the Oversight Committee on Public Records, however, text messages could ostensibly fall into the “general files” category, which carries with it a three-year retention cycle. General files are defined as “Office records that are not related to policy implementation. This series includes correspondence, memos, and routine staff files”.¹ In any case, text messages are not statutorily excepted from disclosure.

Complicating the issue is there is no question many public employees at the state and local level use both government issued and personal cell phones to compose text messages. When a public official is conducting public business, he is acting on behalf of the public agency as an agent of that entity, even if he does so on a personal device on personal time. It is the content of the message which is the critical element. This is buttressed by the definition of public record in the statutes governing the Indiana Archives and Records Administration. Consider the following found at Indiana Code § 5-15-5.1-1.

"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, and which is generated on:

- (1) paper or paper substitutes;
- (2) photographic or chemically based media;
- (3) magnetic, electronic, or machine readable media; or
- (4) **any other materials, regardless of form or characteristics.**

Emphasis added.

The APRA does not speak to text messages and, to my knowledge, Indiana Courts have not addressed text messages as public records. *Opinion of the Public Access Counselor 12-FC-83* did find text messages to be subject to retention and a violation if not retained. In my opinion, content is key in determining whether to retain text messages. While most are likely fleeting and transitory, they can certainly document conversations relating to substantive policy and business.

“Transitory” does not have a definition in Indiana Code, however, it is known generally as personal records, unsolicited advertising or spam, carbon copies from mass emails such as a listserv, and duplicative non-records used for reference or research. The definition of personal records in Indiana Code § 5-15-5.1-1(m)(1) also sheds some light on what types of text messages may be discarded:

all documentary materials of a private or nonpublic character that do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of a public official, including diaries, journals, or

¹ http://www.in.gov/iara/files/county_general.pdf; GEN 10-4

other personal notes serving as the functional equivalent of a diary or journal that are not prepared or used for, or circulated or communicated in the course of, transacting government business;

The practical problem with retention is that there is often no central server where text messages are stored. Governmental units provide smartphones to their employees through outsourced providers or employees use personal devices. Unlike emails, local government servers do not capture the messages. While they are most likely akin to instant messages and mostly a substitute for brief face-to-face conversations, they are documented records of actions of public employees. The practice of retaining those messages would likely be costly and time-consuming; therefore, my recommendation is each agency develop and implement a policy so that employees do not potentially run afoul of APRA considerations.

Best practice would dictate each employee keep track of his or her own substantive public business messages and retain them on their own respective devices – personal or government issued. This shows good faith and stewardship of government-related information. As for requests for text messages, I would suggest the standard of reasonable particularity for emails be maintained as well: a named sender, a named recipient, a finite subject matter and a six-month-or-less timeframe. Recognizing search capabilities for text messages would be tedious and less robust than an email query, the more specificity the better when it comes to requests.

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt
Public Access Counselor