STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

June 15, 2018

Ms. Catherine Haines
Court Administrator
Hendricks County Courts
51 W. Main St. #101
Danville, IN 46122

Via email to chaines@co.hendricks.in.us

Re: Informal Opinion 18-INF-05; Emails of Judicial Officers; Text messages

Dear Ms. Haines:

This informal opinion is in response to your inquiry about whether the email messages of judicial officers, and text messages on the personal mobile device of the chief probation officer are subject to disclosure under the Access to Public Records Act ("APRA"). In accordance with Indiana Code section 5-14-4-10(5), I issue the following informal opinion to your inquiry.

BACKGROUND

You have raised the following two issues in your informal inquiry to this Office. Specifically:

1. Whether e-mails sent/received by judicial officers are subject to disclosure under APRA as public records; and
2. Whether text messages sent/received on the personal cell phone of the Chief Probation Officer are subject to disclosure under APRA…

I will address each issue in turn.

DISCUSSION

The Access to Public Records Act ("APRA") and Administrative Rule 9

The Access to Public Records Act ("APRA") expressly states that "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. In general, APRA governs access to public records in Indiana. What is more, public records are presumptively disclosable unless an exception applies.

APRA has both mandatory and discretionary exceptions to disclosure.[1] Notably, Indiana Code section 5-14-3-4(a)(8) provides: "[r]ecords declared confidential by or under rules adopted by the Supreme Court of Indiana" are not "subject to disclosure unless access is required by state or federal statute or access is ordered by a court under the rules of discovery."

Indiana Administrative Rule 9, promulgated by the Indiana Supreme Court, governs public access to, and confidentiality of, court records. Critically, except as provided by Administrative Rule 9, access to court records is governed by APRA. In other words, if Administrative Rule 9 is silent on an open records issue, then APRA controls public access.

1. Whether e-mails sent/received by judicial officers are subject to disclosure under APRA as public records?

Generally, unless an exception applies, emails are disclosable public records under APRA. 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). Even though email is not specifically addressed in the statute, there is no genuine dispute that emails qualify as *public records* based on APRA's broad definition of the term.

As a result, the issue is whether an exception applies under Administrative Rule 9, and if not, under APRA that exempts the emails sent and received by judicial officers, which in this context means "elected trial court judges" as you specified.

1.1 Administrative Rule 9(G) Exceptions to Disclosure

In general, all court records are accessible to the public. *See* Admin. R. 9(D)(1). The confidentiality of court records, that is, the exceptions to the general rule of access is governed by Administrative Rule 9(G).

Administrative Rule 9(G) does not make any explicit categorical exception for a judge's email messages. The rule does, however, specifically exempt "all personal notes, e-mail, and deliberative material of judges…" that are connected with individual case records.[2] The term *case record* is defined as

> Any document, information, data or other item created, collected, received or maintained by a court, court agency, or Clerk of court in connection with a *particular case.*

[1] Ind. Code §§ 5-14-3-4(a) and (b).
[2] Admin. R. 9(G)(2)(i).

Admin. R. 9(C)(2)(emphasis added). Because Administrative Rule 9(G)(2)(i) expressly excludes "all personal notes, e-mail, and deliberative material of judges…" that are connected with a *particular case*, I conclude that emails sent and received by judges concerning specific cases are excepted from disclosure for purposes of APRA.

To the extent that an email message is not connected with particular case and otherwise not excepted by Administrative Rule 9(G), APRA will govern public access. Indeed, unless an exception applies, emails are public records for purposes of APRA and presumptively disclosable upon the agency's receipt of a reasonably particular request. As stated above, APRA contains both mandatory[3] and discretionary[4] exceptions to disclosure that may apply to a judge's emails if Administrative Rule 9(G) is silent.

2. Whether text messages sent/received on the personal cell phone of the Chief Probation Officer are subject to disclosure under APRA?

The Access to Public Records Act ("APRA") does not specifically address text messages. Even so, this Office has provided guidance on the issue[5] and incorporates that response by reference here.

Whenever a public employee or official memorializes public business, in writing, regardless of medium, the result is a public record. In accordance with Indiana Code § 5-14-3-2(r), the legislature's definition of *public record* leaves no doubt that text messages qualify as public records. Therefore, unless an exception applies, the text messages of a public official that are created or maintained in the course of conducting public business constitute a public records and are presumptively disclosable under APRA.

Furthermore, APRA does not specifically address public records on a non-governmental device. Even so, public agencies, officials, and employees should be mindful that APRA does not define *public record* based on where the record is stored or located. Stated differently, if something qualifies as a public record under APRA, it does not lose that status by storing it in a non-governmental email account or device. The same is true for a document pulled from a government file cabinet in the courthouse, that document does not cease to be a public record when it is transported from the government building to a non-governmental building.

Notably, probation in Indiana is a court function, and probation officers are trained, tested, hired, and supervised directly by the judiciary. Further, this Office is aware that the Indiana Probation Standards, promulgated by the Judicial Conference of Indiana, declare information contained in probation files as confidential. Still, it seems doubtful that text messages of the Chief Probation Officer would qualify as "information contained in a probation file;" and thus, would not be confidential per se.

---

[3] Ind. Code § 5-14-3-4(a).
[4] Ind. Code § 5-14-3-4(b).
[5] *Informal Inquiry,* 16-INF-30, (2016).

Best practice would dictate that each public employee keep track of his or her own substantive public business messages and retain them. This recommendation applies to personal or government-issued devices. As for requests for text messages, I suggest the standard of reasonable particularity as that used for emails: (1) Identified sender; (2) Identified recipient; (3) Reasonable timeframe (e.g., six months); and (4) Subject matter and/or keywords.

Please do not hesitate to contact me with any questions.

Best regards,

Luke H. Britt
Public Access Counselor