STATE OF INDIANA

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July 31, 2018

Ms. Kayla Sullivan
Via email

Re: Informal Opinion 18-INF-08; Social Media Accounts of Public Officials

Dear Ms. Sullivan:

This informal opinion is in response to your inquiry regarding government officials' use of social media 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 issues in your informal inquiry to this Office. Specifically:

1. When it comes to public access, do you advise government officials to keep their accounts public? Why or why not?
2. Should a government official ever block a reporter and/or a constituent? Why or why not?

I will address each issue in turn.

DISCUSSION

The Access to Public Records Act ("APRA")

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.

1. Access to government officials' social media accounts

Social media is not expressly addressed in statute or by the state judiciary. Therefore this is a matter of first impression. Simply put, the legislature cannot realistically keep up with each iteration of an emerging technology. In terms of public access, social media is very

much a disruptive technology but not necessarily in a negative way. In fact, it presents opportunity to enhance access. Even still, it poses challenges.

Statutorily, this Office has the unique opportunity via these informal opinions to educate public officials on their responsibilities under the access laws pursuant to Indiana code section 5-14-4-10. To the extent the legislature or judiciary has not addressed a certain matter, this Office generally approaches issues by exploring other persuasive authorities, consulting subject matter experts and inferring intent from other Indiana statutes. Because the APRA is to be liberally construed in favor of transparency pursuant to Indiana code section 5-14-3-1, this often appears as if this Office is legislating from the executive branch, however, these opinions are intended to be recommendations, educational opportunities and intellectually honest interpretations of existing authority.

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 also *Opinion of the Public Access Counselor 16-FC-150* 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) wherein Justice David opined on the part of the majority 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 at Indiana code section 5-15-5.1-1(o):

> "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 can qualify as public records based on APRA's broad definition of the term if the content is germane to public business. 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. Readers should take into consideration that this analysis only applies to a public official's accounts which are held 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 in which the employee or official conducts public business[1].

2. Should a government official block a reporter or a constituent?

It is the public policy of the state 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. See Ind. Code § 5-14-3-1. Therefore anyone has the right to inspect the public records of an agency or its representatives. A government unit (or its agents) may not deny or interfere with the exercise of this right. See Ind. Code § 5-14-3-3.

Ostensibly, blocking a follower or user of a public officials' social media account is a barrier to access. The creation of a public forum for constituents has been addressed in Federal district court on a number of occasions.[2] To the extent any Constitutional First Amendment issues are implicated, this Office declines to weigh in on those as it is largely outside the scope of its jurisdiction. From a public access standpoint, however, if the employee or official is using the account for public business purposes, they cannot avoid disclosure of that material simply by blocking a follower. Therefore it matters not whether an individual is blocked, that individual can simply request the timeline, feed, or page and it must be disclosed regardless if a public forum is created. The *nature* of the social media account is the operative consideration.

From a practical standpoint, it may be prudent to implement some basic parameters around a forum based upon the manner of communication rather than substantive content. For example, the State Personnel Department of the State of Indiana has a robust policy on when a comment may be hidden from public view[3]. These are non-discriminatory factors and will only be triggered when there is profane or abusive communication. As a model policy, I encourage public officials to take note of SPD's guidelines.

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[1] Campaign business likely would not qualify as public business, however, a campaign of an incumbent often blurs the lines as to what is public business and what is campaign-related. Officials should be mindful of this nuance.

[2] See *Davison v. Loudon County Board of Supervisors*, 227 F. Supp. 3d 605 (2017); *Knight First Amendment Inst. at Columbia University v. Trump*, 302 F. Supp. 3d 541 (2018).

[3] https://www.in.gov/spd/2719.htm

In the event officials consider their public social media pages to be "work product" or "deliberative" and therefore non-dislosable, that argument does not hold water as the remainder of the non-blocked community can view the posts as a front-facing public site. Whether it be the media, disgruntled constituents or opposing political parties, public officials should not "pick and choose" who they serve and who they do not by allowing access to some but not others.

3. Recommendations

As noted above, the Indiana General Assembly cannot reasonably anticipate each and every possible scenario that may have public access implications as it relates to emerging technology. So the solution is less statutory than one of best practice and good governance. This Office is a bit more nimble in how it can provide guidance and interpretation on a case by case basis and indeed Public Access Counselor opinions do evolve with changing conditions.

Therefore this Office discourages blocking social media followers if the account is created for the purposes of conducting public business. It is a barrier to access and the practice often discriminates between users based upon ideology rather than objective factors. Social media creates a forum. If that forum is kept private and internal for non-public business purposes, then it may remain private and a public employee does not lose the privacy expectation of a personal account. Once that account is held open as a public-business-related forum, however, all comers should be welcome regardless of their ideological, political or community standing.

Please do not hesitate to contact me with any questions.

Best Regards,

Luke H. Britt
Public Access Counselor