



STATE OF INDIANA

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RE: Opinion 22-INF-7; Public Access to Cast Vote Records

This opinion examines issues raised by several formal complaints filed with this office against county circuit court clerks and the Indiana Election Division over access to data from the 2020 general election commonly referred to as “cast vote records.”

BACKGROUND

Beginning in August, county clerks throughout the state began receiving public records requests for data from the 2020 general election commonly referred to as a “cast vote record.”

On August 26, 2022, the Indiana Election Division—a division of the Secretary of State’s office—issued a memo to circuit court clerks, election directors, and election administrators offering guidance on handling the pending requests. In sum, the Indiana Election Division concluded a CVR is confidential by statute; and thus, not disclosable under the Access to Public Records Act (APRA). Specifically, the election division asserted that a CVR is the equivalent of a ballot¹ cast in an election because it contains information on how each individual ballot was cast and tabulated, which includes individual selections made by the voter as recorded on a direct record electronic (DRE) voting system.

Additionally, the election division asserted that a CVR is confidential even if a specific ballot cannot be traced to a specific voter because providing the CVR would disclose the name of each candidate and public question answer each voter selected.

Around the same time, this office began hearing concerns from requesters and public agencies regarding access to CVR data. Requesters were

¹ “Ballot” is defined under Ind. Code § 3-5-2-3.

interested in both accessing the CVR data and extending the 22-month retention period to prevent the data from being discarded. Most, if not all, of the requesters that contacted this office were convinced the CVR data would be deleted or destroyed on Saturday September 3, 2022.

This office received 17 formal complaints against 14 counties. Most complainants requested priority status, which this office denied. None of the complainants cited any discernable reason for priority status as required by the Indiana Administrative Code. *See* 62 IAC 1-1-3.

Since the nature and substance of the complaints are substantially similar, this office consolidated the complaints into one action. This opinion will apply to each of the pending complaints concerning public access to and retention of CVR data for the 2020 general election. Both the Indiana Election Division and the county circuit court clerks were advised of the complaints. An index of complaints can be found at the end of this opinion.

ANALYSIS

1. The Access to Public Records Act (APRA)

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 Indiana Election Division and county circuit court clerks are public agencies 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 an agency’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).

1.1 Cast vote record (CVR)

At the heart of this controversy is what “cast vote record” means. As an initial matter, the term “cast vote record” is not defined under the Indiana Code or relevant caselaw. The public records requests appeared universal and not specific to Indiana.

Even so, the Indiana Election Division observed that a cast vote record is generally defined as “the individual lines of data that capture how each individual voter voted. This could be the data entered on a direct record electronic voting system or data pulled from a scanned ballot card by a ballot card tabulator.” The division cited Indiana Code section 3-10-1-31.1(b), in part, as authority to preserve the confidentiality of ballots. By the election division’s definition, cast vote records remain confidential as well.

Based on the information provided from election officials, voting machine vendors, and the requesters, there is significant and disparate disagreement about what data and reports are available from county clerks, much less what a “cast vote record” even is. In fact, many complainants submitted material suggesting “cast vote record” is a fungible term that could entail several different definitions and associated data.

What is more, some terms appear to be only applicable to an official statutory audit or recount period versus what is available to the general public once those contests are concluded. Additionally, many of the terms used by some of the requesters seem to be specific to a certain type of election machine that is simply not used in Indiana. In other words, there is no homogeneous definition of “cast vote record,” which makes it impossible to reconcile the various interpretive definitions without a fact finding.

Many requesters rely on legal authority from other states as support for their position. Out-of-state authorities, however, are not binding on Indiana. Other states define “cast vote record” but their laws are written differently from those in Indiana. The complainants did not provide sufficient countervailing evidence or persuasive arguments demonstrating any of the denials were deficient.

Toward that end, the investigative authority of this office and the formal complaint process is governed by statute. *See* Ind. Code § 5-14-5-1, to -12. Although a public agency is required to cooperate with this office during any investigation or proceeding, this office does not have administrative subpoena power, the authority to order and take sworn testimony, or to authenticate evidence.

When there can be no consensus on the public records sought, it is inappropriate for this office to make a definitive conclusion in an administrative context. Ultimately, the complainants and respondents cannot agree on the “who,” “what,” “when,” and “where.”

Judicial remedies are available under APRA to anyone dissatisfied with this opinion, however, there are no further administrative remedies through this office. Petitioning a court for a declaratory judgment or injunction is one avenue, as is approaching legislators for statutory clarification. The complainants sought and received this advisory opinion. As a result, this office’s role in this matter has concluded.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the respondent agencies carried their initial burden of proof for the nondisclosure as required under the Access to Public Records Act.



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Appendix A:

1. Martin Bloomfield v. Allen County
2. Rocke Woelk v. Boone County
3. Pamela S. Arias v. Elkhart County
4. Lois Hertog v. Floyd County
5. Anne C. Duell v. Green County
6. Dawn R. Rogers v. Hamilton County
7. Julia K. Bond & Clee R. Oliver v. Howard County
8. Daniel Morris v. Hendricks County
9. Rocke Woelk v. Johnson County
10. Heather Cripe & Shelia Madjecki v. Lake County
11. Rochelle F. Fox v. Marion County
12. Creighton Prawat v. Marshall County
13. Julia Bond v. Monroe County
14. Cheryl Glotzbach & Glendon Jungels v. Tippecanoe County
15. Julia Bond v. Tipton County
16. Rebecca Rutledge v. White County