



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
JOSEPH B. HOAGE**

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

February 27, 2013

Ms. Heather Vogell
435 W. 119th St., Apt. 9-B
New York, New York 10027

Re: Formal Complaint 13-FC-26; Alleged Violation of the Access to Public Records Act by the Indiana Department of Education

Dear Ms. Vogell:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Education ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Maggie Paino, Legal Counsel, responded on behalf of the Department. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that you submitted a written request for records to the Department on October 10, 2012. You specifically sought copies of all letters, memos, reports, emails or other correspondence concerning fines either levied or proposed against companies offering a testing-related service to the state since 2001. As of January 28, 2013, the date you filed your formal complaint with the Public Access Counselor's Office, you still have yet to receive any records in response to your request. You provide that you have made similar requests to all 50 states to which you have either already been provided with the records or have modified your request to alleviate any hardship.

In response to your formal complaint, Ms. Paino advised that the Department received your written request for records on October 15, 2012. The Department acknowledged the receipt of the request in writing on October 22, 2012 and asked for further detail as the initial request was too broad and lacked clarity. The Department also followed up with you on this issue in a phone conversation on October 22, 2012. Ms. Paino advised that you refused to provide specifics on the records that were sought and informed the Department that most assessment offices for Education Departments are aware of what records were being sought and demanded that the Department contact its own assessment office for clarification. Because of the lack of particularity, your request became rather voluminous, requiring the Department to compile multiple types of

correspondence spanning a period of 11 years. Not until January 15, 2013 did you offer to modify your request, three months after the Department asked for the clarification.

In addition to the difficulty of addressing such a broad request, during the month of December the Department moved to a new office facility. The move displaced and limited the Department's normal resources. Further, on December 10, 2012, the public access administrative assistant went on maternity leave. On January 14, 2013, the Department experienced an administrative transition with newly elected Superintendent Glenda Ritz taking office. With the arrival of Superintendent Ritz, the Department saw a turnover in staff that included the Department legal counsel for public access. Regardless of these issues, the Department has provided you with records responsive to your request and is in the process of reviewing and redacting additional records that have been recently retrieved. The remaining records will be provided upon completion of the review.

ANALYSIS

The public policy of the 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." See I.C. § 5-14-3-1. The Department is a public agency for the purposes of the APRA. See I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Department's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. See I.C. § 5-14-3-3(a).

A request for records may be oral or written. See I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. See I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here the Department acknowledged the receipt of your request in writing within seven (7) days of its receipt. As such, it is my opinion that the Department complied with the requirements of section 9(b) of the APRA in response to your request.

The APRA requires that a records request "identify with reasonable particularity the record being requested." I.C. § 5-14-3-3(a)(1). While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor. Counselor Neal provided the following regarding "reasonable particularity":

"When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998).

Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. App. 1991). “Particularity” as used in the APRA is defined as “the quality or state of being particular as distinguished from universal.” *Merriam-Webster Online*, www.mw.com, accessed July 18, 2007. There are no specific guidelines as to what constitutes reasonable particularity. Certainly a request cannot always be considered to be made without reasonable particularity solely because it covers a large number of records. As I general guideline, I advise agencies that when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity. *Opinion of the Public Access Counselor 09-FC-24*.

Because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88*.

You specifically sought copies of all letters, memos, reports, emails or other correspondence concerning fines either levied or proposed against companies offering a testing-related service to the state since 2001. Upon receipt of your request, the Department asked that you clarify your request as it related to “fine and test-related services” in an October 22, 2012 email from Ms. Katie Williams-Briles. At some point thereafter, you and Ms. Williams-Briles had a phone conversation regarding your request. On November 13, 2012, you followed up with Ms. Williams-Briles in an email regarding the status of your request. She returned your email the following day and advised that she had contacted the Department’s Assessment Office and informed you that the Office was in the process of reviewing records responsive to your request. After further correspondence over the next two months, on January 15, 2013 you informed the Department that you were open to modifying your request if the Department was finding it onerous to respond to. From my review from all that has been provided, the Department clarified your request in early November 2012. While the request was considered to be “reasonably particular” in early November 2012, it was considered quite broad in light of the records being requested and the timeframe of the request. The expansive nature of the request would significantly affect the Department’s ability to comply with section 3(b) of the APRA which requires that all records be provided in a reasonable period of time.

The APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that among the factors to be considered in determining if the requirements of

section 3(b) have been met include, the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and redacted prior to disclosure. The APRA requires an agency to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. *See* I.C. § 5-14-3-6(a). Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

You originally submitted your request on or about October 12, 2013. The Department timely responded to the request in writing pursuant to the requirements of section 9(b) of the APRA. Your request was clarified and was thus made with 'reasonable particular' in early November 2012. The Department has provided that the scope of your request was quite broad due to the records that were sought and the eleven-year time period that the request covered. In November 2012, December 2012, and January 2013, you inquired with the Department regarding the status of your request, to which the Department responded within one day of the receipt of each inquiry. The Department has now made an initial disclosure of records responsive to your request and plans to provide the remaining records shortly. Other factors affecting the timeliness of production include the Department's transition to a new office building, the maternity leave of Ms. Williams-Briles, and most importantly, the turnover of staff that had previously handled your request after the election of Superintendent Ritz. In light of all of these factors, it is my opinion that the Department has currently complied with the requirements of section 3(b) of the APRA in response to your request. However, I believe the Department's handling of your request should take priority over all other pending records requests. I would *strongly* encourage the Department that all remaining records are provided no later than March 13, 2013 in light of the original submission date of the request (emphasis added).

CONCLUSION

Based on the foregoing reasons, it is my opinion that the Department complied with the requirements of section 9(b) of the APRA in response to your request. Further, it is my opinion that the Department has currently complied with the requirements of section 3(b) of the APRA. However, I believe the Department's handling of your request should take priority over all other currently pending records requests. I would *strongly*

encourage the Department that all remaining records are provided no later than March 13, 2013 in light of the original submission date of the request (emphasis added).

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Maggie Paino