



STATE OF INDIANA

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September 29, 2010

Mr. Richard E. Volbrecht, Jr.
9221 Parkway Dr.
Highland, IN 46322

Re: Formal Complaint 10-FC-196; Alleged Violation of the Access to Public Records Act by the Indiana Department of Education

Dear Mr. Volbrecht:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Education ("IDOE") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-3 *et seq.* The IDOE's response to your complaint is enclosed for your reference.

BACKGROUND

In your complaint, you allege that on August 28, 2010, you requested¹ access to "Core 40 results for Alg [sic] I and English 10 for school year Aug [sic] 2009 thru [sic] June, 2010." You claim that you communicated your expectation that if the IDOE denied you access to the records, the IDOE should cite a specific statute justifying its denial. However, you claim that Wes Bruce of the IDOE failed to cite to such a statute.

Assistant Superintendent Heather Neal responded to your complaint on behalf of the IDOE. Ms. Neal claims that the IDOE did not violate the APRA and is, in fact, still working to make the information you requested available. She notes that IDOE's Office of Student Assessment administers end-of-course assessment ("ECA") tests. The IDOE does not release student-specific test results because such records are confidential under federal law. However, the IDOE does make aggregate test score data available to school corporations and the general public. Accordingly, after the ECA testing is completed at the school level, the IDOE conducts what Ms. Neal describes as "a significant amount of data clean-up before making the results available." The IDOE brings in a group of

¹ In your complaint narrative, you allege that you sent a request to the School Town of Highland. However, because you did not name the School Town of Highland as the public agency that denied you access to the records, I will not address that allegation in detail here.

practitioners to look at the test questions as well as the impact data to set the passing score or cut score. The ECA cut scores were approved by the Indiana Education Roundtable and the Indiana State Board of Education in early August. Since then, Ms. Neal states that “the IDOE staff has spent a considerable amount of time, working almost around the clock, conducting data clean-up to get the ECA results to the school corporations and the public as soon as possible.” She says that the IDOE wants to release the information to the public and school corporations as soon as possible, but the records do not yet exist. Ms. Neal expects the data to be available via the IDOE’s website within the next weeks.

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.” I.C. § 5-14-3-1. The IDOE does not dispute that it is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the IDOE’s public records during regular business hours unless the records are excepted from disclosure as confidential or nondisclosable under the APRA. I.C. § 5-14-3-3(a).

It is unclear whether or not you seek access to student level test data. Regardless, I agree with Ms. Neal that such data is confidential under subsection 4(a)(3) of the APRA and cannot be disclosed by the IDOE. I.C. § 5-14-3-4(a)(3). One exception to the public’s general right to inspect and copy a public record applies when federal law classifies a record as confidential. I.C. § 5-14-3-4(a)(3). Here, the IDOE cites to the Federal Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(g). FERPA operates to classify all “education record[s]” as confidential: “No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein...” 20 U.S.C. § 1232g(b)(1). “Education record” is defined as those records that are directly related to a student and maintained by an educational agency or institution or by a person acting for such agency or institution. 34 C.F.R. § 99.3. Based on these provisions, it is my opinion that FERPA operates to classify as confidential all student-level ECA test data.

Moreover, it is my opinion that the IDOE did not violate the APRA by failing to produce the ECA results to you if the data had not yet been cleaned. From my understanding, the raw data is useless prior to the completion of the cleaning process because the cut scores have not been applied to show pass and cut rates. In other words, the IDOE does not actually “maintain” – for purposes of the APRA -- the ECA tests until the cleaning process is completed. Consequently, the IDOE did not violate the APRA by failing to release records that the IDOE does not yet have. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *See, e.g., Opinion of the Public Access Counselor 01-FC-61; see also Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the

[agency] could not be required to produce a copy....”).

The public access counselor has repeatedly opined that public agencies are under no obligation to create new records in response to a public records request. *See, e.g., Opinion of the Public Access Counselor 10-FC-56* (“Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”). That said, it is my understanding that IDOE expects to complete the ECA results soon and make them available to you. Under the APRA, there are no prescribed timeframes when the records must be produced by a public agency. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances. In my opinion, it is reasonable for the IDOE to release the ECA information to you upon completion of the data clean process.

CONCLUSION

For the foregoing reasons, it is my opinion that the IDOE has not violated the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: Heather Neal