STATE OF INDIANA

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July 12, 2012

Christopher P. Hartley
2310 E. 11th Street
Indianapolis, Indiana 46201

Re: Formal Complaint 12-FC-146; Alleged Violation of the Access to Public Records Act by the Indianapolis Public Schools

Dear Mr. Hartley:

This advisory opinion is in response to your formal complaint alleging the Indianapolis Public Schools ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Roberta Recker responded to your formal complaint on behalf of the School. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on May 7, 2012, you submitted a written public records request to the school for "all emails sent or received by Superintendent Dr. Eugene White in the period from August 1, 2011 through May 7, 2012 using the email address whiteeg@ips.k12.in.us or any others." On May 9, 2012, the School responded in writing to your request and provided that it was compiling and reviewing the records and would either present the documents or a status update by June 1, 2012. The School further indicated that there would be a cost of $.10 per page.[1]

On May 15, 2012, you received a letter from Ms. Recker who advised that after the initial review, there were 20,000 records that would be responsive to your request and the approximate cost would be $4,000. You responded to Ms. Recker's correspondence on May 15, 2012 and informed her that you would provide your own electronic media and did not need paper copies. Receiving no reply from Ms. Recker, you sent a follow-up email on May 22, 2012 to inquire about the June 1, 2012 deadline.

[1] The School noted in its May 9, 2012 response that it would not produce any e-mails from any "non-ips email addresses." I would note that due to the broad nature of "public record" as defined by I.C. 5-14-3-2(n) any e-mail sent or received from a public agency e-mail account would be considered a public record, regardless of the sender or recipient. After determining whether a record is a public record, it is an altogether separate inquiry whether the record is exempt from disclosure under the APRA or if the agency is required to retain the record. If the agency has a record that is responsive to the request at the time the request was submitted, the agency must either provide the record or cite to the specific statutory exemption authorizing the withholding or all or part of the record.

On May 25, 2012, you received correspondence from the School that a significant portion of the records were exempt from disclosure and that the School would print the records so that it could review and redact material that is exempt from disclosure. The School further noted that I.C. § 5-14-3-3(b) permits the School to determine in which of the alternative matters to respond. Lastly, the School provided that if you would like an initial one-hundred e-mails, redacted, you were to advise the school that you were willing to pay the associated copying fees. You responded to the School's May 25, 2012 correspondence and re-iterated your request to receive the documents electronically or review them in person with your own copying equipment. Since that time, you have yet to receive a response from the School.

As you desire to either receive the records electronically or review them in person, you allege that the School district's insistence that you pay copying fees is in fact a fee to "review a record to determine whether the record is disclosable", which is not allowed under the APRA. You would like to either receive the documents electronically or if not possible, review them in person and duplicate them with your own equipment.

In response to your formal complaint, Ms. Recker reiterated the events leading up to the filing of you formal complaint with the public access counselor's office on June 12, 2012. As an addition, Ms. Recker advised that on July 3, 2012, your were advised, in an amended response, that the School was denying your request for disclosure due to you had failed to identify the records sought with reasonable particularity based on "further research into the volume of records subject to your request, the estimated time it would take the School to redact the portions of the records prohibited from or not subject to disclosure, and legal authorities addressing the obligation of the requesting party to identify the records sought with reasonable particularity . . ."

The School has advised that it is not legally required to produce any documents in response to your request because the request is overly broad. The APRA requires that a request for public records identify with reasonable particularity the records being requested. Although an e-mail is a public record, e-mail is a method of communication. The Public Access Counselor has stated that a "request which identified the records only by a particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits. *See Informal Opinion 11-INF-63; 11-INF-257*. Further, the Public Access Counselor has advised that at a minimum, a request for e-mail correspondence generally must include the sender, received, and a date range in order to be reasonably particular. Your request is universal, which is exactly the type of request the Counselor ahs condemned as overly broad. As your request fails to identify with reasonable particularity the records sought, the School has no obligation to produce them.

As to the format of your request, the School has offered to produce redacted copies of responsive records; however the School is not required to produce the records in the electronic format that Mr. Hartley demands. Both the text and guidance from the Public Access Counselor's Office confirm that "the APRA places the responsibility for making a determination on the production of this information in the hands of the public agency, not the requestor."

A similar issue was raised in a January 2008 informal opinion raised by the Warrick County School Corporation. The School sought guidance from the Public Access Counselor about how to download, redact, and produce the emails and how much a charge could be made for this production. In a January 23, 2008 informal opinion, the Counselor stated:

> If the requestor provides the USB drive and the School is able to download the records to the USB drive in the form they currently exist, it is my opinion that were would be no associated cost. If, however, some of the emails must be redacted and the School does not have reasonable access to redaction software of some other method to provide the redacted materials electronically, it is my opinion that the School would print those records, redact the nondisclosable infomratino, and charge the requestor the per page cost established by the fiscal body pursuant to I.C. § 5-14-3-8(d).*See Informal Inquiry 12308.* *http://www.in.gov/pac/informal/files/Informal_Inquiry103_12308.pdf*

As applicable here, the software that permits redactions is not installed in the computers of the individuals who would review and redact and redact the e-mails. Further, IPS has determined that the redaction can be done more quickly, carefully, and efficiently working with paper records. The School believes that it is its judgment to make.

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 School 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 School'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 in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). 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 include information regarding how or when the agency intends to comply. Here, you submitted your initial written request to the School on May 7, 2012 to which the School responded in writing on May 9, 2012. As such, it is my opinion that the School complied with the requirements of section 9 of the APRA in responding 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). However, 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.* In its July 3, 2012 amended response, the School denied your request because it failed to identify the records with reasonable particularity. As such it is my opinion that the School violated the APRA when your request was denied in such a fashion. The School's proper response to such a request would be to seek further clarification from you rather than simply denying the request.

Regarding your request for e-mail correspondence, I addressed similar issues that are presented here in a prior advisory opinion. In 11-FC-257, I stated as to a request for e-mail correspondence and the requirement of reasonable particularity:

> As to your request in Item 2 for all e-mails sent or received by five (5) School employees from May 1, 2011 through August 5, 2011, prior public access counselors had opined on this issue. APRA requires that a request for inspection or copying identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). Counselor Neal provided the following under in a 2009 opinion:
>
> > With your request, you seek "all emails sent and received by you in the last 100 days." The County argues this request does not identify with reasonable particularity the record(s) being requested. The APRA requires that a request for access to records identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). "Reasonable particularity" is not defined in the APRA. "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. Ct. 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. Ct. 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.m-w.com*, accessed July 18, 2007.
> >
> > In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain

form of communication. It is important to remember that electronic mail is a method of communication and not a type of record. Electronic mail is one way an agency might receive correspondence. As Mr. Murrell indicates, and as I often advise people, electronic mail messages are similar to postal mail or facsimile transmissions. And certainly few individuals would disagree that a request for any piece of mail sent or received by an agency or official within the last one hundred days would be considered an overly broad request which does not identify with reasonable particularity the record being requested. The same is true for electronic mail messages. That the correspondence is communicated using a different medium does not change the scenario; in my opinion a request which identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits.

I have previously issued an advisory opinion in a similar matter regarding a request for access to electronic mail messages. In *Informal Opinion 08-INF-23*, I wrote the following:

If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure. *Informal Opinion 08-INF-23*, available at www.in.gov/pac.

Similarly, it is my opinion here that your request is overly broad. If your request identified particular records in such a way that the agency could identify which records you seek, the agency could better address your request. For instance, you might narrow your request to messages between a county official and certain other individual(s) for certain dates. In some cases, an agency may also be able to sort messages on the basis of the subject of the email. But this type of search is only as good as the information which appears in the "Subject" line of each electronic mail and is only feasible where an agency has the technology to conduct a search other than a manual search. *Opinions of the Public Access Counselor 09-FC-124 and 11-FC-12.*

> I agree with Counselor Neal's and Kossack's analysis in regards to this issue. As such, it is my opinion that your request was not reasonably particular and did not meet the requirements of I.C. § 5-14-3-3(a). If you would narrow your request by providing the sender, recipient, and a particular range of dates, the School should comply with the request unless an exception to the APRA permits or requires withholding all or part of any records responsive to your request. Therefore, it is my opinion that the School did not violate the APRA in responding to Item 2 of your request. *See Opinion of the Public Access Counselor 11-FC-257.*

The guidance provided by the Public Access Counselor's on e-mail correspondence and APRA's requirement of reasonable particularity dates back to 2008. The following informal and formal opinions have addressed this issue: 08-INF-23, 09-FC-24, 09-FC-104, 09-FC-124, 10-FC-57, 10-FC-71, 10-FC-272, 10-FC-311, 11-FC-12, 11-FC-80, and 12-FC-44. The formal and informal opinions provide that e-mail is a method of communication and not a type of record; requests for records that only identify the records by method of communication only are not reasonably particular. I am not aware of any case law from the Indiana Supreme Court or Appellate Court that has held the guidance provided by the Public Access Counselor was contrary to the APRA. Further, the Indiana General Assembly has not responded to the guidance provided the Public Access Counselor on this issue by amending the APRA.

As such, a request for all e-mail correspondence to and from Jane Doe for a range of dates is not reasonably particular. *See Opinion of the Public Access Counselor 09-FC-124, 11-FC-12, and 11-FC-257.* However, a request for all e-mail correspondence from Jane Doe to Jim Smith for a range of dates would be reasonably particular, *regardless* of how many records that are responsive to the request (emphasis added). *See Opinion of the Public Access Counselor* 09-FC-24. Using the above example, if Jane Doe had sent or received 20,000 emails from Jim Smith from January 1, 2011 – January 1, 2012, the agency would be required to produce the records or cite to the specific statutory exemption authorizing their withholding. A separate issue would arise as to what is a reasonable period of time to produce the records, which I will address below. As applicable here, your request for e-mail correspondence was not made with reasonable particularity as you have not provided the sender/recipient corresponding with Dr. White. Upon providing the necessary information to the School, it would be required to compile and produce all records that are responsive, regardless of the breadth of the request, minus any applicable statutory exemption authorizing all or part of their withholding.

Effective July 1, 2012, 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 factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA 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 edited to delete nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. 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*. Accordingly, the parties should keep this guidance in mind when Mr. Hartley resubmits a reasonable particular request for Dr. White's e-mail correspondence.

The APRA provides that an agency must make reasonable efforts to provide records in the medium requested, when those records are maintained in an electronic data storage system. *See* I.C. § 5-14-3-3(d). An agency can charge the agency's direct cost of supplying the information in the form of a computer tape, disc, or analogous record system. *See* I.C. §5-14-3-8(g).

Counselor Neal provided the following guidance as to this issue:

> If the requestor provides the USB drive and the School is able to download the records to the USB drive in the form they currently exist, it is my opinion that were would be no associated cost. If, however, some of the emails must be redacted and the School does not have reasonable access to redaction software of some other method to provide the redacted materials electronically, it is my opinion that the School would print those records, redact the nondisclosable information, and charge the requestor the per page cost established by the fiscal body pursuant to I.C. § 5-14-3-8(d).*See Informal Inquiry 12308.* *http://www.in.gov/pac/informal/files/Informal_Inquiry103_12308.pdf*

There is no dispute that the records that have been sought are created and maintained electronically. There have been no technology issues raised by the School regarding its inability to electronically provide the requested records. The School has further provided that it does have the software capable of electronically redacting the nondiscloseable information; however, the software is not available on the computers of those individuals who may review and redact the records. This is not a situation where the School does not own the required software, as it could not be said that the APRA would require an agency to purchase software in order to comply with a request for records. While the software not being available on the computers of those individuals who are to review and redact the records may affect the timeliness of the School's response, it is my opinion that the School does have reasonable access to the redaction software.

Previous opinions of the public access counselor have provided guidance where a requestor has been provided electronic records in a non-desired electronic format. *See Opinions of the Public Access Counselor 02-FC-23 and 07-FC-70.* Here however, the School desires to provide a record that is created and maintained electronically in a paper format. The overall affect of converting the records into a paper-format would result in a fee of greater than $4,000 to the requestor. If the requested record is a record created and maintained in an electronic format, it is the type of record contemplated by I.C. § 5-14-3-3(d). *See Opinion of the Public Access Counselor 08-FC-146.* An agency must make reasonable effort under 3(d) to provide a copy of the record in the medium requested if the medium requested is compatible with the agency's data storage system. *Id*. While the records may be provided in a timelier manner if produced in a hard-copy format, which is a factor the requestor must bear in mind, it is my opinion that it would not require an unreasonable effort by the School to provide the records in an electronic format in light of the record being created and maintained in an electronic format and the ability of the School to electronically redact the nondiscloseable information.

CONCLUSION

For the foregoing reasons, it is my opinion that the School acted contrary to the APRA when it denied your request for failure to identify the records sought with reasonably particularity. However, it is my opinion that the School can require that a request for e-mail correspondence include the sender, recipient, and date range. Further, it is my opinion that it would not require an unreasonable effort by the School to provide the records responsive to your request in an electronic format, in light of the record being created and maintained in an electronic format, and the availability of software to allow the School to make electronic redactions to nondiscloseable information.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Robert Recker