



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
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December 5, 2012

Wendella K. Brant  
9240 East 350 South  
Zionsville, Indiana 46077

*Re: Formal Complaint 12-FC-342; Alleged Violation of the Access to Public Records Act by the Zionsville Community Schools*

Dear Ms. Brant:

This advisory opinion is in response to your formal complaint alleging the Zionsville Community Schools ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Jeffery J. Qualkinbush, Attorney, responded on behalf of the School. His response is enclosed for your reference. I have granted your request for priority status pursuant to 62 Indiana Administrative Code 1-1-3(3).

## BACKGROUND

In your formal complaint, you provide that on November 19, 2012 you submitted a written request for records to the School, seeking copies of Exhibits A-E as part of the Assignment Agreement ("Agreement") entered into by the School, the Town of Zionsville, and Rockland Development. On November 20, 2012, Dr. Scott Robison, the School's Superintendent, responded in writing to your request and provided as to Exhibits A-E, the records were still being prepared and/or finalized and as such, the School was unable to provide you with a copy. Dr. Robison did provide that once the documents were finalized, a copy would be provided.

On November 26, 2012, you submitted a subsequent written request for records to the School for draft copies of Exhibits A-E as part of the Agreement. On November 27, 2012, Dr. Robison responded in writing to your request and provided the following:

- With respect to Exhibit A, the surveyor was currently preparing the ALTA Minimum Standard Survey that will serve as the basis for the Exhibit. Therefore, we do not have a draft of this Exhibit to provide you at this time.
- With respect to Exhibit B, the School is not a party to the Development Agreement. Therefore we have not received a draft of this Exhibit to provide you at this time.

- With respect to Exhibit C, it is the School's understanding that the Redevelopment Commission will be approving the proposed form of the Existing and Future Debt Service Obligations of the Commission and will provide a copy for the School for its consideration and review later this week. The School recommended that you contact the Redevelopment Commission for the current form of the document.
- With respect to Exhibit D, the list of Due Diligence Costs is to be compiled by the Redevelopment Commission and no draft of this document has been provided to the School. Therefore, the School is unable to provide you with a draft at this time.
- With respect to Exhibit E, the School's attorneys have requested from the Redevelopment Commission a copy of the document showing the required infrastructure improvements to be provided by the Redevelopment Commission at the property. Neither the School nor its attorneys have received the record. Thus, the School is unable to provide you with a copy of this Exhibit at this time.

You question how the School could vote on the Agreement on November 12, 2012 if it did not at that time of the vote maintain a copy of the exhibits in question.

In response to your formal complaint, Mr. Qualkinbush advised that on November 12, 2012, the School's Board of Trustees approved the Agreement by and among the School, the Town of Zionsville's Redevelopment Commission, and Rockland Development, LLC in substantially the form presented to the School at the meeting and authorized certain actions to be taken in connection with such approval. Such actions include, but were not limited to, authorizing the President of the School Board, the Secretary of the School Board, any other officer of the School Board, the Superintendent, and the Chief Financial Officer to execute and deliver the Agreement in its form approved by the people signing it and to execute and deliver all other related documents.

Pursuant to the terms of the Agreement and satisfaction of the conditions precedent in the Agreement and the corresponding Purchase Agreement between Rockland Development and The Dow Chemical Company, Rockland Development would assign to the School and the Redevelopment Commission all of its rights, interests, and obligations under the Purchase Agreement, the School would receive title to a portion of the larger tract of property described in the Purchase Agreement, the Redevelopment Commission would receive title to the remaining portion of such larger tract of property described in the Purchase Agreement, the School would pay Dow Chemical the entire purchase price set forth in the Purchase Agreement, and the Redevelopment Commission would pay the School over the next fifteen years the purchase price for the tract of land obtained from the Redevelopment Commission. Under the terms of the Purchase Agreement, the sale must occur no later than December 12, 2012 and the due diligence period ends on December 4, 2012.

The Redevelopment Commission discussed this transaction and related documents at its meetings held on November 14, 2012 and November 26, 2012, and



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publicly stated during its meeting on November 26, 2012 that it would hold a special meeting sometime during the week of December 3, 2012 to consider approval of the transaction. Accordingly, the exhibits referred to in the formal complaint that was filed as being attached to a purchase agreement approved by the School Board and published on the School's website, are in fact attached to the Agreement. Moreover, as Dr. Robison stated in response to your original two requests, those exhibits at the time of each communication were in the process of being prepared by the professionals hired by the Redevelopment Commission to prepare such documents and/or approved by the Redevelopment Commission itself. Said documents are not yet in possession of the School Corporation, which continues to be true as of December 4, 2012. As to each specific exhibit:

- Exhibit A to the Agreement is the legal description of the property conveyed to the School. It is the School's understanding based on communication received from the surveyor hired by the Redevelopment Commission that it is in the process of preparing the ALTA Minimum Standard Survey which will serve as the basis for the Exhibit. Once prepared, the survey will be provided to the title company, which has been hired by the Redevelopment Commission, to create a written record of all of the recorded documents related to the property. At that time, the record will be provided to the School's Counsel, who will identify to the School any recorded liens, encumbrances, or restrictions on the property that may create an impediment to the School's use of the property. Such records have yet to be provided to the School's counsel at the present time;
- Exhibit B is a proposed Redevelopment Agreement between the Redevelopment Commission and Rockland. The School is not a party to the Development Agreement and thus has no interest in the Development Agreement. The School does not expect to receive a copy of the Development Agreement until after it is approved by the Redevelopment Commission, which has yet to occur to the knowledge of the School;
- Exhibit C is the form of the existing and currently anticipated future debt service obligations of the Redevelopment Commission that will impact the amount and time of the installment payments paid to the School by the Redevelopment Commission. It is the School's understanding that the Redevelopment Commission has yet to approve the Agreement or the debt service obligations. Thus, the School does not have any document at this time to satisfy your request;
- Exhibit D is the list of due diligence costs that will be paid or reimbursed by the Redevelopment Commission, including any of those incurred by

the School. All professionals engaged to prepare such records have been hired by the Redevelopment Commission. Therefore, the School has yet to incur any costs related to the due diligence investigation and has not received any list of due diligence costs from the Redevelopment Commission. Thus, the School has no record at this time that is responsive to your request;

- Exhibit E is the document showing the required infrastructure improvements to be provided by the Redevelopment Commission at the property. The School has yet to receive such documents as of December 4, 2012 but anticipates receiving said documents after the Redevelopment Commission's approval.

### 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, the School responded in writing to both of your written requests within one day of receipt. As such, it is my opinion that the School complied with the requirements of section 9(b) of the APRA in response to your request.

Pursuant to the APRA, a “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, chemical based media, magnetic, or other machine readable media, electronically stored data, or any other material, regardless of form or characteristic. *See* I.C. § 5-14-3-2(n). The APRA does not contain a “draft” exception applicable to the definition of a public record or as a basis for denial in response to a request made for the record. “Even a draft public record is a public record subject to the disclosure requirements of the APRA.” *See Opinions of the Public Access Counselor 04-FC-49; 05-FC-195; and 08-FC-54.* The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request. *See Opinion of the Public Access Counselor 08-FC-54.*



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However, there is a distinct difference between a public agency retaining a draft copy of a public record versus not maintaining a copy of the record in any form. Generally, if a public agency has no records responsive to a public records request, the agency generally does not violate the APRA by denying the request. "[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." *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...."). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. Here, the School has provided that at this time, it does not retain any records, in any form, that are responsive to your request for Exhibits A-E. As such, it is my opinion that the School did not violate the APRA by failing to produce a record that it does not maintain.<sup>1</sup> I would note that Dr. Robison has provided that once the School is in possession of any records responsive to your request; a copy will be provided to you at that time.

## CONCLUSION

For the foregoing reasons, it is my opinion that the School did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage".

Joseph B. Hoage  
Public Access Counselor

cc: Jeffery J. Qualkinbush, Dr. Scott Robison

<sup>1</sup> The issues you have raised regarding the authority of the School to vote and/or approve the Agreement without the Exhibits are outside the purview of this office.