



# STATE OF INDIANA

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April 16, 2012

Bradley L. Nemeth  
512 Hunters Trail  
Greenwood, Indiana 46142

*Re: Formal Complaint 12-FC-80; Alleged Violation of the Access to Public Records Act by the Indiana Department of Workforce Development*

Dear Mr. Nemeth:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Workforce Development ("DWD") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Robert K. Robisch, Associate General Counsel, responded on behalf of the DWD. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that on February 24, 2012 you submitted a written request to Jeff Gill, General Counsel for the DWD, for a copy of the minutes from the January 2012 Indiana Unemployment Insurance Board ("Board") meeting. In your request, you provided that you still desired a copy of the minutes if they were in draft form. On February 27, 2012, Mr. Gill responded in writing to your request and provided that Casey Long, the Board's Secretary, would e-mail you the minutes "as soon as they are prepared if they are not already." As of March 28, 2012, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive a copy of the minutes. Prior to filing your complaint, you verified that the minutes were not posted to the Board's website. You further provide that when the Board used to meet monthly, the minutes were always completed by the next meeting.

In response to your formal complaint, Mr. Robisch advised that you have now been provided with the minutes from the Board's January 2012 meeting. Mr. Robisch advised that the delay in providing the record was a result of the DWD's procedure for handling the Board's minutes. The Executive Assistant transcribed the minutes and then provides a copy to the Chief Financial Officer ("CFO"). The CFO reviews the transcription and if he deems them to be acceptable, they then become "draft" minutes. As applicable here, the minutes were approved last week, at which time they were provided to Mr. Nemeth. The "draft" minutes will not become official until approved by the Board at its April 2012 meeting.

## 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 DWD is considered to be public agencies pursuant to the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the DWD’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). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). 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, Mr. Gill responded to your written request within seven (7) days of its receipt; as such it is my opinion that the DWD complied with the requirements of section 9 in responding to your request.

Regarding minutes and memoranda, the Open Door Law provides the following:

(b) As the meeting progresses, the following memoranda shall be kept:

- (1) The date, time, and place of the meeting.
- (2) The members of the governing body recorded as either present or absent.
- (3) The general substance of all matters proposed, discussed, or decided.
- (4) A record of all votes taken, by individual members if there is a roll call.
- (5) Any additional information required under IC 5-1.5-2-2.5.

(c) The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. The minutes, if any, are to be open for public inspection and copying. *See* I.C. § 5-14-1.5-4.

Memoranda are to be made available within a "reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings." *See* I.C. § 5-14-1.5-4(c). Meeting minutes are not required under the ODL, but if created, must be available for public inspection and copying. *Id.*



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Previous public access counselors have opined that minutes in draft or unapproved form should be made available for inspection and copying upon request. *See Opinion of the Public Access Counselor 98-FC-8.* However, if the minutes are not even recorded yet, the public agency does not violate the APRA by failing to produce the minutes until they are actually created. *See Opinion of the Public Access Counselor 10-FC-56.* A public record, in part, is defined as any writing, paper, report, that is created, received, retained, maintained, or filed by or with a public agency. *See I.C. § 5-14-3-2(n).* As applicable here, the minutes became a public record when they were created by the Executive Assistant, not when approved by the CFO. The APRA does not provide that a record does not become a “public record” until approved by a public employee or official. Once created, draft or proposed minutes are public records and nondisclosure must be based upon one of the exceptions outlined in the APRA. *See Opinions of the Public Access Counselor 01-FC-65; 05-FC-23; and 10-FC-264.* If the DWD is concerned about releasing the minutes in draft form, the DWD could include a disclaimer noting that the minutes are not yet approved and subject to revision. *See Opinions of the Public Access Counselor 01-FC-65 and 10-FC-264.*

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as 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.*

You submitted your initial request to the DWD on February 24, 2012. On April 13, 2012, the DWD provided you with a copy of the draft minutes. I am not aware from the DWD’s response when the minutes were drafted by the Executive Assistant, which as outlined *supra*, is when they became a public record pursuant to the APRA. As such, it is my opinion that the DWD has failed to sustain its burden to show that the minutes were

provided to you in a reasonable period of time. As the DWD has now provided all records that were responsive to your request, I trust that this is in satisfaction of your complaint.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the DWD acted contrary to the requirements of the APRA when it failed to meet its burden to demonstrate that the records that were responsive to your request were provided in a reasonable period of time.

Best regards,

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

Joseph B. Hoage  
Public Access Counselor

cc: Robert Robisch