



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

**PUBLIC ACCESS COUNSELOR  
LUKE H. BRITT**

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

July 17, 2014

Kim Kilbride  
C/o South Bend Tribune  
225 West Colfax Ave.  
South Bend, IN 46601

*Re: Formal Complaint 14-FC-129; Alleged Violation of the Access to Public Records Act by the Indiana Department of Education*

Dear Ms. Kilbride,

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 § 5-14-3-1 *et. seq.* IDOE has responded via staff attorney, Kelly M. Bauder, Esq. Her response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on July 22, 2014.

## **BACKGROUND**

Your complaint dated June 17, 2014, alleges the Indiana Department of Education (“IDOE”) violated the Access to Public Records Act by not providing records responsive to your request in violation of Ind. Code § 5-14-3-3(b).

On May 8, 2014 you requested from IDOE copies of reports, monitoring data, site visit information, etc., the IDOE compiled for a number of schools relating to their priority status. A priority status is given to a poorly performing school which received an “F” school designation under Indiana’s Federal Accountability Waiver. On May 7, 2014 your request was acknowledged and forwarded to the IDOE Office of Legal Affairs. On May 8, 2014, IDOE requested you provide clarification of the records you were requesting. On May 27, 2014, you requested an update on the status of your request; IDOE informed you your request was in queue with the data team. On June 6, 2014, you were informed your request was denied in full based on the advisory or deliberative material exception under Ind. Code § 5-14-3-4(b)(6). Cory Havens, on your behalf, responded to the denial, requesting IDOE redact only those records which expressed an opinion or were speculative, and release factual based records. IDOE responded confirming the denial of

records, arguing that “[m]ost authorities agree that the purpose of the deliberative materials exception is to prevent injury to the quality of agency decisions,” basing this argument on *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

In its response to your formal complaint, IDOE again asserts the deliberative material exception. IDOE argues these records are exempted from disclosure because they are gathered in order to promote discussion about the strengths and weaknesses of schools. Furthermore, the records “can include opinions of school administrators”. This information is then used by the IDOE to “make decisions regarding the school’s compliance with federal and state laws.” IDOE asserts all of the reports gathered relating to the school’s priority status is used for this decision making process; therefore, all of these records are excepted from disclosure requirements.

## **DISCUSSION**

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 Ind. Code § 5-14-3-1. The Indiana Department of Education is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy IDOE’s public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14-3-3(a).

A public agency may choose to withhold written communication from public disclosure if the agency feels it may discourage officials from being frank and open in their discussions. This is referred to as the “deliberative materials exception” of APRA. Ind. Code § 5-14-3-4(b)(6) states:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

While the two-pronged standard in subsection (b)(6) is not a difficult hurdle, I encourage agencies to use it sparingly only when necessary. If it would not harm the decision-making process, there may be no reason to employ the exception. This would be best practice and consistent with the spirit of transparency. If an agency feels as if withholding the record is in the best interest of fostering an internal atmosphere of earnest discussion and idea-exchange, then the exception should be utilized.

It should be noted a record has to be both speculative *and* communicated for the purpose of decision making. Statements of fact do not fall into the deliberative materials exception. If a public record contains disclosable and nondisclosable information, however, the public agency must separate the material that may be disclosed and make it

available for inspection and copying. See Ind. Code § 5-14-3-6. I have not had the opportunity to review the records IDOE states are deliberative, therefore I cannot accurately determine if they are truly speculative or of an opinion-based nature. If the totality of the communication meets the two-pronged standard of Ind. Code § 5-14-3-4(b)(6), then the IDOE has not violated the Access to Public Records Act. If there are statements within the communication which do not meet the statutory definition of “deliberative”, they should be separated and disclosed.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline.

Luke H. Britt  
Public Access Counselor

Cc: Kelly M. Bauder, Esq.