



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

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February 1, 2016

Mr. Tony Cook  
130 South Meridian Street  
Indianapolis, Indiana 46225

*Re: Formal Complaint 16-FC-320; Alleged Violation of the Access to Public Records Act by the Office of Former Indiana Governor Mike Pence*

Dear Mr. Cook:

This advisory opinion is in response to your formal complaint alleging the Office of Former Indiana Governor Mike Pence ("Former Governor") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-1.5-1 et. seq. The Former Governor has responded via Mr. Joe Heerens, Esq., General Counsel for Governor Eric Holcomb. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on December 27, 2016.

## **BACKGROUND**

Your complaint dated December 22, 2016, alleges the Office of the Governor has violated the APRA by not providing your requested documents in a reasonable time.

On or about September 16, 2016, you submitted a records request to the Office of the Governor for several sets of email correspondence between Governor Mike Pence from his private email account. A request was made by the Governor's Office to narrow down your request to meet its standards of reasonable particularity. After doing so on October 20, 2016, the Governor's Office indicated it would initiate the search. After a significant amount of time passed, several status update requests were unsuccessful; therefore, a formal complaint was filed with this office.

Due to the timing of the election season, the Holcomb administration responded on behalf of Former Governor Pence's office. According to Mr. Heerens, the Former Governor passed along his office's files and public records to the incoming administration. This includes the records responsive to your request. The new administration has taken on the task to curate the Former Governor's records for potential production. Governor Holcomb's legal team is reviewing those files for release and assures any records appropriate for distribution will be produced in the near future.

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

### **Reasonable Particularity**

A requirement of a valid records request is that a request must be made with reasonable particularity. *See Indiana Code § 5-14-3-3(a)(1)*. Indiana Courts as well as this Office have opined on reasonably particular email requests and their standard of specificity. In the aggregate, those opinions have settled on four elements which meet minimum reasonable particularity requirements. They are as follows: a named sender; a named recipient; a date range of six (6) months or less; and a subject matter designation or a key word(s) search parameter. Those factors are not suggested to create obfuscation, but to give a public agency a clear path to search for the actual emails responsive to a request.

Your first two public records requests lacked one or more of those factors. Consistent with my past guidance, the Former Governor’s Office did not outright deny your request, but rather invited you to narrow down your search, so that it may efficiently search for the messages you seek. Therefore the timeline for production begins upon an agency receiving a request which meets the standards set forth by precedent. In this case, the clock began to toll on October 20, 2016, despite the fact the Governor’s office accepted a request which exceeds a reasonable standard timeframe.

### **Reasonable Time for Production of Documents**

Indiana Code § 5-14-3-3 states that production of documents responsive to a request should occur within a reasonable time of the request. While a reasonable time has not been defined by the legislature or the judiciary, this Office and prior Public Access Counselors have opined on what that term means in practicality. Amongst the factors incorporated in the interpretation of ‘reasonableness’ include size of staff, complexity of a request and any extenuating circumstances.

As mentioned above, the purpose of requiring a reasonably particular request is to allow an agency to search efficiently and quickly for the records sought in order to meet the timeliness standard. That being said, the past several months have been historically unprecedented in state government. The usual course of business has been anything but usual. If any circumstances were to ever qualify as extenuating, the past few months would certainly be so. The challenges faced by administration transitions (including staff turnover), elections and even the holiday season are all valid justifications for delay in responding to a public records request. This was no doubt exacerbated by the influx of public record requests submitted to the Pence administration after he accepted the candidacy for Vice President.

A nine-week delay with no status updates and no piecemeal production of documents would normally run contrary to any reasonable interpretation of timeliness. While the release of requested public records should always be a priority, there were undoubtedly competing priorities in the last weeks of the Pence administration. By the same token, in its first few weeks, the Holcomb administration has been concerned with the business of establishing itself as head of the executive branch while also preparing for the 2017 legislative session. Given those responsibilities coupled with the task of being the custodian of a prior administration's public records, a subsequent delay in the production was inevitable. Yours is unlikely to be the final request for the records of Vice President Pence's gubernatorial records. Whether those records are retained by the administration or transferred to the state archives with past administrations' files, it is my sincere hope the future accessibility of these records is swift and easy.

By no means am I minimizing the importance of yours or any other public records request. But given the unique nature of recent events, I am inclined to defer to the Former Governor's office on the issue of timeliness. My advice to both parties is to consider this Opinion an outlier. Based on my brief conversations with the Holcomb administration staff, I am confident they are committed to best practice and good governance as it relates to transparency, including matters of timeliness.

Please do not hesitate to contact me with any further questions.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long, sweeping underline that extends to the left and then curves back under the main signature.

Luke H. Britt  
Public Access Counselor

Cc: Mr. Joe Heerens, Esq.