



STATE OF INDIANA

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July 20, 2012

Michael B. Pell
223 Perimeter Center Parkway Northeast
Atlanta, Georgia 30346

Re: Formal Complaint 12-FC-164; Alleged Violation of the Access to Public Records Act by the Gary Indiana School Corporation

Dear Mr. Pell:

This advisory opinion is in response to your formal complaint alleging Gary Indiana School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Our office forwarded a copy of your formal complaint to the School. As of today's date, we have yet to receive a response.

BACKGROUND

In your formal complaint, you provide that you submitted a written request pursuant to the APRA to the School on May 9, 2012 for the following records:

- Records of complaints alleging improprieties on standardized tests by teachers and school administrators from January 1, 2007 through the present. These records should include, but not be limited to, complaints, investigative records, and documents that reflect the resolution of each case.
- Documents showing the results of any test screening activities, such as erasure analysis, for standardized tests administered each year since 2007.
- Records of personnel actions since 2007 related to testing improprieties

After submitting your request, you inquired with Ms. Sarita Stevens regarding the status of your request. Ms. Stevens advised that the School had never had any cheating and was uncertain as to what records you sought. In late May and early June, Ms. Stevens stated that although the School had never had a cheating allegation, she would gather up documents related to testing problems that she was aware of. Ms. Stevens provided that the records would be provided by a certain date. Thereafter, you contacted Ms. Stevens, who provided that she was having a difficult time obtaining the records.

On June 19, you again called Ms. Stevens regarding your request. Initially, Ms. Stevens provide that she could not respond to your request for a few weeks because the

School was in the midst of hiring a new superintendent. When you inquired how the hiring of a new superintendent would affect responding to your request submitted under APRA, Ms. Stevens against provided that the School never cheated and that she was a writer too. Thereafter, Ms. Stevens provided that she did not have any records that were responsive to your request. You then inquired regarding the records showing testing improprieties. Ms. Stevens stated that “improprieties” was too broad a term and she did not understand your request fully. You provided several examples of what you considered to be an “impropriety” and reminded Ms. Stevens that she had mentioned an impropriety in a previous conversation. Ms. Stevens then provides that it was a training problem that she previously alluded to, and suggested that there were no documents related to the problem.

As such, you requested a written denial to your open request for record. She provided that she would not respond in writing. Ms. Stevens stated that you needed to go to the State and request the records. You informed her that under the APRA, in response to a written request, a written denial was necessary. She stated she knew how the law works and “this is garbage.” Subsequent to this conversation, Ms. Stevens provided that you would receive the denial when she sent it. At a later date, Ms. Stevens then provided that she would not provide you with a written denial, only an oral denial.

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. Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O’Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-

9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinion of the Public Access Counselor 01-FC-47*.

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....”). However, as your request was submitted to the School in writing, even if the School did not maintain any records that were responsive to your request, it would still have been required to provide a response in writing. To the extent the School denied your request, it would have been required to cite to the specific exemption found in the law that would have authorized the withholding of the record. As the School has failed to respond to your request in writing or cite to the applicable citation allowing the withholding of any records that would have been responsive to your request, it is my opinion that the School violated the APRA.

Without the benefit of a response from the School, it is unclear to me why your request was denied. If the School cannot justify withholding the records under the APRA, the law would require that the records be released. To the extent the Board persists in its denial of access following the issuance of an advisory opinion from this office and you believe the Board is in violation of the APRA, I leave you to your remedies before a court pursuant to Ind. Code § 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, it is my opinion that the School violated the APRA by failing to issue a written response to your written request for records and failing to cite to the specific exemption authorizing the withholding of any record that was responsive to your request.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Gary Indiana School Corporation