



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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September 8, 2015

Mr. Rod A. Gardin
P.O. Box 370
502 East College Avenue
Kouts, IN 46347

Re: Formal Complaint 15-FC-216; Alleged Violation of the Access to Public Records Act by the Indiana Department of Education.

Dear Mr. Gardin,

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Education (“DOE”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et. seq.* 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 30, 2015.

BACKGROUND

Your complaint dated July 30, alleges the Indiana Department of Education has violated the Access to Public Records Act by failing to provide the records you requested. This complaint is a continuation of your previous complaint, addressed in *Opinion of the Public Access Counselor 15-FC-162*, which is incorporated into this opinion.

On March 4, you submitted a records request seeking all copies of Testing Irregularities reports for ISTEP+ testing for the 2014-2015 school year. You received an acknowledgement of the request on March 4. You followed-up about the records on March 18, and on March 19 were informed by the DOE that time was needed to comply with FERPA and other laws, but that it did intend to comply with your request. On March 30, you added to your request, asking for “a copy of each and every Testing Concerns and Security Violations Report submitted by an and all schools” participating in ISTEP+. However, you contend the DOE violated the APRA by failing to acknowledge the added on March 30 request within seven (7) days. The DOE contends that they responded to your original request on March 4 within 7 days and considered the March 30 request as a modification of the first request, and therefore did not need to respond again. I reminded the DOE of its responsibility under APRA to be efficient when responding to requests.



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On July 1 and July 8, you were provided with the digital files from your records request. However, you contend the files only contain the Testing irregularity Reports, no Testing Concerns and Security Violation Reports were included as had been requested on March 30. On July 30, you emailed the DOE with regards to this oversight. On July 31, you received a response stating that your request for the Testing Concerns and Security Violations Reports was denied because the materials requested were deliberative and made for the purpose of decision making. You contend that the denial is illegitimate because the DOE did not raise any reason for the denial during the original request.

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 Ind. Code § 5-14-3-1. The 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 the ISA’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).

As I have previously opined on the matter of the delays and response time, and therefore will focus only on the denial of records. As for the records denied, the DOE has contended the records requested fall under the deliberative materials exemption.

The General Assembly has provided that records which qualify as deliberative materials may be disclosed at the discretion of the public agency. See Ind. Code § 5-14-3-4(b)(6). 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.

The subsection provides:

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.

Deliberative materials include information which reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making process. See *Opinion of the Public Access Counselor 98-FC-1*. Many, if not most documents



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that a public agency creates, maintains or retains may be part of some decision making process. See *Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64*. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002).

You take exception to this on two grounds.

First, you do not believe the Testing Concerns Reports can be considered anymore deliberative than the Testing Irregularity Reports, which are public records. You contend that the Testing Concerns Reports are only used for information gathering purposes.

This Office is not fully aware of the intricacies of the testing process. Therefore, this Office would require additional information to add in its determination about whether the deliberative exemption is applicable in this situation. However, the Public Access Counselor is not a finder of fact and cannot opine on the applicability of an exemption without being provided access to the records. Without access to these records, this office must defer to the Department.

Second, you object because the DOE failed to raise the deliberative exemption in its previous response. DOE has not waived its ability to raise new exceptions to disclosure. I have already expressed disappointment in its timeliness, however, I do not see a violation for raising the deliberative materials exception. Similarly, the law does not contemplate the circumstances of denial as you raised in your complaint only that a denial must include, pursuant to Ind. Code § 5-14-3-9: a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and the name and the title or position of the person responsible for the denial. It appears as if this was done.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor that the Indiana Department of Education has not violated the Access to Public Records Act.

Regards,



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A handwritten signature in black ink, appearing to read "LH Britt", is positioned above the printed name.

Luke H. Britt
Public Access Counselor

Cc: Ms. Leslie-Ann James