



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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November 2, 2012

Louisa Abada
In the Public Interest
1825 K Street NW Ste. 210
Washington, D.C., 20006

Re: Formal Complaint 12-FC-296; Alleged Violation of the Access to Public Records Act by the Indiana Department of Education

Dear Ms. Abada:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Education (“Department”) violated the Access to Public Records Act (“APRA”), I.C. § 5-14-3-1 *et seq.* Christopher P. Greisl, Attorney, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on February 16, 2012, Ms. Kaissal submitted a public records request to the Department for the following:

“A copy of all communications (including, but not limited to, email, fax, and written) “created, received, maintained, or filed by or with” Tony Bennett, Indiana Superintendent of Public Instruction and/or his designees and the following people and organizations [from January 1, 2012 to the date of this request]:

- Patricia Levesque, Christy Hovanetz, Mandy Clark, Fonda Anderson, Jaryn Enhof, Lisa Kammel Raguso, Erin Price, Raquel Cisneros, Matthew Lander, May Laura Bragg, Carrie Jenkins, Jeb Bush, F. Phillip Handy, Zachariah P. Zachariah P. Zachariah, Reginald J. Brown, Cesar Conde, Joel Klein, William Simon, Brian Yablonski and/or their designees of the Foundation for Excellent in Education and/or the Foundation for Florida’s Future; and
- Bob Wise, Sara White Hall, Daniel Leeds, Linda Darling-Hammond, Frederick James Frelow, N. Gerry House, Joan Huffer, Gerard Leeds, Lilo Leeds, C. Kent McGuire, Michael T. O’Keefe, Vijay Ravindran, Charles P. Rose,

Harold M. Williams, Esther Wojcicki and/or their designees of the Alliance for Excellent Education.”

The request also asked for “copies of any and all records of the Superintendent’s expenses that were paid by the Foundation for Excellent in Education, the Foundation for Florida’s Future, or the Alliance for Excellent Education from January 1, 2010 to the date of the request.”

On March 15, 2012, you provide that Mr. Greisl submitted written confirmation of the receipt of your request. Mr. Greisl provided that he would begin to review the records that were responsive to your request if any records that had been sought were maintained by the Department. He further provided that the portion of the request asking for “designees” was not reasonably particular and acknowledged your ability to supplement the request with additional specificity.

In response, on March 23, 2012 Ms. Kaissal supplemented the request and in relevant part, provided:

“Along with the named individuals from the Foundation of Excellent in Education, Foundation for Florida’s Future, and the Alliance for Excellent Education, please provide all communications in which the following words appear:

- “Foundations for Excellent in Education”
- “Foundation for Florida’s Future”
- “Alliance for Excellent Education”
- “Chiefs for Change”

On April 2, 2012, Mr. Greisl acknowledged the receipt of your supplemental request and you provide that he gave no indication that the request was deficient. Mr. Greisl stated that the Department would respond to the request in a reasonable period of time.

On May 17, 2012, an email was sent inquiring as to the status of your request. On May 21, 2012, Mr. Greisl responded that he was continuing to reviewing what records, if any, the Department maintains. You provide again that Mr. Greisl did not indicate that the request was deficient. On July 13, 2012, a further inquiry was sent by Ms. Habibi regarding the status of your request. Mr. Greisl responded that there were still unanswered questions, that Ms. Kaissal had not identified Superintendent Bennett’s designees, and recommended to either shorten the time frame of the search and/or reducing the number of people found within the request. In response, Ms. Habibi provided on August 13, 2012 the following:

“I would like to shorten the time period of the request to any communications from January 1, 2011 to the present. Also, please provide communications between the named Foundations (the Foundation for Excellence in Education, the Foundation for Florida’s Future, and the Alliance for Excellent Education) and Superintendent Benet, Senior

Advisor Dennis Brooks, Deputy Chief of Staff Marcie Brown, Director of Outreach Jennifer Carlton, Executive Assistant Debbie Downing, Executive Assistant Susan Jackson, Chief of Staff Heather Neal, and other immediate staff of the Office of the Superintendent. Also, please provide any expenses paid by the Foundations for the named individuals.”

In response, on August 23, 2012, Mr. Greisl inquired what individuals within the named Foundations communicate with the members of the Department that you sought records for. In response, Ms. Habibi provided the original individuals cited in the February 16, 2012 request. Ms. Habibi sought any communications between those individuals and the individuals named who work in the Department. In regards to “other immediate staff”, Ms. Habibi provided that referred to those individuals who worked for the Department during the requested period, but who no longer work for the Department.

You allege that the pursuant to the August communications, the Department has taken an unreasonable amount of time to produce the following records:

From January 1, 2011 to the present communications between:

Patricia Levesque, Christy Hovanetz, Mandy Clark, Fonda Anderson, Jaryn Enhof, Lisa Kammel Raguso, Erin Price, Raquel Cisneros, Mathew Lander, May Laura Bragg, Carrie Jenkins, Jeb Bush, F. Phillip Handy, Zachariah P. Zachariah, Reginald J. Brown, Cesar Conde, Joel Klein, William Simon, Brian Yablonski of the Foundation for Excellent in Education and/or the Foundation for Florida’s Future, Bob Wise, Sara White Hall, Daniels Leeds, Linda Darling-Hammond, Frederick James Frelow, N. Gerry House, Joan Huffer, Gerard Leeds, Lilo Leeds, C. Kent McGuire, Michael T. O’Keefe, Vijay Ravindran, Charles P. Rose, Harod M. Williams, Esther Wojcicki of the Alliance for Excellent Education.

And the following Department employees or public officials:

Tony Bennett, Denis Brooks, Marcie Brown, Jennifer Carlton, Debbie Downing, Susan Jackson, Heather Neal, and other immediate staff.

You also provide that the Department has taken an unreasonable amount of time to produce copies of any and all records of the Superintendent’s expenses that were paid by the Foundation for Excellent in Education, the Foundation for Florida’s Future, or the Alliance for Excellent Education, from January 1, 2010 to the present.

In response to your formal complaint, Mr. Greisl denies that the Department has violated the APRA in response to your request. He provides that your organization has repeatedly failed to follow up on the Departments requests or in providing information necessary for the Department to identify the records that were sought. As opposed to providing the requested specificity, you have supplemented your requests and thus enlarged the scope of the original request. Mr. Greisl provides that you have filed your

formal complaint 37 days after the latest version of your request was received. The Department will produce all records that are maintained by it in a reasonable period of time, but Mr. Greisl would argue that fulfilling the request within the timeframe that you expect would materially interfere with the essential functions and duties of the Department and its employees.

The Department provides that it received Ms. Kaissal's initial request on February 22, 2012. On February 27, 2012, the Department acknowledged the receipt of the request in writing and requested further clarification regarding several unnamed "designees". Mr. Greisl asked that the request be supplemented with further specificity. Mr. Greisl also advised the challenges of responding to the request; most notably the estimated length of time associated with responding to the elaborate request and directed the agency to stay in communication with the Department so that collaboration could occur regarding the issues that had been raised.

On March 19, 2012, Mr. Greisl was contacted by phone by an employee of the organization. Mr. Greisl provided that at that time he again reiterated the challenges of responding to the request and asked for further specificity. On March 28, 2012, Mr. Greisl provides that the original request was significantly broadened to include any communication by or between Dr. Bennett in which the following certain phrases appeared. On April 2, 2012, Mr. Greisl provided that he acknowledged receipt of the supplemental request in writing. On May 21, 2012, Mr. Greisl maintains that he updated Ms. Kaissal on the status of the Department's progress. Again Mr. Greisl noted the extensive time that was required to provide the records that were sought, which was further hindered by the lack of communication from the requestor.

At this point, the Department maintains that over eight (8) weeks elapsed between the May 21, 2012 communication and any response from Ms. Kaissal. After waiting fifty-three days for a response, the Department believed that the requestor no longer desired for her request to be fulfilled. On July 13, 2012, Ms. Habibi contacted the Department requesting an update on the request. Ms. Habibi noted that Ms. Kaissal was no longer employed with the organization. Mr. Greisl acknowledged the email on August 10, 2012. Mr. Greisl provided that he did not respond to the inquiry sooner as Ms. Habibi failed to submit your request to the dedicated email address that the Department provided for requesting records. On the date of receipt of the August 10, 2012 email, Mr. Greisl responded and provided the process for requesting records of the Department. Mr. Greisl stated that the Department had previously sought additional specificity regarding the request, but the request was unanswered.

On August 13, 2012, Ms. Habibi shortened the timeframe of the request from January 1, 2011, however Mr. Greisl provide she increased the number of people for whom communication was sought. On August 29, 2012, Mr. Greisl advised that Ms. Habibi further requested expense information regarding certain Department personnel. Mr. Greisl advised that the amount of time to satisfy Ms. Habibi's request was overwhelming and only 37 days had passed since the request was received by the Department and the filing of a formal complaint with the Public Access Counselor. The

lack of communication on the parts of the requestor(s) made it impossible for the Department to fulfill the request. When the Department has asked for further clarification required under the APRA, the response either failed to address the specificity issues or simply broadened the scope of the original request. The Department and Superintendent Bennett understand and take seriously its responsibilities under the APRA. The Department must also balance its commitment to transparency with its primary functions and responsibilities. Further, since August 2012, the Department has received 83 requests for records pursuant to the APRA. A full-time employee dedicates nearly all of her time to working through the approximate 35 other pending record requests. In light of all of these factors, the Department would provide that it has complied with the APRA in responding to the requests that have been submitted on behalf of your organization.

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 Department 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 Department’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).

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *Ops. of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-13*. A request for email correspondence that includes the sender, recipient, and date range would be considered reasonably particular under the APRA. *See Opinions of the Public Access Counselor 09-FC-24, 11-FC-12, 12-FC-146*.

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, 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*. This office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172*. Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121*.

As to the February 22, 2012 request, while it is my opinion that the original request failed to identify with reasonable particularity the "designees" of Superintendent Bennett, it has not been challenged that the portion of the February 22, 2012 request seeking communication between Superintendent Bennett and a list of named individuals and certain expense records was not reasonably particular. While it is my opinion that the Department followed the proper steps in seeking to identify Superintendent Bennett's "designees" listed in the February 22, 2012 request, the Department does not address the timeframe in providing the records as to the reasonably particularized portions of the February 22, 2012 request. Contrary to the Department's assertions, it is my opinion that the March 23, 2012 correspondence from Ms. Kaissal did not "significantly broaden" the request for the Superintendent Bennett's communications by seeking certain phrases, as the original request had already sought "all communication." The Department advised that as of July 13, 2012, it believed that Ms. Kaissal no longer desired the records that were sought from the February 22, 2012 request. At that point, approximately 163 days had passed since Ms. Kaissal's original request was received by the Department. Although I am mindful of the duties and responsibilities of the Department, it is my opinion that the Department has acted contrary to section 3(b) of the APRA by failing to provide all records in a reasonable period of time that were responsive to the reasonably particularized portions of Ms. Kaissal's February 22, 2012 request.

As to the timeliness of the production of records by the Department following the August 29, 2012 correspondence between Mr. Greisl and Ms. Habibi, it is my opinion that the Department has met its burden in demonstrating that it has complied with the requirements of section 3(b). As of August 29, 2012, Ms. Habibi sought all communication between approximately 34 members of the public and approximately 7 Department employees between January 1, 2011 and the present date. In addition, Ms. Habibi renewed Ms. Kaissal's request for copies of the Superintendent's expenses that were paid by the Foundation for Excellent in Education, the Foundation for Florida's Future or the Alliance for Excellent Education from January 1, 2010 to the present. It should be noted that prior to August 29, 2012, at no time did either Ms. Kaissal or Ms. Habibi identify with reasonable particularity the "designees" of Superintendent Bennett

that it sought communications from. The Department requested this information, in writing, in its original response to the February 22, 2012 request. Approximately 35 days elapsed between the date of receipt of Ms. Habibi's reasonably particular request and the filing of a formal complaint with the Public Access Counselor's Office on October 3, 2012. The Department has provided that in addition to maintaining the normal duties and functions of its agency, it currently has 35 other pending record requests. In light of the breadth of your request, the fact that the Department must not only collect, but review all records that are responsive to the request, the requirement that the Department maintain the normal duties of the agency while working on all request for records that are received, and that there are currently 35 separate pending records requests that the Department is working on, it is my opinion that at this time the Department has complied with section 3(b) in its efforts to provide all records in a reasonable period of time that were responsive to the reasonably particularized request that was received on August 29, 2012.

CONCLUSION

Based on the foregoing, it is my opinion that the Department has acted contrary to section 3(b) of the APRA by failing to provide all records in a reasonable period of time that were responsive to the reasonably particularized portions of Ms. Kaissal's February 22, 2012 request. However, it is my opinion that at this time the Department has complied with section 3(b) in its efforts to provide all records in a reasonable period of time that were responsive to the reasonably particularized request that was received on August 29, 2012.

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: Christopher P. Greisl