

June 27, 2001

Mr. Richard E. Volbrecht, Jr.  
9221 Parkway Drive  
Highland, IN 46322

*Re: Advisory Opinion 01-FC-35; Alleged Denial of Access to Public Records by the Indiana Department of Education.*

Dear Mr. Volbrecht:

This is in response to your formal complaint, which was received on June 18, 2001. You have alleged that the Indiana Department of Education ("Department") violated the Indiana Access to Public Records Act, ("APRA,") Indiana Code chapter 5-14-3. Specifically, you claim that you made a public records request to the Department on June 8<sup>th</sup> but that you did not receive a response to your request. Mr. Kevin McDowell General Counsel for the Department responded in writing to your complaint and copies of his response and the attachments are enclosed for your reference.

For the reasons set forth below, it is my opinion that the Department's failure to specifically respond to your written request within seven (7) days after it was received was a denial that is actionable under the APRA.

### BACKGROUND

According to your complaint, on June 8, 2001, you sent two written requests to Mr. McDowell. The first request concerned information about any communications by the Department that ordered or directed employees of the Department not to speak with you. You received a response to this request in a letter dated June 11, 2001. This second request specified that you wanted copies of the "Form 9" report that contains Account 49200 information for each of the state's 294 school corporations. As of the filing of your complaint, you claim that the Department had not provided a response within seven (7) days of receiving the second request as required under the APRA.

In response to your complaint, Mr. McDowell stated that the Department acted promptly in response to your second request for Form 9 report information. As evidence of the fact that he was making a good faith effort with respect to your second request, he enclosed a copy of his June 8<sup>th</sup> memorandum to Ms. Patty Bond, Director of the Division of School Finance. The goal of this memorandum was to provide you with an estimate of the copying fee that would be charged for this information, as you had asked for such an estimate within your request. In a letter dated June 18<sup>th</sup>, the Department did respond directly to your second request indicating that they will be able to retrieve the documents you requested on June 26<sup>th</sup> or after. According to Mr. McDowell, while there may have been one (1) business day delay in responding to you, this delay should be considered *de minimus* and the Department should be found to

have been in substantial compliance with the APRA.

## ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code § 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

The Department is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Department during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

It is the responsibility of the public agency to respond to requests for access to public records within a specified time period. The APRA does not set any time periods for producing public records, merely for responding to the request. For requests that are delivered by mail, a denial is deemed to have occurred if seven (7) days elapse after the agency receives the request and there has been no response. Ind. Code § 5-14-3-9(b). Once a denial has occurred under the APRA, a person may file suit in the circuit or superior court in the county in which the denial took place to compel the public agency to disclose the public records requested. Ind. Code § 5-14-3-9(d).

According to your complaint, you sent your request via facsimile to the Department on June 8, 2001. In a letter from Mr. McDowell dated June 11, 2001, there is a reference to your request for Form 9 report information, but only generally to "your two separate requests." There was no specific reference to the substance of your request or what the Department was doing with respect to it. Mr. McDowell states in his response to your complaint that this reference to your two requests of June 8, 2001 was sufficient to serve as a response to your complaint. Alternatively, Mr. McDowell claims that since the Department did specifically respond to your second request on June 18<sup>th</sup>, only one (1) business day after the seven (7) day time period had elapsed, the Department should be held to have been in substantial compliance with the APRA.

It is my opinion that the June 11<sup>th</sup> letter from the Department was not responsive to your second request for information on the Form 9 reports. The failure of the Department to respond within the seven (7) day period following the receipt of your June 8<sup>th</sup> request for this information was a denial under Indiana Code section 5-14-3-9(b).

It is important to note, however, that the Department was clearly making efforts to respond to your request, beginning with Mr. McDowell's memorandum to Ms. Bond and her efforts to determine the cost of copying the information for you. These efforts, however, should have communicated this to you

in their June 11<sup>th</sup> letter. In addition, the Department did respond to your second request in a letter dated June 18<sup>th</sup>, but this was beyond the seven (7) day period contemplated under Indiana Code section 5-14-3-9(b). While Indiana courts have recognized a "substantial compliance" test in the context of posting notices of public meetings under the Open Door Law, Indiana Code chapter 5-14-1.5, I am not aware of a similar test being applied in any interpretations of the APRA. Since this Office can only interpret the APRA as written and apply any case law that has been decided interpreting the APRA, the question of whether the Department substantially complied with their June 18<sup>th</sup> response would be a question for the courts.

## CONCLUSION

It is my opinion that the Department of Education's failure to respond to your written request for access to public records within seven (7) days after it was received was a denial that is actionable under Indiana Code section 5-14-3-9(d).

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Mr. Kevin McDowell, General Counsel

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