



# STATE OF INDIANA

**MICHAEL R. PENCE, Governor**

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February 28, 2014

Mr. Brad Murray  
555 New Jersey Avenue NW  
Washington, D.C. 20001

*Re: Formal Complaint 14-FC-15; Alleged Violation of the Access to Public Records Act by the Indiana Department of Education*

Dear Mr. Murray,

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”), Ind. Code § 5-14-3-1 *et. seq.* The Department has provided a response to your complaint via Ms. Kelly M. Bauder, Staff Attorney. Her response is attached for your review. 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 January 29, 2014.

## **BACKGROUND**

Your complaint dated January 29, 2014 alleges the Indiana Department of Education violated the Access to Public Records Act by not providing records responsive to your request in a timely manner in violation of Ind. Code § 5-14-3-3(b).

On August 8, 2013, you submitted to the Department a request for considerable amount of communication from January 2009 to the date of your request. In the first part of your request, you listed over 15 named separate senders of communication (as well as the catch-all “other immediate staff of the Office of the Superintendent”) and approximately 80-named recipients as well as an indefinite number of unnamed “group” recipients such as the Foundation for Excellence in Education and the Foundations for Florida’s Future. You also included 23 key phrases to narrow the search. Additionally, you requested a copy of all proposals, schedules and attachments received by the Department’s Office of School Improvement and Turnaround.

The Department acknowledged receipt of your request; however, as of the date of your formal complaint they had not produced any documentation responsive to your request. The Department responded to your complaint on February 12, 2014 stating they were still

in the process of satisfying numerous other requests received and had not processed your 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 Indiana 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 Department’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).

A request for records may be oral or written. See Ind. Code § 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 Ind. Code § 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 Ind. Code § 5-14-3-9(b). A response from the public agency could be an acknowledgement the request has been received and information regarding how or when the agency intends to comply.

Your request is presumably pursuant to a debate sparked in August 2013 regarding the Department’s A-F school accountability grading system administered by the previous Indiana Superintendent of Public Instruction Tony Bennett. Most of the materials you are seeking appear to be related to that particular situation. The alleged controversy was widely covered in local and national press. Consequently, I am aware the Department’s incoming administration has received abundant requests for information very similar to your request.

I point this out because the Department’s claim they have received “numerous requests for information and we process the requests in the order we receive them” is likely under these circumstances. And while you are entitled to the records you seek (notwithstanding any confidential or deliberative material) it is to be expected the Department would be the recipient of a large number of public records request related to this controversy.

You are correct the APRA mandates a public agency shall provide records to the requestor within a reasonable time (Ind. Code § 5-14-3-3(b)). Reasonableness is a subjective standard which changes on a case-by-case basis. To conclude the Department has not yet caught up with the numerous requests for information would not be beyond reason. Moreover, the APRA is not intended to interfere with the regular discharge of the functions or duties of the public agency or public employees. See Ind. Code § 5-14-3-7(a). It is my understanding the Department has only a limited number of staff members assigned to address public records requests. Considering the amount of attention this matter has generated, your request may still be waiting in queue.

You are likewise correct stating an agency should produce portions of a response as they become available in situations where the request is large. This has been my standing opinion as well as former Public Access Counselors. As your response is being processed, I encourage the Department to release the disclosable information in a piecemeal manner. However, *as they have not begun to work on your request*, this is not practical at this time.

Five months is certainly a long time to wait for records production. In normal circumstances, even for a request as large as yours, I would find a violation if the agency had not produced any records responsive to the request. Given the unprecedented amount of attention and public records requests received by the Department in light of August's news cycle, I do not find it unreasonable the Department has taken this amount of time to even commence investigation into the response to your request.

### CONCLUSION

For the foregoing reasons, it is the Opinion of the Indiana Public Access Counselor the Indiana Department of Education Authority has not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt  
Public Access Counselor

Cc: Ms. Kelly M. Bauder, Esq.