

July 27, 2005

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

Re: Formal Complaint 05-FC-126; Alleged Violation of the Access to Public Records Act by the Metropolitan School District of Washington Township

Dear Mr. Volbrecht:

This is in response to your formal complaint alleging that the Metropolitan School District of Washington Township ("MSD") violated the Access to Public Records Act by indicating that it would first ascertain whether the record could be released from the third party who supplied it to the MSD. I find that the MSD did not deny you a record or otherwise interfere with your right to a record. However, the MSD may not rely on a third party's rules regarding disclosure of a record that the MSD maintains.

BACKGROUND

You sent a request for a copy of the evaluation of a grant application submitted by MSD to the Lilly Endowment for the 21st Century Learning Community Grant for the period 2001 to 2004. As an oral response to your request, you allege that Mr. William Hammel, Director of Business and Legal Services for the MSD told you that he would first have to ascertain from the Lilly Endowment whether the MSD was subject to any restrictions on release or disclosure of the evaluation. You allege that this communication was a refusal to make a copy of the evaluation and to mail it to you.

You filed your formal complaint with my office on June 28, 2005. I sent a copy of your complaint to Mr. Hammel. I received a response to your complaint via e-mail. I enclose a copy of the e-mail for your reference. Mr. Hammel admits that he told you he wanted to consult with the Lilly Endowment to determine any restrictions the MSD might be subject to because the evaluation documents "were actually the property of the Lilly Endowment." He also stated that MSD at no point denied you access. The MSD in fact received permission from Lilly Endowment to provide full access to the evaluation documents to anyone who sought to review

them. Mr. Hammel had been in discussions with you regarding whether you wished to scale your request to fewer than the 1,000 documents that comprised the evaluation, to only those involving the mathematics portion of the evaluation. He stated that you agreed to come to the MSD's offices to inspect the material and select those portions that you wished to copy.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A public agency may not deny or interfere with the exercise of the right stated in subsection (a). IC 5-14-3-3(b). A public agency that denies a written record request must state in writing the exemption or exemptions that authorize the withholding of the record. IC 5-14-3-9(c). The public agency must respond to the record request within seven (7) days of its receipt, if by U.S. Mail or facsimile. This response could take the form of a letter acknowledging receipt of the request and a statement of how or when the agency intends to comply. The public agency could indicate in its initial response that it intends to consult with counsel or others to determine its responsibilities and obligations under the APRA.

You have contended that the MSD denied you a record because it indicated that it would consult with the Lilly Endowment to determine whether there were any restrictions on grant recipients with respect to release of the evaluation of the grant. There appears to be no issue that the evaluation was a public record, because it was retained or maintained by the MSD, a public agency. IC 5-14-3-2(m)(defining "public record"). To be sure, it is likely that the evaluation could not be denied to you even if rules of Lilly Endowment prohibited release of the evaluation. This is because a public record must be disclosed unless an exemption in section 4 of the APRA applies to it, irrespective of whether the person or corporation who supplied the record "consents" to its disclosure.

However, there are exemptions that apply to a record that a public agency maintains where the record is submitted to it by a private company, rather than created by the public agency itself. For example, confidential financial information received, upon request, from a person, is confidential under the APRA. IC 5-14-3-4(a)(5). "Person" as used in the APRA includes a corporation. IC 5-14-3-2(j). Also, records containing trade secrets are confidential. IC 5-14-3-4(a)(4). Trade secrets has the meaning set forth in IC 24-2-3-2; a public agency seeking to determine whether a record constitutes a trade secret could conceivably need to consult with the corporation who supplied the record to the public agency. Hence, I hesitate to deem a public agency out of compliance with the APRA *merely* because the agency indicates it will consult with the corporation that supplied the record. I will concede that neither of these exemptions were cited by the MSD, and it is not obvious what objection the Lilly Endowment could have lodged to disclosure of the evaluation. Nevertheless, it is not out of the realm of possibility that the Lilly Endowment's restrictions could have met an exemption to disclosure.

Also, it is not unusual for a public agency to state its intention to consult with legal counsel or others (like the public access counselor) to determine how it must comply with the APRA in a particular instance. I do not view the communication of Mr. Hammel to be materially different from the many other types of consultation that public agencies may wish to

perform upon receipt of a request for a record. In fact, it is conceivable that the MSD could have consulted with its counsel or my office if it had received a negative response from the Lilly Endowment, to determine whether the MSD could rely on the Lilly Endowment's restriction. In reality, the Lilly Endowment approved the disclosure of the evaluation. It does not matter for purposes of the APRA that the Lilly Endowment's approval was superfluous.

Clearly, the MSD's communication to you contemplated that the MSD would contact you with a fuller response. The MSD cannot, in my view, have been deemed to have denied you a record, or even interfered with your rights under the APRA, in these circumstances. That you were reasonably in fear that an improper denial *could have occurred* is not doubted. However, I do not view the MSD's preliminary statement to be a violation of the APRA.

I would caution public agencies that the time in which a record must be produced may not be enlarged for purposes of seeking permission from others to release a record that could not be subject to an exemption. Accordingly, had the MSD stated that the Lilly Endowment's "permission" could not be obtained for two months, I would have found the record's production unreasonably delayed. However, the MSD made the inquiry quickly and received a timely response from the Lilly Endowment.

Also, I write to point out that it was not a violation for the MSD to solicit your inspection of the record prior to making copies; the MSD was not obligated to make the copies and mail them to you. Under IC 5-14-3-3(b), the public agency may allow the person to make copies on the agency's equipment or on the person's own equipment. So long as the MSD made its records available for inspection and copying, it met the requirements of the APRA.

CONCLUSION

For the foregoing reasons, I find that the Metropolitan School District of Washington Township did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: William D. Hammel