



STATE OF INDIANA

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September 19, 2012

Michael B. Pell
223 Perimeter Center Parkway Northeast
Atlanta, Georgia 30346

Re: Formal Complaint 12-FC-239; Alleged Violation of the Access to Public Records Act by the Gary Indiana School Corporation

Dear Mr. Pell:

This advisory opinion is in response to your formal complaint alleging Gary Indiana School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Tracy A. Coleman, Attorney, responded on behalf of the School. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that you submitted a written request pursuant to the APRA to the School for the following records:

- Records of complaints alleging improprieties on standardized tests by teachers and school administrators from January 1, 2007 through the present. These records should include, but not be limited to, complaints, investigative records, and documents that reflect the resolution of each case;
- Documents showing the results of any test screening activities, such as erasure analysis, for standardized tests administered each year since 2007; and
- Records of personnel actions since 2007 related to testing improprieties.

On August 14, 2012, the School advised in writing that the Indiana Department of Education ("IDOE") would have the information that you requested. The School provided that the IDOE maintained track of complaints alleging improprieties regarding testing. Further, the School noted that personnel actions for School employees are private and therefore will not be disclosed.

Prior to receiving the School's written denial, you had been informed by Sarita Stevens that the records that had been requested had been sent to the School's attorney. Ms. Stevens stated that the attorney would be reviewing the documents before they would be provided. You believe that the School's claims that the IDOE maintains the records

you had requested are inaccurate. The IDOE informed you in a June 6, 2012 letter that: “Any allegations of an educator participating in or aiding a student cheating on a standardized test are initially investigated by the local school corporation. The local school corporations are also responsible for maintaining personnel actions relating to testing improprieties, not the IDOE.”

You further provide that the records that have been requested do exist and the School has engaged in a blatant lie to avoid their responsibility under the APRA, relying on the presumption that you were not aware of IDOE’s investigation procedures. Furthermore, the letter you received from the School does not serve as a formal denial as required under the APRA as the School fails to cite to a specific exemption that would authorize the School to withhold the records.

In response to your formal complaint, Ms. Coleman advised that on August 7, 2012, the School sent a letter to you in an attempt to confirm what information was requested. The School thereafter conducted a review of records that it maintained related to personnel actions regarding the allegations of erasure marks. The information requested regarding personnel actions are not subject to disclosure. Because of this reason, your request was denied. Ms. Coleman further advised that the School has not violated the APRA and you are attempting to obtain records that are exempt from disclosure due to numerous privacy issues related to personnel actions, testing, etc...

In reply to your response, Mr. Pell advised he has no record of receiving any correspondence from you on August 7, 2012. The last correspondence from the School indicated that the IDOE maintains the records that were requested. The August 14, 2012 correspondence stated that the records do exist, are being held by the School, and are exempt due to they are related to personnel actions. After a complaint was submitted establishing that the School was required to keep such documents, the School now maintains that the records are related to personnel actions. The original request was submitted on May 9, 2012. During that time, the School has alternatively denied the existence of any documents and thereafter maintained that the record do exist but refused to respond to any records request in writing. The APRA requires that records related to personnel information that resulted in the employee being suspended, demoted, and discharged must be made available.

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 School 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 School’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).

A request for records may be oral or written. *See* I.C. § 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* I.C. § 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* I.C. § 5-14-3-9(b). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either “establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit” *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinion of the Public Access Counselor 01-FC-47*.

In response to your request, the School failed to cite to any specific exemption that would authorize it to withhold any records that were responsive to your request. Although the School made general references to “personnel actions”, such a response would not be considered compliant with the requirements of I.C. § 5-14-3-9(c)(1)-(2). As such, it is my opinion that the School violated the APRA by failing to comply with the requirements of I.C. § 5-14-3-9(c).

As to the substance of the School’s denial, the APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA’s disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and
- (C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged. I.C. § 5-14-3-4(b)(8).

However, it should be noted that I.C. § 5-14-3-4(b)(8), by itself, does not make any record maintained in an employee's personnel file confidential. In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion. To the extent that the School maintains records in an employee's personnel file that contain the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged, such records must be disclosed under the APRA. It is not clear from the School response whether it maintains such records that would fall under subsection (C). Thus I cannot definitively state that the School violated the APRA regarding this issue. However, the APRA would require that the School to review the applicable provisions of I.C. § 5-14-3-4(b)(8) and provide any such records, in existence, that are responsive to your request.

Generally, if a public agency has no records responsive to a public records request, the agency generally does not violate the APRA by denying the request. "[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy...."). The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. See *Opinion of the Public Access Counselor 11-FC-80*. As such, the School would not violate the APRA if it failed to produce records that it was not legally obligated to maintain (emphasis added).

CONCLUSION

For the foregoing reasons, it is my opinion that the School violated the APRA by failing to cite to a specific exemption authorizing the withholding of any record that was responsive to your request. Further, to the extent that the School maintains any record that must be provided under I.C. § 5-14-3-4(b)(8)(C), such records should be provided. Finally, the School would not violate the APRA *if* it failed to produce records that it was not legally obligated to maintain (emphasis added).

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a stylized "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Tracy A. Coleman