



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

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October 30, 2012

Rita A. Jeffirs
629 Elm Road
Bremen, Indiana 46506

Re: Formal Complaint 12-FC-291; Alleged Violation of the Access to Public Records Act by the Bremen Public Schools

Dear Ms. Jeffirs:

This advisory opinion is in response to your formal complaint alleging the Bremen Public Schools ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Mark E. Wagner, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege you hand-delivered a written request for records to the School on September 18, 2012. You requested a completed copy of School Board Policy 230 Complaint Procedure that was filed by William M. Jeffirs on July 11, 2012 and a copy of the Teaching Assistant Performance Review Special Services Department ("Review") that was completed by Ms. Jennifer Payne for Rita Jeffirs. You provide that the request specifically stated that the copy of the Review that was requested was filled out in its entirety by Ms. Payne, prior to it being edited by Mr. Larry J. Yelaska.

You allege that the School violated the APRA by failing to timely respond to your request. At the time of your request, you were orally informed by Ms. Terri Biddle that the records would be available the following day. When you returned the following day, you were then informed that a response had been sent to you via U.S. Mail. You further allege that the School failed to produce an unedited copy of the Review that you had requested.

In response to your formal complaint, Mr. Wagner advised you were a non-certified employee of the School. As a result of that status, you were an "at will" employee. You have been terminated from your position with the School. After your termination, you submitted a written request for public records on September 18, 2012. You were initially informed that the request would be fulfilled on the next business day,

September 19, 2012. However, Superintendent Russ Mikel thereafter responded in writing to your request on September 19, 2012 via certified mail and provided that the records would not be available until September 28, 2012. On September 28, 2012, you received copies of the records that were produced.

In response to the allegation that the School did not timely respond to your request, Mr. Wagner argues that the APRA does not require that all records be produced within twenty-four hours. Rather, the APRA requires the records be produced in a reasonable period of time. You were informed in writing via certified mail that the records you had requested would be available within ten (10) days. The School maintains all records were provided to you in a reasonable period of time.

As to your request for an unedited copy of the Review, Mr. Yelaska had asked Ms. Payne to fill out the Review in question. When Ms. Payne submitted the record, Ms. Payne had answered in three (3) areas that Mr. Yelaska felt that she could not answer on her own. These three areas were correctly circled by you on the attachment to the formal complaint that was filed. All three areas dealt with questions that Ms. Payne could not answer by herself and were to be answered by an administrator. Mr. Yelaska took the form that Ms. Payne had submitted and then completed the answer to the three areas in question. It was the completed form that the School produced in response to your request. Mr. Wagner would argue that Ms. Payne's written review was only part of the basis for the Review that was completed by Mr. Yelaska. Ms. Payne's review did not become a part of your personnel file and thus I.C. § 5-14-3-4(b)(8) would not be applicable. Mr. Wagner would argue that the School would retain discretion to produce the records pursuant to I.C. § 5-14-3-4(b)(6) as a deliberative material. Regardless, you have apparently been able to determine those portions of the record that were completed/edited by Mr. Yelaska as evidenced by the copy of the Review that was submitted with your formal complaint.

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 twenty-four 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 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 information regarding how or when the agency intends to comply. Here, you hand-delivered a written



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request for records to the School on September 18, 2012. The School was thus required to respond, in writing, within twenty-four hours of receipt of your hand-delivered written request. The APRA requires the agency respond in writing within twenty-four hours; the law does not provide that the requestor actually receive the response in twenty-four hours. Mr. Mikel responded to your request in writing on September 19, 2012, which was evidenced by the date-stamped certified envelope that was submitted with your formal complaint. As such, it is my opinion that the School complied with the requirements of section 9 of the APRA in responding to a hand-delivered, written request in writing within twenty-four hours of receipt. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63.*

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.* 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.* Here, the School produced all records that were responsive to your request within ten (10) days of the receipt of your request. In light of the nature of your request, the fact the records were required to be reviewed prior to production, and that the School complied with the requirements of section 9 in its response, it is my opinion that the School provided all records in a reasonable period of time.

As to your request for a copy of the Review completed by Ms. Payne that did not include the comments/amendments made by Mr. Yelaska, it is not clear from the School's response whether it actually maintains an unedited version of the Review. If the only copy of the Review maintained by the School is an edited version, then it is my

opinion that the School has complied with the requirements of the APRA in producing the record that was responsive to your request. The School would not be required to create a record in response to a records request. *See Opinions of the Public Access Counselor 01-FC-61; 10-FC-56; 12-FC-162.* Regardless of the ability to produce the record, as pointed out by the School in its response, you have identified Mr. Yelaska's amendments/edits in a copy of the edited Review that you submitted with your formal complaint.

Alternatively, if the School does maintain a copy of the unedited review, with only Ms. Payne's comments, it is my opinion that pursuant to I.C. § 5-14-3-4(b)(8) the School would be required to produce a copy to you. I.C. § 5-14-3-4(b)(8) provides that all personnel file information shall be made available to the affected employee or the employee's representative. Although the School might have discretion to disclose the unedited Review in response to a general request under the APRA pursuant to the deliberative materials exception found under I.C. § 5-14-3-4(b)(6), subsection (b)(8) specifically states that all personnel file information shall be made available to the affected employee. It is my opinion after reviewing an edited copy of the Review, this type of record in its unedited form would be considered to be personnel file information. As such, pursuant to subsection (b)(8), the School would be required to disclose a copy to you as the affected employee.

CONCLUSION

Based on the foregoing reasons, it is my opinion that the School complied with the requirements of section 9 of the APRA by responding in writing to your hand-delivered written request within twenty-four hours. It is my opinion that the School provided all records that were responsive to your request in a reasonable period of time. If the School does not maintain an unedited copy of the Review that was sought, it is my opinion that the APRA would not require the School to create a record in response to your request. Lastly, it is my opinion that if the School maintains an unedited copy of the Review, pursuant to I.C. § 5-14-3-4(b)(8), it would be required to provide you with a copy as the affected employee.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Mark E. Wagner