



STATE OF INDIANA

MICHAEL R. PENCE, Governor

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December 12, 2016

Ms. Roberta A. Kaplan, Esq.
1285 Avenue of the Americas
New York, NY 10019

Re: Formal Complaint 16-FC-281; Alleged Violation of the Access to Public Records Act by the Office of the Indiana Governor

Dear Ms. Kaplan:

This advisory opinion is in response to your formal complaint alleging the Office of the Indiana Governor ("Governor's Office") violated the Access to Public Records Act ("APRA"), Indiana Code § 5-14-3-1 et. seq. The Governor's Office has responded on November 14, 2016 via Mr. Mark Ahearn, Esq., General Counsel. His response is included for your review. Pursuant to Indiana Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on October 25, 2016.

BACKGROUND

Your complaint dated October 25, 2016, alleges the Governor's Office has violated the APRA by failing to provide you with public records. On August 18, 2016, you sent an amended public records request for correspondence between staff members, different individuals from various outside entities, and thirty (30) search terms to use when locating records.

The Governor's Office replied to your request on August 30, 2016, acknowledging your request as well as stating that correspondence is generally the most time intensive public records searches and will do its best in producing those records quickly.

On September 2, 2016, you sent correspondence stating you would accept materials on a rolling basis if the request proved to be a voluminous amount of records. On October 6, 2016, correspondence was sent requesting a status update for records request. You filed your formal request on October 25, 2016.

The Governor's Office responded to your formal complaint on November 14, 2016. It alleges your request was very broad and included emails over the course of two and one-half years. In order to retrieve these records, Indiana Office of Technology ("IOT") has to pull from backup files for each quarter of the year an employee works for the State. For one person this could easily take seven (7)

hours to complete, a request such as this one would take a minimum of two (2) weeks to compile. After records are compiled the attorneys in the Governor's Office must go through each to determine whether it contains confidential or deliberative materials which may be withheld pursuant to APRA.

Additionally, the Governor asserts the workload of the office has drastically increased in the past few months since Governor Pence was announced as the Republican candidate for vice president and subsequently elected vice president-elect. The Governor's Office has received numerous amounts of APRA requests in the past few months and have worked diligently to produce some voluminous requests - one totaling 7,500 pages of emails. Prior to July, APRA requests were a minor part of the day-to-day duties of the legal counsel, but now has become a major factor of operations.

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 Indiana Code § 5-14-3-1*. The Governor's Office of Indiana is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)(1)*. Accordingly, any person has the right to inspect and copy the Governor's Office disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

A request for records may be oral or written. *See Indiana Code § 5-14-3-3(a); § 5-14-3-9(c)*. If the request is submitted and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See Indiana 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.

Indiana Code § 5-14-3-3(b), states a request for public records must be fulfilled by a public agency within a reasonable time. The APRA does not specify a time for production or inspection of responsive records. Often, this Office is asked to make a determination as to the reasonableness of the time for production by a public agency. What is a "reasonable" time period under one circumstance may not be reasonable under other conditions. Production need not materially interfere with the regular discharge of the functions and duties of the public agency. *See Indiana Code § 5-14-3-7(a)*.

Therefore, the determination of what is a reasonable time for production depends upon the public records requested and circumstances surrounding the request. Although reasonable time is not defined in the APRA or by the Courts, it is a standard which differs on a case-by-case basis. The timing of your amended request is one of the many requests in which the Governor's Office has received since the nomination of Governor Pence as candidate for vice president. You have also requested a large amount of information; you sought correspondence between eight (8) different staff members, twenty-nine (29) different individuals from various outside entities, as well as thirty-six (36) search terms to use to locate records spanning over two and one-half years. The Governor's Office has acknowledged your request and explained to you the correspondence requests typically are the most time consuming records to fulfill.

The circumstances affecting the “reasonableness” of timely production of documents include: size of the public agency, number of pending requests, complexity of the request, and any other operational considerations which may reasonably affect the public records process. In this case, APRA requests in The Governor’s Office are handled by three attorneys who must also continue their day to day duties, and you requested a large amount of information. Nevertheless, the Governor’s Office has produced the records it believes are responsive to your request within 90 days of the amended request.

I am aware of the amount of public records requests the Governor’s Office has received since the announcement of Governor Pence’s candidacy. Given the relatively small size of the Governor’s staff roster, as well as the complexity of your request for emails, I do not believe there was an unreasonable delay in the production of documents.

CONCLUSION

Based on the foregoing, in the opinion of the Public Access Counselor the Office of the Indiana Governor has not violated the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a large, sweeping flourish underneath.

Luke H. Britt
Public Access Counselor

Cc: Mr. Mark Ahearn, Esq.