



# STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR  
JOSEPH B. HOAGE

Indiana Government Center South  
402 West Washington Street, Room W470  
Indianapolis, Indiana 46204-2745  
Telephone: (317)233-9435  
Fax: (317)233-3091  
1-800-228-6013  
[www.IN.gov/pac](http://www.IN.gov/pac)

November 3, 2011

William Francis McGarry  
2317 Leroy Avenue  
Fort Wayne, Indiana 46805

*Re: Formal Complaint 11-FC-261; Alleged Violation of the Access to Public Records Act by the Fort Wayne Community Schools*

Dear Mr. McGarry:

This advisory opinion is in response to your formal complaint alleging the Fort Wayne Community Schools ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Krista Stockman, Public Information Officer, responded to your formal complaint. Her response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that you submitted a request in writing on September 28, 2011 to the School for the following records:

- (1) Policy and accepted practice for custodial access
- (2) Policy and accepted practice for non-custodial access
- (3) Acceptable and necessary documents to demonstrate custodial/non-custodial status
- (4) Policy and accepted practice for custodial access to Pinnacle
- (5) Policy and accepted practice for non-custodial access to Pinnacle
- (6) Policy and accepted practice for verification of student registration forms(s)/date; i.e. if a non-custodial parent is listed what is the policy to validate/verify and how is the custodial parent validated/verified.
- (7) Data on Pinnacle access, including but not limited to: number of parents with access, number of custodial parents with access, and number of non-custodial parents with independent access.
- (8) Any and all related policies and/or accepted practice(s) related to parental access, both custodial and non-custodial.

You requested, if possible, electronic copies of any records that were responsive to your request. On September 29, 2011, Mr. Martin responded to you via e-mail and provided

that he was aware of your request and would like to speak with you concerning the records that had been requested, to which he provided you with his contact information. You replied to Mr. Martin's response on September 29, 2011 via e-mail and maintained that your request was made with reasonable particularity. On October 10, 2011, having not received a response from Mr. Martin, you submitted another e-mail to him regarding your request. Mr. Martin replied on October 11, 2011 and provided that School personnel were working on your request and would ascertain the status of your request. On October 12, 2011, you responded to Mr. Martin and requested further clarification.

On October 13, 2011, you filed a second request for public records with the School, in person, at the Grile Administrative Center in Fort Wayne, Indiana. You allege that the School failed to respond within the twenty-four hours as required by the APRA. As of October 14, 2011, the date you filed your formal complaint with the Public Access Counselor's Office, you have yet to receive any records from the School in response to your request.

In response to your formal complaint, Mr. Stockman advised that the School responded to your initial inquiry regarding the School's policy for non-custodial parents the day it was received. The same day, you submitted your first formal records request, to which the School responded one day after it was received. The School further responded to the October 10, 2011 inquiry within one day of receipt. On Thursday, October 13, 2011, you dropped off an additional public records request in person. The School was closed on Friday, October 14, 2011.

As to the substance of Mr. McGary's requests, the School did not have any documents responsive to your request for acceptable and necessary documents to demonstrate custodial/noncustodial status, policy and practice for verification of student registration forms, and data on Pinnacle access. As to the remaining items, the School provided to you all records that were responsive to your request on October 18, 2011.

## 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). Under the APRA, when a request

is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). 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, the School responded to your initial requests submitted via e-mail within one day of receipt. It is my opinion that the School responded to your initial requests within the timelines provided by the APRA. You submitted an additional request to the School in person on Thursday, October 13, 2011. The School has provided that it was closed on Friday, October 14, 2011 and all documents responsive to all requests that had been submitted were produced on Tuesday, October 18, 2011. While I sympathize with the School with the confusion that identical records requests might cause, pursuant to the requirements of section 9 of the APRA, the School was required to respond to your October 13, 2011 request, submitted in person, by Monday, October 17, 2011. As such, in that instance it acted contrary to the requirements of section 9 of the APRA.

Generally, if a public agency has no records responsive to a public records request, the agency 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...”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. *See Opinion of the Public Access Counselor 10-FC-56*. To the extent that the School did not have records that were responsive to your requests for acceptable and necessary documents to demonstrate custodial/noncustodial status, policy and practice for verification of student registration forms, and data on Pinnacle access, it is my opinion that it did not violate the APRA by not producing records which do not exist.

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). “Reasonable particularity” is not defined in the APRA, but the public access counselor has repeatedly opined that “when a public agency cannot ascertain what records a requester is seeking, the request likely has not been made with reasonable particularity.” *Ops. of the Public Access Counselor 10-FC-57; 08-FC-176*. However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-13*.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as 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 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.*

The APRA *requires* public agencies 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). (emphasis added). A public agency shall “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); *See also Opinion of the Public Access Counselor 09-FC-115* (two months was not an unreasonable production time where agency director and records request handler recently assumed the duties of another position and needed time to review and redact confidential information); *see also Opinion of the Public Access Counselor 11-FC-222* (thirteen days was not an unreasonable amount of time to respond to the request when the School maintained communication with the requestor and established that it took action on the request outside of the normal house or operation.).

From the date of your initial request, September 28, 2011, the School took approximately twenty-one (21) days, or fourteen (14) business days, to provide all records that were responsive to your request. You made eight separate requests of the School to produce records pursuant to the APRA. Upon receiving your initial public records requests, the School responded within one day of receipt. Mr. Martin attempted to clarify your request and expressed a desire to speak with you on the phone to this end. You responded that e-mail correspondence was the most reliable form of communication for you and your belief that the request was reasonably particular. Although APRA does not require a person making a request to speak personally with the public agency, many times person-to-person contact, either directly or via telephone, will expedite the efforts of the public agency to clarify the request and begin researching and reviewing any documents that are responsive to it. After retrieving the documents that were requested, the School was required to review the documents pursuant to the APRA. All the while responding to your requests, the School it was required to maintain the regular duties required of the office and respond to other records requests received by it. As such, I do not believe the School took an unreasonable amount of time to collect, review, and reproduce the records in response to your request. As the School has provided that it produced all records responsive to your request on October 14, 2011, I trust this is in satisfaction of your complaint.

## CONCLUSION

For the foregoing reasons, it is my opinion that the School acted contrary to the requirements of section 9 of the APRA by failing to respond within twenty-four (24) hours to your in-person records request. As to all other issues, it is my opinion that the School did not violate the APRA.

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 long, sweeping underline.

Joseph B. Hoage  
Public Access Counselor

cc: Krista Stockman