



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
ANDREW J. KOSSACK

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

December 1, 2010

Mr. Gaylon J. Nettles
10116 E. Washington St.
Indianapolis, IN 46229

Re: Formal Complaint 10-FC-272; Alleged Violation of the Access to Public Records Act by the Indiana Department of Education

Dear Mr. Nettles:

This advisory opinion is in response to your formal complaint alleging the Indiana Department of Education ("IDOE") violated the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.* The IDOE's response is enclosed for your reference.

BACKGROUND

In your complaint, you allege that IDOE violated the APRA by denying your request for IDOE records that contained your name and were communicated between several IDOE staff members during May of 2010. Your request was the fifth in a series of requests to the IDOE, all of which were denied. You note that your requests were related to a complaint with the Equal Employment Opportunity Commission. In response to that complaint, the IDOE claimed that you had supported the ghost employment of a subordinate. You allege that IDOE's claim was false. You also note that you requested that the individual who denied your request recuse herself from deciding whether or not to grant or deny your requests due to the fact that her emails were included in your request.

In response to your complaint, IDOE Assistant Superintendent for Policy, Legal, and Communications Heather Neal claims that IDOE is not aware of the existence of any records responsive to your request. Ms. Neal argues that IDOE is not obligated to conduct research in order to determine what records, if any, are responsive to your request. She states that conducting an electronic search for responsive records would require IDOE staff to manually click on each email and read the entire body of the email. However, Ms. Neal personally asked the individuals whose emails were subject to your request whether any of them recalled any such messages pertaining to you. None of the individuals could recall any such emails or documents. Due to the imprecise nature of that "search," Ms. Neal notes that she could not indicate with absolute certainty whether

the IDOE maintains any records responsive to your request. However, even if IDOE did maintain such records, Ms. Neal anticipates that they would be exempt from disclosure under subsections 4(a)(1), 4(b)(2), or 4(b)(6) of the APRA. Finally, Ms. Neal claims that there is no statutory reason for her to recuse herself from handling your requests.

ANALYSIS

The public policy of the APRA states, “[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.” I.C. § 5-14-3-1. The IDOE does not contest that it is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the IDOE’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

Ms. Neal is correct that several of my predecessors and I have opined that the APRA does not require public agencies to search through records -- electronically or manually -- to determine what records might contain information responsive to a request. *See Ops. of the Public Access Counselor 10-FC-57; 08-FC-124; 04-FC-38*. 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*.

Nevertheless, Ms. Neal voluntarily queried each of the individuals whose emails were subject to your request, and none of them identified any records responsive to your request. If the IDOE has no records responsive to your request, it did not violate the APRA by denying it. “[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....”).

Finally, nothing in the APRA requires public officials or employees to recuse themselves from decisions regarding whether to grant or deny a public records request. Moreover, I am not aware of any statute or rule that would require the recusal of such a decision maker merely because the decision maker’s own emails are subject to the request.

CONCLUSION

For the foregoing reasons, it is my opinion that IDOE did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Heather Neal