



# STATE OF INDIANA

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April 1, 2010

Ms. Katie A. Barnes  
1149 Winter Wood Ct.  
Zionsville, IN 46077

*Re: Formal Complaint 10-FC-56; Alleged Violation of the Access to  
Public Records Act by the Zionsville Community Schools*

Dear Ms. Barnes:

This advisory opinion is in response to your formal complaint alleging the Zionsville Community Schools ("ZCS") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* I have enclosed ZCS' response for your reference.

## BACKGROUND

According to your complaint, ZCS violated the APRA by denying you access to a copy of "the 2009 General Fund Actual Expenditures (Actual 2009 Budget for ZCS)."

In response to your complaint, ZCS notes that Supt. Robison responded to your request for the expenditures as follows:

The preparation of our 2009 expenditures report is incomplete at this time. Review and analysis is ongoing and preparation of the report is not yet complete. This report is not due to the State Department of Education until the end of this month [March]. When this record is complete and properly submitted as its official form, it will be provided within a reasonable time.

*ZCS Response at 1.* ZCS argues that it did not violate the APRA because it could not provide a document that did not exist at the time of your request. ZCS notes that it intends to provide you with a copy of the document within a reasonable time after its creation.

## 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. ZCS 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 ZCS’ 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).

ZCS maintains that it does not have a copy of the record you seek. Typically, 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*.

However, I note that in this case, ZCS has indicated that the record is in the process of being created but it is not yet complete. Previous opinions from this office have viewed draft or incomplete records as disclosable public records under the APRA. *See Opinion of the Public Access Counselor 08-FC-54; 06-FC-124; 05-FC-142; 98-FC-4*. In one such case, Counselor Neal reasoned:

Here the Auditor may sustain the denial by providing the statutory authority exempting the record from disclosure. The record is not exempted from disclosure merely by the fact that it is a draft or incomplete record. The APRA does not require a record to be in its final or complete form before it can be produced pursuant to a request.

*Opinion of the Public Access Counselor 08-FC-54*. Counselor Neal concluded that an auditor could not deny access to a deed simply because the deed had not yet been recorded; the deed existed and was maintained by a public agency, so it should have been disclosed unless an exception to the APRA permitted or required the auditor to withhold it. *Id.*

The above line of opinions is distinguishable from the instant matter, however. In the cases above, public agencies denied access to records that were already created on the basis that the records were in a draft form. In one of the first of these types of disputes, Counselor O’Connor opined, “**Once created**, draft or proposed minutes are public records and nondisclosure must be based upon one of the exceptions outlined in the APRA.” *Opinion of the Public Access Counselor 98-FC-8* at 1 (emphasis added). Draft minutes that have not yet been approved are different than records that have not yet been created. Where records are not yet created, a public agency does not violate the APRA by refusing to produce them. *See 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....”).

That said, ZCS should not refuse you access to the record once it is created on the basis that it has not yet been, as Supt. Robison said, “properly submitted [to the Department of Education] as its official form.” If the record exists, it must be disclosed unless an exception to the APRA applies whether or not it is in its “official form.” *See Opinion of the Public Access Counselor 08-FC-54*

#### CONCLUSION

For the foregoing reasons, it is my opinion that ZCS did not violate the APRA. I trust that ZCS will provide you with a copy of the requested record as soon as practicable after ZCS has created it.

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: Alan L. McLaughlin