



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

May 3, 2012

Chris T. Baker
3055 Shawnee Trail
New Haven, Indiana 46774

Re: Formal Complaint 12-FC-105; Alleged Violations of the Access to Public Records Act and the Open Door Law by the East Allen County School Board

Dear Mr. Baker:

This advisory opinion is in response to your formal complaint alleging the East Allen County School Board ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.*, and the Access to Public Records Act ("APRA"), I.C. § 5-14-3-1 *et seq.* Neil Reynolds, Board President, responded in writing to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that the Board commissioned Dr. Daryl Yost ("Yost") to complete a survey ("Survey") of the educational environment within the school district as it relates to academic programs, academic standards, and the larger school community. It is your understanding that the Survey has been completed and various parties have requested a copy. You allege that all parties who have sought a copy of the Survey from the Board have been denied. You further allege that the Board intended to discuss the Survey at its April 24, 2012 executive session. You allege that the Board failed to respond to your inquiries at its April 17, 2012 public meeting as to how it would be allowed pursuant to the ODL to discuss the Survey at an executive session. The notice of the executive session provided by the Board stated the reason for the session was to train school board members with an outside consultant about the performance of their roles as public officials pursuant to I.C. § 5-14-1.5-6.1(b)(11). You believe that discussing the Survey at the executive session does not fall within the parameters of the exception found in (b)(11).

In response to your formal complaint, Mr. Reynolds advised that the Board did commission Yost to conduct a Survey and that the Board has received requests from various groups for a copy of the record. It is the intent of the Board to publish the Survey

on its district website when it receives the record. It is anticipated that the Survey will be completed and submitted by Yost in the next few weeks.

As to the April 24, 2012 executive session, Mr. Reynolds acknowledged that you spoke at the April 17, 2012 public Board meeting regarding your allegations relating to the Survey and the April 24, 2012 executive session. The Board filed a proper notice pursuant to the ODL for its April 24, 2012 executive session. The executive session was held in accordance with I.C. § 5-14-1.5-6.1(b)(11). The only activity conducted during the April 24, 2012 was training by Yost, an outside consultant to the Board. Discussion included training in how they, as individual members of the Board, work with the Superintendent, administration, teaching staff, employee groups, and the community at large in keeping their responsibilities as public school board members at the forefront of everything they do. Expectations, roles, and responsibilities of the Board were also discussed and focus was given to how to make the best decisions possible for the students.

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 Board 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 Board’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).

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*. Here the Board has acknowledged that it commissioned Yost to conduct the Survey. The Board further advised that Mr. Yost has yet to complete and submit the Survey to the Board. Upon receipt of the Survey, the Board intends to publish the record on its website. As such, it is my opinion that the Board did not violate the APRA in denying requests for a record that it has yet to receive. Upon receipt of the Survey, the Board would be required to produce the record in response to a public records request, minus any applicable exceptions.

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section



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

6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c).

I.C. § 5-14-1.5-6.1(b)(11) provides that an executive session may be held to train school board members with an outside consultant about the performance of the role of the members as public officials. Mr. Reynolds advised that proper notice was provided pursuant to I.C. 5-14-1.5-5 for the April 24, 2012 executive session held by the Board and that the only topic discussed during the executive session involved training performed by Yost, an outside consultant hired by the Board. You allege that the Board discussed the Survey completed by Yost at the April 24, 2012 executive session. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80*. As such, if only activity that occurred at the April 24, 2012 executive session held by the Board consisted of a training session for school board members with an outside consultant about the performance of the role of the members as public officials, then the Board complied with the requirements of the ODL. If the discussions went beyond what is allowed pursuant to I.C. § 5-14-1.5-6.1(b)(11), then the Board acted contrary to the requirements of the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that the School did not violate the APRA. As to the ODL, it is my opinion that if the activities of the Board at its April 24, 2012 executive session consisted solely of a training session for Board members with an outside consultant about the performance of the role of the members as public officials, then the Board did not violate the ODL.

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 distinct "Hoage" at the end.

Joseph B. Hoage
Public Access Counselor

cc: Neil Reynolds