



# STATE OF INDIANA

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August 9, 2012

Daniel J. Parker  
Chairman, Indiana Democratic Party  
115 W. Washington St.  
Indianapolis, Indiana 46204

*Re: Formal Complaint 12-FC-191; Alleged Violation of the Access to Public Records Act by the Treasurer of the State of Indiana*

Dear Mr. Parker:

This advisory opinion is in response to your formal complaint alleging the Treasurer of the State of Indiana ("Treasurer") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Jillean Long Battle, General Counsel, responded on behalf of the Treasurer. Her response is enclosed for your reference.

## BACKGROUND

In your formal complaint, you allege that on May 16, 2012, you submitted a request to the Treasurer for "a copy of all legal invoices and any related billing information, including expense receipts, from White & Case LLP, pertaining to the litigation of the Indiana State Police Pension Trust v. Chrysler." You acknowledged in your request that certain materials were likely not to be disclosed at the discretion of the agency, but that I.C. § 5-14-3-6 requires for the separation of material that is disclosable from that which is not, when a record contains both kinds of information.

On June 29, 2012, you received records from the Treasurer that were responsive to your request. The cover letter provided with the records indicated that the records that were contained within were "all invoices and any related billing documentation." On July 9, 2012, you received an additional document from the Treasurer to indicate that the records that had previously been provided on June 29, 2012 were not, in fact, "all documentation." The Treasurer's July 9, 2012 correspondence, received unsolicited, provided a "status update" as to your request. An additional record was also provided at that time that directly related to your initial request concerning billing information. The record has been in the Treasurer's possession since July 5, 2011. You allege that the Treasurer's failure to provide all documents that were responsive was a denial of access under the APRA. In addition, you allege that the Treasurer has still not produced all records that were responsive to your request, evidenced by records that were previously

produced by the Treasurer to other parties who made similar requests, have still yet to be produced to you in response to your request.

In response to your formal complaint, Ms. Battle acknowledged the Treasurer received your hand-delivered request on May 16, 2012. On the same day, the Treasurer responded in writing to your request and acknowledged its receipt. On May 25, 2012, the Treasurer submitted written correspondence to you that the anticipated review of the records that were responsive to your request would be completed on or before June 15, 2012. The letter further noted that a great deal of the information that you were requesting was available online via the Treasurer's website. Thereafter, the Treasurer informed you in writing that the estimated completion date had been extended to June 29, 2012 due to the high volume of records requests received by the agency. On June 29, 2012, you were thus informed that the documents that you requested were ready for pick up and in fact, representatives from the Democratic Party received and paid for that day. Five business days later, the Treasurer provided you with an additional invoice that was responsive to your request. During the initial review process of over six-hundred documents, the invoice was attached to a privileged document and categorized as such.

Pursuant to I.C. § 5-14-5-6, a person has grounds to file a complaint if the public agency has denied the right to inspect or copy records pursuant to the APRA. A denial of access occurs when a public agency either affirmatively denies the request or fails to respond to a public records request in the timeframes mandated by the APRA. *See Informal Opinion of the Public Access Counselor 12-INF-18*. If a request is delivered in person, an agency is required to respond to the request within twenty-four hours of receipt. A response from an agency could be an acknowledgement that the request has been received and may provide an estimate timeframe of when the agency will comply with the request. Records must be provided in response to a request in a reasonable period of time.

As applicable here, you never received an affirmative denial from the Treasurer in response to your request for records. Further, the Treasurer responded in writing to your hand-delivered written request within twenty-four (24) hours of its receipt. You received the secondary disclosure of records on July 9, 2012 prior to the filing of the formal complaint with the Public Access Counselor's Office. In regards to the information that was provided on July 9, 2012, the Treasurer had already communicated to you on May 25, 2012 that said information was available on the Treasurer's website. As such, the Treasurer maintains that since you were never denied access to a record, no violation of the APRA would have occurred.

In regards to the allegation that the Treasurer has still failed to provide all records that were responsive to your request, while you may not have received the record from the Treasurer when it was expected, it was always the intent of the office to disclose all documents and that the information provided in the document was shared with you prior to the filing of your complaint with the Public Access Counselor's office. The Treasurer has maintained information regarding your request (i.e. Chrysler litigation) on its website since May 18, 2009. Due to recent interest, the Treasurer added additional detail to the

information that was provided, including a breakdown of expenses and information regarding the amount billed to each of the three funds involved in the litigation. In the nine weeks since you have submitted your original request, the Treasurer has communicated with you in writing on ten separate occasions to keep you abreast of its actions in responding to not only this request, but the forty-four other public records requests you have submitted to the Treasurer in the last two months.

## 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 Treasurer 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 Treasurer’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 twenty-four 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 days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). 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, you hand-delivered a written request for records to the Treasurer on May 16, 2012, to which it responded in writing to your within twenty-four hours. As such, it is my opinion that Treasurer complied with the requirements of section 9 of the APRA in responding in writing to a hand-delivered written request within twenty-four hours of its receipt. *See Opinions of the Public Access Counselor 05-FC-176; 11-FC-84; 11-FC-308; 12-FC-63; 12-FC-162.*

Effective July 1, 2012, the APRA provides a public agency shall provide records that are responsive to the request within a reasonable time. *See* I.C. § 5-14-3-3(b). The public access counselor has stated that factors to be considered to be considered in determining if the requirements of section 3(a) under the APRA have been met include, 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 APRA requires an agency 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). Section 7 of the APRA requires a public agency to 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). 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.* This office has often suggested a

public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184; 08-FC-56; 11-FC-172.* Further nothing in the APRA indicates that a public agency's failure to provide "instant access" to the requested records constitutes a denial of access. *See Opinions of the Public Access Counselor 09-FC-192 and 10-FC-121.*

The essence of first part of your formal complaint is that as the Treasurer indicated in its production of records on June 29, 2012 that all invoices and any related billing documentation was being provided, in light of the Treasurer making a subsequent disclosure of an additional record, you were effectively denied proper access under the APRA on June 29, 2012. The APRA provides definitive guidelines in section 9 for responding to a request and under section 3 the production of records must be produced in a reasonable period of time. *See Opinions of the Public Access Counselor 02-FC-09 and 10-FC-233.* Thus, the proper inquiry is whether the Treasurer produced all records that were responsive to your request in a reasonable period of time. Based on the breadth of your request, the fact that the May 29, 2012 request was one of forty-four requests that you had submitted to the Treasurer since May 16, 2012, the level of communication maintained by the Treasurer with you during this time period, and the considerable time involved in the review of the records required by the Treasurer, it is my opinion that the Treasurer produced all records that were responsive to your request in a reasonable period time. Even if it were my opinion that the Treasurer effectively denied your request by not producing all records on June 29, 2012, it would have been my opinion that the Treasurer's actions were inadvertent and not intentional. The Treasurer provided that it immediately contacted you upon discovery that a record had not been included in its original production, the secondary record was then provided, the Treasurer had already communicated to you on May 25, 2012 that information contained in the secondary record was available on the Treasurer's website, and a great deal of the records that were responsive to your request have been available online since May 18, 2009.

As to the second part of your formal complaint, the Treasurer under the APRA has a duty to produce all records that are responsive to your request or alternatively, cite to the specific statutory citation that would authorize the withholding of the record. The APRA does not require that an agency must definitively state when the production of records is complete; rather as outlined above the records must be produced in a reasonable period of time. You maintain the records that have been provided by the Treasurer in responding to similar requests made by other parties, were not provided to you in response to your request. The Treasurer in response provided that it never intentionally withheld any records in responding to your request. 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.* Thus, if the Treasurer produced all records that were responsive to your request or issued a proper denial under section 9, then it did not violate the APRA. Alternatively, if it failed to produce all records, then it would have acted contrary to the requirements of the APRA.

## CONCLUSION

For the foregoing reasons, it is my opinion that the Treasurer complied with the requirements of Section 3 of the APRA in providing all records that were responsive to your request in a reasonable period of time. If the Treasurer at the completion of its disclosure produced all records that were responsive to your request or issued a proper denial, it would not have violated 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 distinct "Hoage" following.

Joseph B. Hoage  
Public Access Counselor

cc: Jillean Long Battle