



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

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

September 18, 2014

Mr. Kenneth W. Davidson
7407 Montana Avenue
Hammond, IN 46323

Re: Formal Complaint 14-FC-189; Alleged Violation of the Access to Public Records Act by the Honorable Mike Pence Governor of Indiana, Serve Indiana-(Office of Faith-Based & Community Initiatives).

Dear Mr. Davidson,

This advisory opinion is in response to your formal complaint alleging the Honorable Mike Pence, Governor of Indiana, Serve Indiana-(Office of Faith-Based & Community Initiatives) ("Governor") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The Governor's office has responded to your complaint via Mark Ahearn, Esq. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on August 22, 2014.

BACKGROUND

Your complaint dated August 22, 2014, alleges the Governor violated the Access to Public Records Act by improperly denying access to the requested records.

On or about July 18, 2014, you submitted a public records request to the Governor's office seeking "a complete and legible copy of any and all correspondence between Jeff Cardwell and the following individuals: Karen Freeman-Wilson; Bridget "B.R." Lane; Chelsea Stallings-Whittington; Joseph Van Dyk; Chet Johnson; Sandra Dafiaghor; and Dwight Mobley for the time period January 1, 2013 until July 18, 2014".

On July 31, 2014, you sent an inquiry via email requesting an update on your request. The Governor's Communications Director responded that same day indicating she would check on your request. As of the particular day of your complaint, you had not received the information requested.

On September 8, 2014, The Governor's office responded to your formal complaint explaining they received your request on July 18, 2014 and sent an acknowledgement on July 20, 2014.

The Governor's office claims that a 35-day period is a reasonable time frame to comply with a records request pursuant to IC 5-14-3-3 because of the office's limited staff, high workload, the interagency coordination required to obtain off-site records, and the time required for the review process.

ANALYSIS

The public policy of the APRA states that "a (p) roviding person 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 Ind. Code § 5-14-3-1. The Office of the Governor is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Governor's public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

Requests for correspondence are generally the most time-intensive public records searches. In addition to the steps outlined in the Governor's response – coordination with the Indiana Office of Technology, attorney review, etc. – correspondence documents are the most likely public records to contain deliberative material. Public agencies often cite Ind. Code § 5-14-3-4(b)(6) as justification to exercise discretion as to their release. Previous Public Access Counselors have speculated that up to 90% of correspondence contains deliberative materials which may be withheld.

Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision-making process. See Opinion of the Public Access Counselor 98-FC-1. Many, if not most documents a public agency creates, maintains or retains may be part of some decision making process. See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64. The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result.

While this Office encourages agencies to use any discretionary exception judiciously, the reality remains that review of records of this sort is time consuming. A request with seven named individuals could potentially yield voluminous results. This Office has not been advised as to the actual number of documents generated by the search, but the result could be substantial. Coupled with the additional responsibilities of the Governor's limited staff, including other pending access requests, 35 days is not an unreasonable time to respond to a request of this size and sort.

That is not to say the responsibilities of the Governor's Office and a small staff is justification for ever unreasonably delaying production of public records. The Governor's Office is obligated by the APRA to provide access within a reasonable period of time as is the case with any other public agency. Transparency is not mutually exclusive to timeliness. I am confident the Governor's Office is mindful of this and will continue to integrate public records access into their daily operations.

Furthermore, it should be noted that access was not denied in this instance and it is my understanding the documents have been produced to you as of the date of the publication of this Opinion. It is my sincere hope the eventual production has satisfied your original request.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor that the Office of the Governor did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to be 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor

Cc: Mr. Mark Ahearn, Esq.