OPINION OF THE PUBLIC ACCESS COUNSELOR

SHAINA R. CAVAZOS,
Complainant,

v.

INDIANA VIRTUAL SCHOOL,
Respondent.

Formal Complaint No.
17-FC-252

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Indiana Virtual School ("IVS") violated the Access to Public Records Act[1] ("APRA"). IVS responded to the complaint through attorney Thomas G. Burroughs. In

[1] Ind. Code §§ 5-14-3-1 to -10

acordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on October 13, 2017.[2]

BACKGROUND

Shaina Cavazos ("Complainant"), reporter and community editor for *Chalkbeat Indiana*, filed a formal complaint alleging IVS violated the Access to Public Records Act by failing to fulfill her records request.

IVS subleases space from a private entity. The record sought is the master lease between that private entity and the landlord. The question becomes whether the master lease is subject to release under the Access to Public Records Act ("APRA").

IVS argues the document is not a public record and Cavazos failed to meet her burden of proof that a master lease between two private entities falls under the definition of public record at all.

[2] This Office did not receive the complaint until October 13, 2017, due to an internal, unintentional administrative error. The complaint is considered timely.

ANALYSIS

The public policy underlying 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." Ind. Code § 5-14-3-1. Unless an exception applies under section 4, any person has the right to inspect and copy a public agency's public records during regular business hours. Ind. Code § 5-14-3-3(a).

IVS argues Cavazos has the burden of proof of establishing the requested document is a public record before the burden of disclosure shifts to the public agency. This most certainly is not the case despite IVS calling that theory "black letter law".

It is undisputed that a requester does not have any legal burden other than ensuring a request is served upon a public agency. This was the dicta in *Indianapolis Convention & Visitors Association, v. Indianapolis Newspapers*, Inc., 577 N.E.2d 208 (Ind. 1991). IVS appears to conflate the requirement of service upon a public agency with whether a record is public. To say otherwise is in direct contradiction with the APRA's preamble, which states:

> This chapter shall be liberally construed to implement this policy and *place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.*

Ind. Code § 5-14-3-1 (Emphasis added).

The IVS is a public agency for the purposes of the APRA; and thus, subject to its requirements. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies under the Act, any person has the right to inspect and copy IVS' public records.

IVS does indeed argue the master agreement is not a public record because it does not meet the definition of Ind. Code § 5-14-3-2(o) as it was not created, received, retained, maintained, or filed by or with IVS. It is true the original parties to the master lease are not public agencies. IVS subsequently did provide the sublease. Once IVS became a sub-lessee, however, the master lease became immediately adjacent to a public agency.

Therein lies the problem. It strains credibility that IVS would enter blindly into a sub-lease without having reviewed the master agreement. Without getting into the finer points of commercial sub-leasing, IVS would be subject to at least some—if not all—of the terms and conditions of the master lease, a fact IVS concedes. Therefore, it stands to reason that the master lease was at least received by an agent of IVS – whether it be an accountant or an attorney – to ensure ongoing compliance with the master agreement. While an original lessor cannot hold a sub-lessee directly liable for a breach of the master lease, it is likely the sublease incorporates some, if not all, of the master lease by reference.

In *Knightstown Banner, LLC v. Town of Knightstown*[3], the Indiana Court of Appeals held that the language "created, received, retained, maintained or filed by or with a public

[3] 838 N.E.2d 1127 (Ind. Ct. App. 2005).

agency" in Indiana Code section 5-14-3-2 did not except records retained *for or on behalf of a public agency*. Furthermore, the court declared that it would amount to a "tortured interpretation of APRA" if private attorneys (or others) could "ensconce government contracts within their… file room and completely deny the public access." *Id.* at 1133.

In other words, where records are created or maintained for a public agency but kept in the possession of an outside entity, the Court of Appeals concluded that the agency is obligated to retrieve the records and make them available for inspection and copying upon request.

RECOMMENDATION

Based on the foregoing it is the opinion of the Public Access Counselor that if an attorney or accountant has received the master lease in the course of its representation of IVS – which is likely - it becomes public record. It should be disclosed upon request less any statutorily redactable information.

Luke H. Britt
Public Access Counselor