



STATE OF INDIANA

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June 18, 2008

Henry Fernandez
12091 Emerald Bluff
Indianapolis, Indiana 46236

Re: Formal Complaint 08-FC-142; Alleged Violation of the Access to Public Records Act by the Metropolitan School District of Lawrence Township

Dear Mr. Fernandez:

This advisory opinion is in response to your formal complaint alleging the Metropolitan School District of Lawrence Township ("MSDLT") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to a record. I have enclosed a copy of the MSDLT's response to the complaint for your reference. It is my opinion the MSDLT has not violated the APRA.

BACKGROUND

You allege that on May 2, 2008 the MSDLT denied access to a reporter to a copy of an electronic mail ("email") message written by a Board member. You further allege that on May 5 the MSDLT denied access to the Board president to the same record. You allege that MSDLT further violated Indiana law by attempting to destroy a public record, namely the email message in question, which you allege was an email solicitation from a Board member to school employees for campaign contributions. You mailed this complaint on May 24, and I received it on May 28.

The MSDLT responded to the complaint by letter dated June 11 from the MSDLT Superintendent, Dr. Michael Cooper. Dr. Cooper asserts that in early April 2008 he received an email message from a Board member concerning the Board member's reelection campaign. Dr. Cooper indicates he was aware some other employees had received the message but did not know the extent. Upon receiving the email message, Dr. Cooper notified the Board President about the message. Dr. Cooper indicates that the email addresses of MSDLT employees are accessible via the Internet to anyone who knows the names of the intended recipients.

Dr. Cooper contends that on May 2 he gave a telephone interview to a reporter who inquired about the propriety of the email communication. She asked whether Dr.

Cooper could forward a copy of the message to her. Dr. Cooper indicated he had deleted the message but suggested she might obtain a copy from the Board member who sent the message. Dr. Cooper contends there was no further discussion about a copy of the record, and he did not consider the inquiry a request for access to records. Instead, he understood the reporter wanted to refer to the message in the current interview. Dr. Cooper contends he was then contacted by the Board President on May 5. She requested a copy of the message by noon that same day so she could provide it to the reporter. Dr. Cooper responded that he did not have the message on his desktop computer to forward to her on such a short deadline. Dr. Cooper received another inquiry from you, raising a concern he had deleted the message and instructing him to retrieve a copy by noon on May 5.

Dr. Cooper then contacted the MSDLT's technology director to retrieve a copy of the message from the email system. Dr. Cooper retrieved and sent a copy of the message to the Board President before noon on May 5. Dr. Cooper provides evidence the Board President received a copy of the email message.

Finally, Dr. Cooper contends it is the suggested practice for users of the MSDLT's email system to delete messages from their inboxes as well as deleted messages file to allow a more efficient use of the email system. But Dr. Cooper contends that even though a message is deleted from a user's desktop computer, it is still available in the MSDLT's email system.

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. The MSDLT is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the MSDLT during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

"Public record" means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.
I.C. § 5-14-3-2(m).

A request for records may be oral or written. I.C. §§ 5-14-3-3(a), 5-14-3-9(c). 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. I.C. § 5-14-3-9(b). If the request is made by telephone or by the person appearing in person at the office of the

agency and the agency does not respond to the request within twenty-four hours of receipt, the request is deemed denied. I.C. § 5-14-3-9(a).

A response could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. There are no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. 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. I.C. § 5-14-3-7(c). The public access counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of 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 are necessary to determine whether the agency has produced records within a reasonable timeframe.

You allege that the MSDLT denied access to the email message to both the reporter who requested it and to the Board President. Dr. Cooper contends that the reporter asked him on May 2 whether he could forward her a copy of the email message. He indicated he had deleted it from his inbox and as such could not forward it. Dr. Cooper contends it was not his understanding the reporter was making a request under the APRA but was instead seeking a copy for use during the present interview. While the APRA does not require a requester to specifically invoke the APRA when making a request, it is my opinion this is a case of misunderstanding.

Certainly the APRA requires an agency to provide access to inspect and copy records upon request. I.C. § 5-14-3-3. Here, though, Dr. Cooper contends he did not understand the inquiry to be a request for access to records but rather a part of the interview. Since there was no further discussion, I believe this was a miscommunication. While the reporter may have intended the inquiry to be a request for access to records, I believe Dr. Cooper did not understand it to be more than another part of the interview. Even if Dr. Cooper did understand the inquiry to be a request for access to records, he did respond immediately, which is within the twenty-four hours required by I.C. § 5-14-3-9(a). It is not my understanding he denied access to the record but instead indicated he did not have access to it from his desktop computer.

Regarding the Board President's request for a copy of the record, nothing in the APRA requires an agency to produce a record by the time limit imposed by the requester. To the contrary, the APRA contains no prescribed timeframes when a record must be produced. In any event, Dr. Cooper provided the Board President with a copy of the message within a few hours of receipt of her request. As such, it is my opinion this did not constitute a violation of the APRA.

Finally, you contend that Dr. Cooper attempted to destroy a public record. The APRA definition for public record applies to any record which has been created, received, retained, maintained, or filed by or with a public agency. *See* I.C. § 5-14-3-

2(m). The email message here was received by Dr. Cooper, among others at the MSDLT. As such, it is a public record. The issue here, though, is the required retention of the record. The MSDLT is required by I.C. 5-15-6 to retain the record for a certain period of time. Many records of local agencies must be retained for three years. *See* I.C. § 5-15-6-3. But some records may be destroyed or deleted following different timeframes. At the state agency level, for instance, transitory email messages may be deleted immediately. *See Commission on Public Records E-mail Retention Policy and Guidelines for Agencies on Developing an Agency-Specific E-mail Retention Policy*, found at <http://www.in.gov/icpr/files/policyemailandguidelines.pdf>.

Regardless of the time which this particular record is required to be retained, Indiana does not require more than one copy of a record to be retained. Dr. Cooper contends that although employees are instructed to regularly “clean out” their inboxes and deleted message files, the MSDLT may still recover those deleted messages through its email storage system; in this instance, in fact, the technology director was able to recover a copy of the message in a matter of minutes. In my opinion, the MSDLT has not violated any public access laws. For more information about retention of public records, please contact the Indiana Commission on Public Records, www.IN.gov/icpr.

CONCLUSION

For the foregoing reasons, it is my opinion the MSDLT has not violated the APRA.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Dr. Michael Cooper, Superintendent, MSDLT