



STATE OF INDIANA

MITCHELL E. DANIELS, JR., Governor

PUBLIC ACCESS COUNSELOR
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May 26, 2010

Mr. Derek D. Dieter
Council President
South Bend Common Council

Re: Informal Inquiry 10-INF-22; South Bend Community School Corporation

Dear Mr. Dieter:

This is in response to your informal inquiry regarding the South Bend Community School Corporation (the "SBCSC"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* For purposes of this opinion, I accept the factual allegations in your inquiry as true. However, I note that the public access counselor is not a finder of fact and, as such, I express no opinion regarding the substance of the factual allegations themselves.

In your inquiry, you allege that on January 30, 2010, you filed a request for public records with the SBCSC. You sought records related to an October 24, 2009, article in the *South Bend Tribune* regarding your position as a South Bend police officer and member of the South Bend Common Council.

On February 11th, the SBCSC's director of communications responded to you via letter and informed you that the SBCSC would contact you as soon as your requested records could be made available. On February 16th, you sent another letter to the SBCSC in which you cited to an opinion from this office regarding emails and noted that you were looking forward to receiving your requested records as soon as possible. On February 19th, the SBCSC director of communications sent you another letter stating that the SBCSC was in the process of retrieving and reviewing the emails you requested. On March 23rd, you sent a letter to the director of communications informing her that you had not received any records. At that time, you requested that the SBCSC produce the records to you by March 31st. On March 26th, the SBCSC responded to you and claimed that "technical difficulties" were preventing the SBCSC from accessing archived emails. The SBCSC further stated that it would provide you with an update on or before April 23rd. As of the date of your inquiry -- May 6th -- you received no such update.

Under the APRA, if a request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. 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. It is unclear here whether or not the SBCSC responded to your request in a timely manner because it is unclear when the SBCSC received the request. The SBCSC's director of communications noted in her February 11th response to you that she personally received the request on February 10th, but a particular person in an agency need not physically possess a public records request for that request to be considered received by the agency itself. In other words, if someone else at the SBCSC received the request earlier but waited seven (7) days to give it to the SBCSC's communications director, the SBCSC cannot defend its response by claiming to have received it on February 10th. Again, I am not a trier of fact. If the SBCSC failed to respond to your written request within the required seven (7) days, the SBCSC violated the APRA.

The APRA does not prescribe a timeframe during which a public agency must produce public records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the relevant facts and circumstances. Considering factors such as 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. 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. 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 ultimate burden lies with the public agency to show the time period for producing documents is reasonable. *Opinion of the Public Access Counselor 02-FC-45.*

You made your initial records request on January 30, 2010. The SBCSC responded to that request, but did not produce any responsive records as of May 6, 2010. The SBCSC claimed in a letter to you that technical difficulties were to blame for the SBCSC's failure to produce the records. If the SBCSC is indeed making a good faith effort to retrieve the records and produce them to you but has not been able to do so, then it is my opinion that the SBCSC has not violated the APRA. However, I note that it is troubling that the SBCSC assured you that it would provide you with an update on the progress of its retrieval on April 23rd but failed to do so. That indicates to me that the SBCSC may not be paying close attention to your request. In any event, I encourage the SBCSC to provide you with the requested records as soon as is practicable. Moreover, in my opinion any significant additional delay in producing the records would likely be contrary to the APRA. *See Opinion of the Public Access Counselor 08-FC-162* (delay of five (5) months was unreasonable).

If I can be of any additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, prominent 'A' and 'K'.

Andrew J. Kossack
Public Access Counselor