

March 29, 2004

Mr. Rich Azar
Princeton Daily Clarion
100 North Gibson Street
Princeton, Indiana 47670

*Re: 04-FC-32; Alleged Violation of the Access to Public Records Act by the
North Gibson School Corporation*

Dear Mr. Azar:

This is in response to your formal complaint alleging that the North Gibson School Corporation (Corporation) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3) when it denied your request for access to the personnel records of David Wayne Edwards, an elementary school teacher employed by the Corporation. The Corporation has responded to your complaint, and a copy of that response is attached for your reference. For the reasons set forth below, it is my opinion that the Corporation did not violate the APRA by declining to produce records responsive to your request.

BACKGROUND

On February 19, 2004, you submitted a written request for records to the Corporation in a letter addressed and directed to the Corporation's attorney. The request indicates that it was hand-delivered on that date. The request seeks the "non-exempt portions of Mr. David Wayne Edwards' personnel file," and specifically "information relating to the status of any formal charges against Mr. Edwards and any disciplinary action, past or present, in which final action has been taken and that resulted in the employee being disciplined or discharged." Your complaint does not attach a copy or otherwise refer to the content of any written response to your request, but alleges that your February 19, 2004, request was denied on February 23, 2004.¹

In response to your complaint, the Corporation acknowledges that the teacher was subject to a personnel investigation, but avers that no formal charges were proffered against the teacher and that no records were created pursuant to that investigation that are not exempt from disclosure at the discretion of the public agency. Specifically, the Corporation states that the teacher was "suspended with pay pending an investigation by the Superintendent" into allegations that had been made against the teacher. The allegations precipitating the

¹ Copies of newspaper reports submitted with your complaint indicate that you made an earlier oral request that was also denied.

investigation are not described, but were communicated to the Corporation by the principal of the elementary school where the employee was a teacher. The Corporation denies that the allegations ever formed the basis for any formal charges to be lodged against the teacher. The Corporation further states that “[d]uring the investigation the teacher in question chose to take early retirement,” and that on February 17, 2004, the Corporation’s Board voted to accept that request for early retirement. The Corporation acknowledges that the APRA requires a public agency to disclose records containing information regarding the status of any “formal charges” against an employee and also to disclose the factual basis for a disciplinary action in which “final action has been taken and that resulted in the employee being suspended, demoted, or discharged.” Response at 1 (citing IC 5-14-3-4(b)(8)(B) and 4(b)(8)(C)). The Corporation concludes that no formal charges were ever brought against the teacher, and no “final action” occurred that resulted in the teacher’s suspension, demotion or discharge. The Corporation otherwise maintains its right to withhold at its discretion other personnel file information regarding this employee.

ANALYSIS²

The public policy of the APRA is set forth in the preamble to that statute, and states:

[I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing 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.

IC 5-14-3-1. In enacting the APRA and the broad policy supporting access to public records, the Indiana General Assembly at the same time acknowledged and determined that public policy required that certain records were appropriate to be maintained as confidential. Indeed, Indiana Code 5-14-3-4 sets forth thirty-one (31) instances in which the public agency must or may withhold disclosure of public records (IC 5-14-3-4), and Indiana Code 5-14-3-3(a) subjects access to public records to the exemptions as set forth in that section (IC 5-14-3-3(a)). Even the preamble acknowledges that some public records are not subject to disclosure. *See* 5-14-3-1 (“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.”) (Emphasis added).

² Your complaint challenging the denial of records does not expressly assert any issues related to the timing or form of the response to your record request. Notwithstanding my conclusion that the failure to produce records was not a violation of the APRA, I offer the following conclusions on these matters. Because the request was hand-delivered, the response was due within 24 hours. IC 5-14-3-9(a). Further, because the request was in writing, the response was required to be in writing. IC 5-14-3-9(c). Moreover, because you were denied records, the response was required to cite to the statutory basis supporting the denial. IC 5-14-3-9(c)(2)(A). If the Corporation failed to comply with any or all of these provisions, they constitute separate violations of the APRA.

Indiana Code 5-14-3-4(b) sets forth the exemptions to disclosure that are discretionary with the public agency. That is to say, the agency may disclose the requested information if it so chooses. One of the discretionary exemptions includes personnel file information. IC 5-14-3-4(b)(8). However, this discretionary exemption is subject to exceptions for three categories of information that are required to be disclosed upon request. Relevant to this opinion are the requirements for the mandatory disclosure of “[i]nformation relating to the status of any formal charges against the employee” (IC 5-14-3-4(b)(8)(B)), and the “factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged” (IC-5-14-3-4(b)(8)(C)). Notwithstanding the general exemptions available to permit a public agency to withhold personnel file information, a public agency must disclose any records it maintains relating to formal charges or the factual basis of final discipline resulting in suspension, demotion or discharge.”

Here, the Corporation’s argument is not that it has responsive documents that are subject to an exemption to disclosure, but rather that it does not have documents that fall within the mandatory disclosure requirements and that are therefore responsive to the request. There is no evidence before me to contradict the Corporation’s averment. Moreover, to the extent that your claims invite me to interpret the mandatory disclosure provisions to encompass the records relating to the investigation and the separation from employment as described here, I am constrained to decline that invitation.

“When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). Certainly, in this context, I cannot find that the allegations made against the teacher and the Superintendent’s resulting review of those allegations, without more, constitute “formal charges” under the plain language of the APRA. See MERRIAM-WEBSTER ONLINE (<http://www.m-w.com/>, last accessed March 29, 2004) (defining “formal” as “following or according with established form, custom, or rule,” and “charges” as “a formal assertion of illegality.”). Moreover, in the same manner it cannot be said that there has been final action for a disciplinary matter that resulted in the employee’s discharge. See MERRIAM-WEBSTER ONLINE (<http://www.m-w.com/>, last accessed March 29, 2004) (defining “discharge” as “to dismiss from employment.”). While you quite understandably suggest in your record request that “early retirement” may be a euphemism for “discharge” given these facts, the General Assembly has closed off that argument with the plain language it used in the provisions for mandatory disclosure. To the extent that your claims support an argument that the Corporation or any other public employer may avoid the disclosure requirements of Indiana Code 5-14-3-4(b)(8) by settling disciplinary matters before final discipline is taken, your argument is more appropriately directed to the General Assembly. That legislative body is in the appropriate position to balance the public policy considerations at issue here.³

³ You also have the right to bring an action against the Corporation pursuant to Indiana Code 5-14-3-9. If you prevail in any such action, this opinion serves to support your entitlement to attorney fees in prosecuting that action. See IC 5-14-3-9(h).

CONCLUSION

For the reasons set forth above, it is my opinion that the Corporation did not deny you access to public records in violation of the APRA when it failed to provide you with records in response to your request. *See* Note 2.

Sincerely,

Michael A. Hurst
Public Access Counselor

cc: Mr. Matthew Nixon