

August 5, 2004

Ms. Mary Oberthur
225 West 246th Street
Sheridan, IN 46069

Re: Advisory Opinion 04-FC-112; Alleged Violation of the Access to Public Records Act and the Open Door Law by the Marion-Adams School Corporation

Dear Ms. Oberthur:

This is in response to your formal complaints, which were received by our office on July 12, 2004. In those complaints, you allege that the Marion-Adams School Corporation ("School"), violated the Access to Public Records Act ("APRA"), I.C. §5-14-3. Although not explicitly stated, your complaint also alleges a violation of the Open Door Law ("ODL"), I.C. §5-14-1.5 by the Marion-Adams School Board ("School Board"). Specifically, you allege that the School failed to provide to you copies of documents related to Marion-Adams School Board meetings, and that some of the meeting memoranda provided failed to include required information. Dr. Mark, Superintendent, provided a response on behalf of the School Corporation and the Marion-Adams School Board. A copy of that correspondence is enclosed for your reference.

BACKGROUND

On July 12, 2004, we received two separate complaints from you both alleging the School's failure to provide you with copies of documents you requested. Essentially, you requested copies of all Marion-Adams School Board memoranda and reports from July 2003, up to and including June 2004, and copies of the daily appointments for Dr. Mark, both in office and away, from January 1, 2004 to June 21, 2004. Your complaints allege that you were provided with documents in a timely manner, but that the documents you received were incomplete. Specifically, you allege that (1) the notice and memoranda for the May 26, 2004 Finance Committee Meeting and the May 27, 2004 Open School Board Meeting are missing; (2) that the photocopies of Dr. Mark's calendar are difficult to read; and (3) that some of the memoranda provided to you were

incomplete as some lacked information regarding the names of the governing body members in attendance and information regarding the items discussed during the meeting.

On July 13, 2004, I forwarded a copy of your complaints to Dr. Mark. He responded that all documents requested had been provided to you. Because both complaints allege the same set of facts, I am treating them as one for purposes of this opinion.

ANALYSIS

Open Door Law

The School Board is a public agency and a governing body subject to the Open Door Law. I.C. §5-14-1.5-2. A governing body must keep memoranda for both public meetings and executive sessions. For public meetings, the memoranda must include information regarding (1) the date, time and place of the meeting; (2) the members of the governing body who were present or absent; (3) the general substance of all matters that were proposed, discussed, or decided; (4) a record of all votes taken (by individual members if there was a roll call); and (5) any additional information required under Ind. Code §5-1.5-2-2.5 or Ind. Code §20-12-63-7. Ind. Code §5-14-1.5-4(b).

The memoranda for an executive session requires much of the same information except rather than setting out the general substance of all matters discussed, the governing body must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given. I.C. §5-14-1.5-6.1(d). Additionally, the governing body must certify by a statement in the memoranda that no subject matter was discussed in the executive session other than the subject matter specified in the public notice. I.C. §5-14-1.5-6.1(d). The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings. Ind. Code §5-14-1.5-4(c).

Although the basis for your complaint is difficult to discern, it seems you allege that some of the meeting memoranda failed to include information regarding the matters discussed and the governing body members present at those meetings. The burden of establishing compliance with the Open Door law rests with the School Board. Dr. Mark's response to your complaint does not address any issue with respect to the completeness of meeting memoranda. However, given the difficulty in discerning your objections to the meeting memoranda, and the fact that you have not explicitly stated your objections in your complaint, nor provided us with a copy of the memoranda, we are unable to affirmatively determine whether or not a violation has occurred. Certainly, if the memoranda lack the required elements, that would constitute a violation of the Open Door Law.

Access to Public Records Act

Memoranda and Notice

You also allege that you were denied copies of the notice and memoranda for the May 26, 2004 Finance Committee Meeting and the May 27, 2004 Open School Board Meeting.

Indiana Code §5-14-3-3 provides that any person has the right to inspect and copy the public records of any public agency. Those records include any writing, photograph, tape recording, or other material that is created, received, maintained, or filed by or with the public agency. I.C. §5-14-3-2. The School is a public agency for purposes of the Access to Public Records Act. Accordingly, you have the right to inspect and copy the public records of the School unless the public records are confidential or otherwise nondisclosable under I.C. §5-14-3-4. It is clear the School was required to create those records; hence, your allegation that you have not received them leaves one to wonder why you have not been provided them since they are disclosable public records.

Dr. Marks responded that he has produced all of the documents you requested. This response is only a generalized statement of compliance. He does not state that whether notice or memoranda were actually produced, whether the notice or memoranda never existed, or whether he has been unable to locate the notice or memoranda. The burden of establishing compliance with the APRA rests with the School. The School has not met its burden to show that it has complied with APRA. Therefore, I find that it has violated the APRA by failing to produce disclosable records or explaining why it has not produced them.

Calendar

You requested a copy of the daily appointments and schedules of Dr. Mark's meetings. The School has provided you a copy of his professional calendar. In your complaint, you allege that Dr. Marks' calendar was difficult to read. In addition, you claim that certain entries are missing; in particular, entries regarding public meetings.

Pursuant to I.C. §5-14-3-4(b), public agencies are granted discretion over the disclosure of certain categories of public records. Indiana Code section 5-14-3-4(b)(7) states that except as otherwise provided by subsection (a), diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal shall be excepted from disclosure at the discretion of the public agency. Prior formal advisory opinions of this office have held that professional calendars constitute the functional equivalent of a diary or journal. See *Opinion of the Public Access Counselor 04-FC-42*. Therefore, pursuant to I.C. §5-14-3-4(b)(7), the School may either disclose or not disclose Dr. Mark's professional calendar to you. The School has evidently decided to disclose the calendar.

There is no requirement in the APRA that an employee's calendar contain certain entries. In this respect, the calendar is not the equivalent of meeting memoranda. I do not find any denial of access with respect to Dr. Mark's daily appointments and schedule.

CONCLUSION

For the foregoing reasons, I find I am unable to determine whether the School Board violated the Open Door Law. However, I do find that the School violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Dr. Patrick Mark, w/out enclosures