

August 2, 2006

Timothy R. Morgan
4606 Tamarack
Fort Wayne, IN 46835

Re: Formal Complaint 06-FC-114; Alleged Violation of the Access to Public Records Act by the Fort Wayne Community Schools

Dear Mr. Morgan:

This is in response to your formal complaint alleging that the Fort Wayne Community Schools (“School”) violated the Access to Public Records Act by refusing to disclose records that you believe must exist. I find that the School has not denied a record if one does not exist. I also find that the School may exempt a record under the “deliberative materials” exemption only if it meets all the elements of the exemption.

BACKGROUND

On May 17, 2006, you submitted to the School a list of ten record requests for which you sought inspection. You set out three issues in your formal complaint. First, you state that after two meetings, Dr. Wendy Robinson from the School stated that “there were two interpretations on what happened” during a particular episode involving a student. You asked in your request #8 for the documentation for Ms. Robinson’s statement. The School denied that there were any documents.

Secondly, you complained that you were denied the record relating to your request #9, again relating to documentation of a statement made by a school board member. You challenge the School’s assertion that no documents exist to support the statement.

Third, you complain of a denial of access to quotes of architects and proposals regarding renovation information provided to the School Board on April 24, your item #7. With this issue, you do not indicate how the School denied you this information or whether it provided you any response.

I sent a copy of the formal complaint to the School. Ms. Deborah Morgan, Public Information Officer of the School provided a written response, which I enclose for your reference. Ms. Morgan stated that with respect to issues #1 and #2, it is a fact that no documents exist that are responsive to your request. Ms. Morgan stated that with respect to your third issue relating to architect proposals, the material was “deliberative and therefore exempt under Indiana Code 5-14-3-4(c).”

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a). “Public record” means any material that is “created, received, retained, maintained, or filed by or with a public agency.” IC 5-14-3-2(m). The School is a public agency under the APRA. IC 5-14-3-2(l)(2)(A). A public agency may deny a written request for a record if the denial is in writing, and if the denial contains a statement of the specific exemption or exemptions authorizing the withholding of the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

It is axiomatic that the failure of a public agency to disclose material that is *not* maintained by a public agency is not a denial of access, although the public agency receiving a request for such material is still required to respond under Indiana Code 5-14-3-9. You challenge in your issues #1 and #2 the School’s assertion that no record exists that supports certain statements made by the School. This office is not in a position to determine whether a record is maintained or not by a public agency. If you remain convinced that the School has such a record but is refusing to disclose it, your recourse is to file a lawsuit compelling the School to disclose the record under IC 5-14-3-9(e).

With respect to your issue #3, the School has asserted, at least in its complaint response, that records responsive to your request for renovation information provided to the School Board on April 24 is “deliberative and therefore exempt under Indiana Code 5-14-3-4(c).” First, I point out that the exemption for deliberative material is properly cited as Indiana Code 5-14-3-4(b)(6). This exemption is for:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

IC 5-14-3-4(b)(6).

A record meets the exemption for deliberative material only if the record: 1) is intra-agency advisory or deliberative material; 2) is expression of opinion or of a speculative nature; and 3) is communicated for the purpose of decision making. Each record for which the exemption is claimed should be described in order to identify it for purposes of IC 5-14-3-9(c). Here, you requested information relating to the renovation provided by the architects and

provided to the School Board on April 24. It is incumbent upon the School to state what documents are maintained by the School that meet the exemption. *See* IC 5-14-3-9(c). For example, if the architects provided the School Board with a proposal and renderings, and the School Board also received a memorandum from the Superintendent expressing opinion about the proposals, each of those records should be identified and any exemptions that apply to those discrete records should be asserted, if the exemption fits the records. Not all records that are used for decision making are deliberative; in particular, those that do not contain expression of opinion or are of a speculative nature do not meet the exemption.

CONCLUSION

Fort Wayne Community Schools is not required to disclose a record that does not exist. Further, the School must correctly cite the applicable exemption for each and every record that the School intends to deny to you.

Sincerely,

Karen Davis
Public Access Counselor

cc: Deborah Morgan