

July 6, 2006

Richard E. Volbrecht, Jr.  
9221 Parkway Drive  
Highland, IN 46322

*Re: Formal Complaint 06-FC-95; Alleged Violation of the Access to Public Records Act by the School Town of Highland*

Dear Mr. Volbrecht:

This is in response to your formal complaint alleging that the School Town of Highland (“School”) violated the Access to Public Records Act (“APRA”) by failing to respond to your request for records in a timely manner, and by failing to disclose e-mail records maintained by the school corporation. I find that the School timely responded to your request of June 1, 2006, and that the School may destroy e-mail records in the ordinary course of business if the e-mail records do not fit the definition of “record” in Indiana Code 5-15. I expressly decline to offer any opinion on the issue of whether any e-mails in the possession of the school attorney are public records of the School because you have not formally raised that issue in your complaint.

#### BACKGROUND

You allege that on June 1, 2006 you hand-delivered to the School and to the law office of Mr. Steven Crist, a request for records. Steven Crist is an attorney for the School. Specifically, you requested copies of all e-mails Mr. McAllister sent to e-mail addresses outside the school Town of Highland from August 1, 2004 through June 30, 2006, and all e-mails Mr. McAllister received from e-mail addresses outside the School Town of Highland from August 1, 2004 through June 30, 2005.

You filed your formal complaint on June 6, 2006, alleging that you had not received a response from the School within the 24-hour period to confirm receipt of your request, in violation of Indiana Code 5-14-3-3(a).

After filing your complaint, you received from Superintendent Renner Ventling a two-page letter dated June 13. In his letter, Dr. Ventling told you that the e-mails you requested no longer existed because Mr. McCallister had severed his employment with the School. In this process, and in accordance with the normal business practice of the School, Mr. McCallister's computer was reassigned to another employee. The e-mails stored on the computer's hard drive were lost. In addition, the School's server for that period did not have the storage capacity to maintain the e-mails sent and received by school employees. Hence, the School does not maintain the e-mails.

After receiving this response of the School, you sent the School a June 14 letter reiterating your request for the e-mail records, wherever they may be stored and in whatever format they may exist, and claiming that under Indiana law, records may not be destroyed except in accordance with the rules. Dr. Ventling sent you a letter dated June 15, stating that the School no longer maintained the records you sought.

You also supplemented your complaint file by sending me a June 20 e-mail message claiming that the *Knightstown Banner* case applied to your request, and claiming that School Attorney Steven Crist has never responded to your June 1 record request. You claim that Dr. Ventling's response of June 13 leaves you in the dark about your request to "non-school officials." Finally, you sent me an e-mail message on June 21, in which you refer to the School's June 20 complaint response. You asserted that the School's letter failed to reply to your request directed to Steven Crist, and you complain that Mr. Crist has failed to state affirmatively whether he possesses any of the e-mails you requested.

I sent a copy of your complaint to the School. I received a response and a supplemental response of the School, copies of which are enclosed for your reference. The School has stated that 1) the School complied with the response time of 24 hours, because Mr. Crist faxed to you on June 2 a response on behalf of the School; 2) the request made to Mr. Crist was not directed to a public agency; 3) the School properly responded to your request by stating that the records did not exist, and the School is not required to create or reconstruct the e-mails; and 4) the substantive response of June 13 was within a reasonable period of time. The School supplemented its response on June 20 to state that the e-mails were not "records" and therefore could be destroyed in the normal course of business, consistent with *Opinion of the Public Access Counselor 06-FC-70*.

## 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). If a public agency receives a request for a record in person, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If a request is made orally, either in person or by telephone, a public agency may deny the request orally. IC 5-14-3-9(c). However, if a request initially is made in writing, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny a written request for a record if the denial states the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c). A

public agency is not required to compile or create a record to satisfy a person's request for information. Rather, the APRA requires that a public agency make available its current records.

A public agency shall protect public records from loss, alteration, mutilation, or destruction. IC 5-14-3-7(a). Notwithstanding section 7 of the APRA, public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention schedules under Indiana Code 5-15; or public records not subject to Indiana Code 5-15 may be destroyed in the ordinary course of business. IC 5-14-3-4(e).

Under IC 5-15, "record," in relevant part, means all documentation of the informational, communicative or decisionmaking processes of state government, its agencies and subdivisions made or received by any agency of state government or its employees in connection with the transaction of public business or government functions, which documentation is created, received, retained, maintained, or filed by that agency or its successors as evidence of its activities or because of the informational value of the data in the documentation. IC 5-15-5.1-1 (defining "record"). This definition is made applicable to records of local government pursuant to IC 5-15-6-1.5. "Local government" means a political subdivision (as defined in IC 36-1-2-13). IC 5-15-6-1.4. "Political subdivision" means municipal corporation or special taxing district, IC 36-1-2-13, and "municipal corporation" includes a school corporation. See IC 36-1-2-10. Accordingly, the records of a school corporation are subject to IC 5-15.

#### *Timeliness of School's Response*

You filed your complaint as soon as you learned that the School had not put a response in the mail to you within 24 hours of your request, or by June 2, 2006. However, the School provided documentation that it faxed to you a letter dated June 2 and sent on June 2. The letter, addressed to you and signed by School Attorney Steven Crist, states that Mr. Crist is responding on behalf of Dr. Ventling, Mr. Curosh (another School attorney) and Mr. Crist to your request for information that was received by Mr. Crist's office on June 1, 2006. This response was timely under the Access to Public Records Act, because it was sent within 24 hours to the fax number you provided the School. Moreover, I find nothing lacking in the substantive response acknowledging receipt of your request and promising to locate responsive records. I find no violation of the APRA as you have alleged.

Moreover, your allegation that Mr. Crist owed you a separate response is not meritorious. The APRA requires only that a *public agency* respond to a request for records. The request that you delivered to Mr. Crist at his law office was not filed with a public agency; hence, Mr. Crist was not bound to respond on his own behalf. This is true irrespective of whether Mr. Crist possesses responsive public records of the School. The School did respond on June 2 as I have stated; Mr. Crist is not a public agency that must respond separately to your request.

#### *Electronic Mail of Mr. McCallister*

Electronic mail is a public record. See IC 5-14-3-2(m)(defining "public record"). To the extent that a particular e-mail meets the definition of "record," it may not be destroyed except in accordance with record retention schedules. On the other hand, some e-mail does not contain

documentation of the informational, communicative or decisionmaking processes of a school corporation, and therefore may be destroyed in the ordinary course of business. IC 5-14-3-4(e). Hence, some e-mails of the school corporation's employees may be subject to retention guidelines, and others may not, depending on the content of the message. The School argues in its June 20 letter that the e-mails you requested were those sent and received by Mr. McCallister outside the School Town of Highland, meaning to and from addresses outside the School's server, I believe. Hence, the School argues that "it is obvious that the e-mails requested by Mr. Volbrecht are unrelated to the informational, communicative or decision-making processes of the school corporation."

If any of the e-mails of Mr. McCallister did not meet the definition of "record" based on the content of the individual message, then the loss of the e-mails did not violate IC 5-14-3-4(e)(1) or IC 5-14-3-7(a). However, it is not apparent at first blush that the criteria applied by the School to the lost e-mails can be sustained, where the School deems that any messages sent or received from e-mail addresses outside the school makes them non-records *per se*. However, the burden is on the public agency to sustain its denial of the records. IC 5-14-3-1.

You contend in your message to me of June 20 that the School has not adequately responded to your request for records because it has not affirmatively acknowledged whether or not the School's attorney Mr. Crist or other "non-school officials" retain copies of the e-mails. I am required to send a copy of any complaint to the public agency against whom a person complains of a denial of access. IC 5-14-5-8. You initially complained that the School did not respond timely to your request, and the School has addressed that complaint as well as the issue of whether the e-mails are "records" within the meaning of IC 5-15. I expressly decline to issue an opinion concerning your allegation that Mr. Crist possesses the e-mails, except to state that the School has responded that the School, as a public agency, does not maintain the e-mails. If you believe that this response cannot be sustained for the reason that the School *does* maintain the e-mails for any reason, including the School attorney's possession, your remedy is to file a complaint in superior court, pursuant to IC 5-14-3-9(e).

#### CONCLUSION

For the foregoing reasons, I find that the School Town of Highland did not violate the Access to Public Records Act with respect to the timeliness of the School's response to your request for records. I also find that the School Town of Highland bears the burden of showing that the McCallister e-mails were not "records" pursuant to IC 5-15, and hence could be destroyed in the normal course of business.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Steven Crist