



STATE OF INDIANA

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November 19, 2009

Mr. Christopher D. Quay
The Courier-Journal
525 W. Broadway
Louisville, KY 40202

Re: Formal Complaint 09-FC-243; Alleged Violation of the Access to Public Records Act by the Greater Clark County Schools

Dear Mr. Quay:

This advisory opinion is in response to your formal complaint alleging the Greater Clark County Schools ("GCCS") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* For the following reasons, my opinion is that GCCS did not violate the APRA.

BACKGROUND

In your complaint, you allege that you submitted two records requests to the Corporation for "the identities of contributors of money to be used for a portion of Superintendent Stephen Daeschner's salary." Mr. Collesano, GCCS's chief financial officer, initially replied to you by saying that GCCS had not received any money for that purpose but that GCCS's general fund was given eighteen thousand dollars (\$18,000) (the "Grant") by the Community Foundation of Southern Indiana ("CFSI") which was going to be used to offset Dr. Daeschner's salary.

You further allege that your second request asked for the names of the contributors who gave money to CFSI, but Sandy Lewis, the School Corporation's general counsel, said that the school did not have that information. According to you, your newspaper has learned that someone not employed by the Schools is administering the account, but GCCS is "not monitoring that person's activity." You also argue that "because the money is going to pay a 'public' official then the identities of the contributors should be released to us." You summarize your complaint by asking: "Should the records of the CFSI account managed by a non-[GCCS] employee be viewed as public records and released to us?"

My office forwarded a copy of your complaint to GCCS. GCCS General Counsel Sandra W. Lewis' response is enclosed for your review. Ms. Lewis states that GCCS has not received funds from any contributor directly. According to Ms. Lewis, GCCS did not set up a "contributions mechanism" on behalf of Dr. Daeschner; rather, a local community member organized a private fundraising effort that utilized CFSI as the entity to receive any contributions made by community members. Ms. Lewis asserts that GCCS does not have any "power or control" over the over the CFSI or the fund established by the community member. GCCS did not receive a list of donors who made contributions to the fund, nor does GCCS have the ability to access such information. Finally, Ms. Lewis states that GCCS has provided you with all of the information that it has available and that it has the ability to obtain regarding the contributions to CFSI.

ANALYSIS

The public policy of the APRA states, "[p]roviding 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." I.C. § 5-14-3-1. GCCS does not dispute that it constitutes a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy GCCS's public records during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

GCCS claims that it does not maintain any information regarding the contributors to the Grant from CFSI. If GCCS does not maintain the records you have requested, GCCS has not violated the APRA by failing to produce them to you. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created and maintained by the agency. *See Opinion of the Public Access Counselor 09-FC-135.*

With regard to the argument that the records regarding contributors should be disclosed because the contributions ultimately went to a public agency, there is only one circumstance in which a record not maintained by a public agency has been considered a public record subject to disclosure: In *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127, 1134 (Ind. Ct. App. 2005), the Indiana Court of Appeals ruled that records created "for or on behalf" of a public agency by an outside contractor are public records. In *Knightstown Banner*, a settlement agreement created by an attorney representing a public agency was considered a public record subject to the requirements of the APRA. The Court of Appeals reasoned that "the Taxpayers of a community have the right to know how and why their money is spent. Therefore, mindful of the statute's purposes of openness, the court does not allow a public authority to thwart disclosure by having an attorney or an insurer's attorney prepare every writing that the public authority wishes to keep confidential." Here, however, GCCS did not retain the CFSI to create any record on its behalf; rather, the CFSI and the community fundraiser acted independently of GCCS and without any direction or control from GCCS. Under such circumstances, it is my

opinion that the contributor records in the possession of CFSI and/or the community fundraiser(s) are not public records because they were not created or maintained by, for, or on behalf of GCCS.

CONCLUSION

For the foregoing reasons, it is my opinion that GCCS did not violate the APRA.

Best regards,

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

Andrew J. Kossack
Public Access Counselor

cc: Sandra W. Lewis, Greater Clark County Schools