



STATE OF INDIANA

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December 8, 2009

Mr. C.J. Hoyt
WFIE Channel 14
1115 Mt. Auburn Rd.
Evansville, IN 47720

Re: Formal Complaint 09-FC-264; Alleged Violation of the Access to Public Records Act by Evansville Vanderburgh School Corporation

Dear Mr. Hoyt:

This advisory opinion is in response to your formal complaint alleging Evansville Vanderburgh School Corporation ("EVSC") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to a videotape depicting students riding one of EVSC's buses. For the following reasons, my opinion is that EVSC did not violate the APRA because the videotape is confidential under federal law.

BACKGROUND

According to your complaint, on October 7, 2009, you requested access to a videotape made of an incident on Bus # 162 of Plaza Park Middle School students on or about the afternoon of Thursday, October 1, 2009. EVSC initially denied your request for the videotape in a letter dated October 8, 2009. In that letter, EVSC cited Section 4(a)(3) of the APRA, which is the exception for records required to be kept confidential by federal law. EVSC cited the Federal Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g), as the applicable federal law that barred disclosure of the videotape. After EVSC persisted in its denial following a response from you that took issue with its application of FERPA, this complaint followed.

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. EVSC does not dispute that it is 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 EVSC's public records during regular business hours unless the public records are exempt from

disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

One exception to the public's general right to inspect and copy a public record applies when federal law classifies a record as confidential. I.C. §5-14-3-4(a)(3). EVSC cites this section of the APRA with respect to the videotape, which EVSC argues is nondisclosable under FERPA. In a previous opinion from this office, Counselor Davis opined that FERPA precluded a school from releasing a videotape depicting students. See *Opinion of the Public Access Counselor 06-FC-191*, <http://www.in.gov/pac/advisory/files/06-FC-191.pdf>. I also recently issued an opinion under similar circumstances in *Opinion of the Public Access Counselor 09-FC-201*. Because the facts and analysis are analogous, I have incorporated relevant portions of the foregoing opinions here.

FERPA operates to classify all "education record[s]" as confidential: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records or personally identifiable information contained therein..." 20 U.S.C. §1232g(b)(1). "Education record" is defined as those records that are directly related to a student and maintained by an educational agency or institution or by a person acting for such agency or institution. 34 C.F.R. § 99.3. "Record" means any information recorded in any way, including but not limited to videotape. *Id.* "Personally identifiable information" includes, but is not limited to, a list of personal characteristics that would make the student's identity easily traceable, or other information that would make the student's identity easily traceable. *Id.* "[A] videotape, to the extent that it contains depictions showing students, is an 'education record.'" *PAC Opinion 06-FC-191* at 3. Consequently, it is my opinion that EVSC's videotape depicting students is a confidential "education record" under FERPA and nondisclosable pursuant to section 4(a)(3) of the APRA.

I note that you cite the *Lindeman* case from the State of Washington's supreme court for your position that FERPA does not operate to prohibit disclosure of the videotape. *Lindeman v. Kelso Sch. Dist. No. 458*, 172 P.3d 329, 331 (Wash. 2007). While your analysis appears to be sound under Washington law, that authority is unpersuasive in this matter because the *Lindeman* court did not apply or interpret FERPA. Moreover, that case involves Washington's public disclosure law, which is distinguishable from the Indiana APRA.

CONCLUSION

For the foregoing reasons, my opinion is that EVSC 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: Patrick A. Shoulders, Ziemer, Stayman, Weitzel & Shoulders, LLP
Sarah Chasnovitz, Covington & Burling LLP