



STATE OF INDIANA

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March 26, 2010

Mr. Christopher G. Crayton
3125 S. Carey St.
Marion, IN 46953

*Re: Formal Complaint 10-FC-52; Alleged Violation of the Access to
Public Records Act by Marion Community Schools*

Dear Mr. Crayton:

This advisory opinion is in response to your formal complaint alleging Marion Community Schools (the "Schools") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* I have enclosed the Schools' response from Superintendent Stephen L. Edwards.

BACKGROUND

According to your complaint, you requested access to investigation records of the Schools related to your termination of employment as a substitute teacher. The Schools denied your request.

In response to your complaint, Supt. Edwards claims that the records you seek are exempt from disclosure under Ind. Code § 5-14-3-4(b)(6) and (b)(7), which are the exceptions to the APRA for intra-agency advisory or deliberative materials and personal notes serving as the functional equivalent of a diary or journal, respectively. Supt. Edwards maintains that the records you seek were generated as part of an investigation. He further notes that the Schools will make your personnel file available to you upon request.

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. The Schools constitute a "public agency" under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Schools' public records

during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, except for:

- (A) The name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
- (B) Information relating to the status of any formal charges against the employee; and
- (C) The factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

IC 5-14-3-4(b)(8). However, the APRA also makes clear that “all personnel file information shall be made available to the affected employee or the employee’s representative.” *Id.* Thus, any information contained in your personnel file should be made available to you (unless some other exception to the APRA permits or requires the Schools to withhold it). It is my understanding that the Schools are prepared to make your personnel file available upon request.

Here, the Schools deny you access to the records on the basis of the so-called deliberative materials exception¹ to the APRA. The deliberative materials exception is found at I.C. § 5-14-3-4(b)(6):

- (b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

...

- (6) 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.

¹ I focus the analysis on the deliberative materials exception to the APRA because, in my opinion, the exception for “[d]iaries, journals, or other *personal notes* serving as the functional equivalent of a diary or journal” does not apply to investigation records. I.C. § 5-14-3-4(b)(7) (emphasis added). Investigation records, by their nature, are not “personal” within the meaning of subsection 4(b)(7). Rather, investigation records are typically communicated to investigators and other interested parties as part of the investigation process. It is unlikely that the General Assembly intended to except investigation records from disclosure via subsection 4(b)(7).

Thus, the deliberative materials exception requires that the records be expressions of opinion or speculative in nature *and* communicated for the purpose of decision making. To the extent the records you requested fit both criteria, it is deliberative material under the APRA, which means that pursuant to I.C. § 5-14-3-4(b)(6) the Schools have the discretion to withhold them from disclosure. I note, however, that it is not clear to me whether or not the records fit within this exception. Because they were created during an investigation, I trust that they were communicated for the purpose of decision making. However, if they were neither expressions of opinion nor speculative in nature, the records could not be withheld under subsection 4(b)(6). Because the APRA places the burden of proof for a denial of disclosure on the public agency and not the requesting party, it is my opinion that the Schools have not yet sustained the burden of proof to show that the records fit within the deliberative materials exception to the APRA. However, if the Schools can demonstrate that the records are speculative or expressions of opinion, the exception would apply.

I note that although section 4(b)(8) requires public agencies to release all personnel file information to an affected employee, in *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 915 (Ind. Ct. App. 2003), the Indiana Court of Appeals noted that the disclosure requirements of section 4(b)(8) do not trump the remaining exceptions to disclosure in section 4. The court held,

If 4(b)(8)(A) through (C) trumped all exceptions to disclosure, one would not expect them to be listed under the section 4(b)(8) exception. More importantly, to read section 4(b)(8)(C) to trump all other exceptions would render other portions of section 4 superfluous.

* * *

Thus, we hold that sections 4(b)(8)(A), (B), and (C) are exceptions only to the disclosure exceptions listed in sections 4(b)(8) and (12). However, the section 4(b)(8)(A), (B), and (C) exceptions do not trump the remaining disclosure exceptions listed in section 4.

Id.

Regarding your allegation related to your demand to meet with Supt. Edwards, nothing in the Open Door Law (“ODL”), I.C. § 5-14-1.5-1 *et seq.*, requires a public official to grant a member of the public a meeting. *See Opinion of the Public Access Counselor 07-FC-24; 08-FC-7.* The ODL applies to meetings of the governing bodies of public agencies (e.g., a school board) and not to meetings of individual public officials. Consequently, Supt. Edwards did not violate the ODL by refusing to meet with you.

CONCLUSION

For the foregoing reasons, it is my opinion that the Schools have not sustained the burden of proof to show that the requested records are exempt from disclosure under the APRA. If the Schools can demonstrate that the records meet the criteria in subsection 4(b)(6) of the APRA, however, the APRA grants the Schools the discretion to withhold the records.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack
Public Access Counselor

Cc: Supt. Stephen L. Edwards