



STATE OF INDIANA

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May 29, 2012

Melissa A. Hayden
719 S. Michigan Avenue
Greensburg, Indiana 47240

Re: Formal Complaint 12-FC-113; Alleged Violation of the Access to Public Records Act by the Greensburg Community School Corporation

Dear Ms. Hayden:

This advisory opinion is in response to your formal complaint alleging the Greensburg Community School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Thomas Wheeler, Attorney, responded on behalf of the School. His response is enclosed for your reference.

BACKGROUND

As applicable to your formal complaint, you allege that you submitted the following written request for records to the School on March 30, 2012:

- (3) Any and all voicemails, recorded audio, or recorded video that relates to any or all of the following: Austin Hayden, Melissa Hayden, Patrick Hayden, the hair cut policy/grooming policy, Boys' Basketball Program, Patrick's employment as the 7th or 8th grade football coach.
- (4) Videos of all of the Junior Varsity and Varsity regular season games for the Greensburg Boys' Basketball 2011-2012 Season.
- (5) Copy or list of those players who were certified to play in the 2011-12 Section and Regional Games for the Greensburg Boys Basketball Team.
- (6) Copies of the entire game book(s), stat sheets and other documents, graphs or statistical compilation of the players and teams for the freshman, Junior Varsity, and Varsity Greensburg Boys' Basketball 2011-12 Season.
- (7) Copies of the entire game book(s), stat sheets and other documents, graphs or statistical compilation of the players and teams for the 7th and 8th grade Greensburg Junior High Boys Basketball Team for the 2009-10 Season.

(8) Copies of the entire game book(s), stat sheets and other documents, graphs or statistical compilation of the players and teams for the 7th and 8th grade Greensburg Junior High Boys Basketball Team for the 2010-11 Season.

(17) Video tape, game books, stat sheets or other documentation form the Greensburg Summer Boys' basketball program for the following years: 2011, 2010, 2009.

On April 1, 2012, the School acknowledged the receipt of your request in writing. On April 26, 2012, the School issued the following denial to your requests (3)-(8) and (17):

“[V]oice-mails, recorded audio, or recorded video” other than of games and/or practices is not something that is regularly retained by the School. As noted in the “Handbook on Indiana’s Public Access Laws”, “[b]y providing the public with the opportunity to review and copy public records, the APRA gives individuals the opportunity to obtain information relating to their government and to more fully participate in the governmental process.” http://www.in.gov/pac/files/pac_handbook.pdf, p. 22. The proposition that the APRA is limited to requests for existing documents and does not require public agencies to create documents is reflected in the opinions of the Public Access Counselor. “A public agency is not required to create or compile a record that does not already exist. This is because the APRA requires that a public agency disclose a public record, which is defined as any material that is “created, received, retained, maintained, or filed by or with a public agency.” I.C. § 5-14-3-2(m); *Opinion of the Public Access Counselor 07-FC-143*.

With respect to videos of games or practices, please be advised that such videos are declared confidential under state and federal statutes and under the APRA the School does not have to disclose confidential documents which includes those “records declared confidential by state statute.” *See* I.C. § 5-14-3-4(a)(1). Specifically, these videotapes are declared confidential under various privacy laws, including, but not limited to, the Family Educational Right to Privacy Act (“FERPA”)(20 U.S.C. § 1232g *et seq.*) and its state law analog, I.C. § 20-33-7-1, *et seq.* I.C. § 20-33-7-1 defines “Education records” as follows: “As used in this chapter, ‘education records’ means information that: (1) is recorded by a nonpublic or public school; and (2) concerns a student who is or was enrolled in the school.” Under I.C. § 20-33-7-3, “[a] school corporation . . . may [not] disclose or report on the education records of a child, including personally identifiable information contained in the education records, without the consent of the child’s parent” except under very limited circumstances, none of which apply in this case. The same result occurs under FERPA. “The Act states that federal funds are to be withheld from school districts that have ‘a policy or practice of permitting the release of education records (or personally identifiable information contained therein. . .) of students without the written consent of their parents.’” 20 U.S.C. § 1232g(b)(1); *Owasso Independent School District v. Falvo*, 534 U.S. 429, 429 (2002). “The phrase ‘education records’ is defined, under the Act, as

‘records, files, documents or other materials’ containing information directly related to a student, which are contained by an educational agency or institution or by a person acting for such agency or institution.’ 20 U.S.C. § 1232g(a)(4)(A); *Owasso*, 534 U.S. at 429.

Because the requested information is declared confidential under both state and federal statutes, your request is denied.

You inquire whether the requested videos are declared confidential as provided by the School. You note that the games that are recorded are open to the public to attend and some are broadcast by the school on its own public cable television station. In regards to the request for statistical information, the information is provided by the school to the local newspaper. As to your request (5), you inquire whether the list that is submitted to the IHSAA is confidential.

In response to your formal complaint, Mr. Wheeler advised that as to the School’s denial issued in response to your request for videotapes of certain games and practices, the videos are considered “educational records” and thus declared confidential pursuant to FERPA and state law analog. The Public Access Counselor has recognized that FERPA’s confidentiality provisions preclude the production of educational records. *See Opinion of the Public Access Counselor 10-FC-250; Indiana Newspaper, Inc. v. The Trustees of Indiana University*, 787 N.E.2d 893, 904 (Ind. App. 2003). Further, the counselor has advised that school videotapes would be considered an educational record pursuant to FERPA. *See Opinion of the Public Access Counselor 06-FC-191*. Counselor Davis noted the following:

First, the School has shown that the videotape (in the singular, since the videotape from the bus does not exist) depicts students, and is therefore an education record in the broad sense in which most authorities believe Congress intended. Second, the School has argued that the School maintains the record; accordingly, the record is not that of a law enforcement unit of the School. Third, the School cannot redact the record as normally would be required under the APRA. *Id.*

As the videotapes of the practices and games are considered confidential as an educational record under FERPA and state law, the School acted in compliance with the APRA in denying your request. The records are declared confidential, even though they may depict public events.

As to the statistic sheets that were sought, again the School cited that the records would be considered “educational records” pursuant to FERPA and thus prohibited the School from disclosing the records in response to a request. While it is true that under FERPA, specifically 20 U.S.C. § 1232g(a)(5), a school may disclose “directory information”, which includes names, addresses, dates of attendance, weight and height of members of athletic teams, upon a prior consent by the athlete or his or her parents, this would not include statistical performance of individual athletes as this would be akin to

disclosing a student's grades, which is expressly forbidden. The fact that the occasionally individual statistics or player information is disclosed to a newspaper does not make the requested documents disclosable under FERPA or APRA.

Lastly, the School believes that the list submitted by the School to the IHSAA of those students who were certified to play in the 2011-12 Sectional and Regional Games for the Greensburg Boys Basketball Team is confidential as an educational record under FERPA. The fact that the list was shared with the IHSAA does not cause the document to lose its FERPA protected status, as FERPA permits disclosure to an entity, such as the IHSAA, which has a legitimate educational interest in the student and the information. *See* 34 CFR 99.31; *Letter to Dixon* (noting disclosure of athletic information to the NCAA does not waive confidentiality provisions, and the NCAA is also subject to FERPA's confidentiality requirements. (<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/washdc.html>.)

ANALYSIS

The public policy of the APRA states that "(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." *See* I.C. § 5-14-3-1. The School is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within twenty-four hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here the School acknowledged in writing the receipt of your written request for records within seven (7) days of its receipt. As such, it is my opinion that the School complied with the requirements of section 9 of the APRA in responding to your request.

An agency is prohibited from granting access to inspect and copy a public record that is declared confidential pursuant to either state or federal law. *See* I.C. §§ 5-14-3-4(a)(1), (3). The School has provided that FERPA and its state law analog, I.C. § 20-33-7, prohibit the School from disclosing the videotapes, statistical information, and the IHSAA Certification list that you have requested.

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. 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. §99.3. “Record” means any information recorded in any way, including but not limited to video tape. *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.* The rights afforded under FERPA rest with a student’s parents until the student reaches the age of 18 or attend an institution of postsecondary education. 34 CFR §§ 99.3, 99.5(a); *Letter to Dixon* (<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/washdc.html>). Generally, in order to disclose information from student education records, a parent or eligible student must provide his or her prior written consent. *Id.* FERPA's consent provisions require a specification of the records that may be disclosed; the purpose of the disclosure; and the identity of the party or class of parties to whom the records may be disclosed. 34 CFR 99.30 and *Letter to Dixon*.

For the purposes of I.C. § 20-33-7, an education record means information that is recorded by a nonpublic or public school and concerns a student who is or was enrolled in the school. *See* I.C. § 20-33-7-1. Except under limited, specific circumstances, a school corporation may not disclose or report on the education records of a child, including personally identifiable information contained in the education records, without the consent of the child’s parent. *See* I.C. § 20-33-7-3. In regards to your request, it is not alleged that you are entitled to receive any records classified as “education records” pursuant to an exception found in I.C. § 20-33-7-3 or FERPA.

In regards to your request for videos of the School’s Junior Varsity and Varsity basketball team, previous opinions issued by the Public Access Counselor have opined that a videotape, to the extent that it contains depictions showing students, is an ‘education record.’” *See Opinion of the Public Access Counselor 06-FC-191 & 09-FC-201*. There is no dispute that the videotapes that you have requested depict students, are directly related to students, and are maintained by an education agency or institution. Thus I can reach no other conclusion that the videotapes are considered “education records” pursuant to FERPA and I.C. § 20-33-7-3 and the School would be prohibited from disclosing the records in response to your request. A public employee or public official who knowingly and intentionally discloses information classified as confidential by state statute commits a Class A misdemeanor. *See* I.C. § 5-14-3-10. Your main point of contention is that since School’s games are sometimes broadcast on television and open to the public, the School can no longer maintain that the records are confidential. You have made a request of the School for records, which is governed in this instance by the APRA, FERPA, and I.C. § 20-33-7-3. The Indiana Court of Appeals has recognized that a public agency may waive an applicable APRA exception if the agency allowed access to its material to one party and denied access to another based on an APRA

exception. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2003). However, there is no allegation that the School has previously disclosed the records in response to a public records request. Further, the School has provided that the records that are sought are confidential pursuant to state and federal law, and is not citing a discretionary exception found under I.C. § 5-14-3-4(b)(1)-(23) to deny your request. Accordingly, as to your request for the videos maintained by the School, it is my opinion that the School did not violate the APRA by denying your request, as the records you sought are considered to be confidential pursuant to both FERPA and I.C. § 20-33-7-3. I would again note that both FERPA and I.C. § 20-33-7-3 provide exceptions to disclosure; however you do not maintain that you meet the requirements of any applicable exception.

As to your request for statistical information relating to the School's Boys Basketball Team, the School again denied your request pursuant to FERPA and I.C. § 20-33-7-3. The School noted that while 20 U.S.C. § 1232g(a)(5) provides that a school may disclose directory information upon a prior consent received by the athlete or his or her parents, directory information does not include statistical performance information of individual athletes. As with your request for videos, there is no dispute that the statistical records that you sought depict students, are directly related to students, and are maintained by an education agency or institution. As such, it is my opinion that the School did not violate the APRA by denying your request for education records as defined by FERPA and I.C. § 20-33-7-3. Further, the same analysis would apply to your request for the IHSAA Certification List. It is not argued that the Certification List is not considered to be an educational record and pursuant to 34 CFR 99.31, the record does not lose its FERPA protected statute when it was disclosed to the IHSAA, who has a legitimate educational interest in the student and the information. As such, it is my opinion that the School complied with the requirements of the APRA, FERPA, and I.C. § 20-33-7-3 in responding to your request for the IHSAA Certification List.

CONCLUSION

Based on the foregoing, it is my opinion that the School did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "Joe Hoage". The signature is stylized with a large initial "J" and "H".

Joseph B. Hoage
Public Access Counselor

cc: Thomas E. Wheeler II