



# STATE OF INDIANA

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July 7, 2008

Frank Rizzo  
2845 45<sup>th</sup> Street  
Highland, Indiana 46322

*Re: Formal Complaint 08-FC-151; Alleged Violation of the Access to Public Records Act by the Hanover Community School Corporation*

Dear Mr. Rizzo:

This advisory opinion is in response to your formal complaint alleging the Hanover Community School Corporation ("Corporation") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Corporation's response to the complaint for your reference. It is my opinion the Corporation has not violated the APRA.

## BACKGROUND

You allege that you submitted a request, dated May 22, 2008, to the Corporation for a report on the climate of Lincoln Elementary School. In the request you indicated that you are aware the Corporation has already provided the document to certain members of the public on a discretionary basis. You enclose a copy of a letter dated June 9 from Barbra Stooksbury on behalf of the Corporation. The Corporation indicates it previously responded to you on May 23 and May 28, indicating it needed to investigate whether the report would be produced. In the June 9 letter, the Corporation denies access to the report based on the deliberative materials exception found at I.C. § 5-14-3-4(b)(6). The Corporation further contends that any previous disclosure does not waive Hanover's ability to assert the deliberative materials exception. You filed this complaint on June 10.

Ms. Stooksbury responded to the complaint on behalf of the Corporation. In a letter dated June 26, the Corporation contends the report was generated by the former superintendent, Dr. Michael Livovich, and was based on a "climate audit" at the school conducted during a two-week evaluation period. The report was created as an evaluative tool of the principal's leadership over staff and teachers. The Corporation contends the report contains information and advisory opinions by Dr. Livovich concerning administrative staff and other personnel issues to be shared with staff and the School Board for evaluative decision making processes. In addition to asserting the deliberative materials exception, the Corporation contends that upon investigation for the response to

the complaint, it was discovered the report was placed in the personnel file of the principal as an evaluation instrument of her performance. As such, the Corporation asserts the personnel file exception found at I.C. § 5-14-3-4(b)(8).

The Corporation addresses your assertion that the report was distributed to a member of the public. The Corporation does not confirm that any disclosure was made but asserts that if any disclosure was made, it was not authorized by the School Board. The Corporation contends that if any other requests were received for the report, the Corporation would globally assert the deliberative materials exception and the personnel file exception.

You provided another letter, dated June 26, to this office regarding your complaint. You contend that there is no evidence of any practice whereby the School Board is the routine decision maker who authorizes or denies access to records. Further, you allege the Corporation has not stated what if any Board policy or rule was allegedly violated by an unauthorized release of the record. You further assert that the Corporation has alternatively claimed the record is confidential and widely disseminated to the school's staff.

#### 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 Corporation is clearly 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 the public records of the Corporation 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).

The APRA excepts from disclosure, among others, the following:

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.

I.C. § 5-14-3-4(b)(6).

Here, the Corporation contends Dr. Livovich's report is intra-agency deliberative material because it is expression of opinion communicated for the purpose of decision making. The Corporation contends the report was an audit conducted by the superintendent to assess the principal's leadership relative to staff and teachers at the school. The Corporation contends the report included information and advisory opinions concerning staff and other personnel issues to be shared with the staff and the School Board for use in the decision making process. In my opinion, the portions of the report

which contain expressions of opinion by Dr. Livovich communicated to the Board and staff for decision making purposes is the type of record I.C. § 5-14-3-4(b)(6) excepts from disclosure at the agency's discretion.

To the extent the report contains information that is not expression of opinion or speculative in nature, and is not inextricably linked to non-disclosable information, that information must be disclosed.

The Indiana Court of Appeals addressed this issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

However, *section 6 of APRA* requires a public agency to separate discloseable from non-discloseable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-discloseable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.

Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access.

*Id.* at 913-14.

I include this analysis not to indicate I believe there is information contained in the report which must be disclosed but to indicate that if there is information which is not expression of opinion or speculative in nature and is not inextricably linked with the non-disclosable materials, that information should be provided. The Corporation indicated the report "included information and advisory opinions by Dr. Livovich . . ." From this statement I cannot ascertain whether the Corporation contends the entire report *consists of* deliberative material or merely *contains* deliberative material.

The Corporation further contends the report was placed in the personnel file of the school principal and as such is a personnel record excepted from disclosure at the discretion of the agency pursuant to I.C. § 5-14-3-4(b)(8). While merely placing any record in the personnel file of an employee does not protect a record based on this exception, a record which is a personnel record related to the employee and as such is placed in the personnel file of the employee is certainly excepted from disclosure

pursuant to this exception. Certain records contained in the personnel files of an agency are required to be disclosed, as listed in the exceptions to the exception in I.C. § 5-14-3-4(b)(8)(A) to (C). It is my opinion an evaluative report regarding an employee's leadership relative to her staff members is a record appropriately placed in the employee's personnel file and appropriately excepted from disclosure based on the personnel files exception.

You further contend that the Corporation waived its discretion by providing a copy of the report to another member of the public. Initially, you claimed the report was provided to a member of the public. In your June 26 letter, though, you claim it was distributed to employees of the Corporation. In my opinion, disclosure to a member of the public is a different matter than disclosure to employees of an agency for use as an evaluative tool.

The Corporation does not concede that prior disclosure of the record was made but indicates that if disclosure was made, it was not approved by the Board and did not waive the Corporation's discretion to withhold the records. The court in *Indianapolis Newspapers* addressed the issue of waiver of discretion.

Waiver is the voluntary and intentional relinquishment of a known right. *City of Evansville v. Follis*, 161 Ind.App. 396, 402, 315 N.E.2d 724, 727 (1974). See also 28 AM. JUR. 2D *Estoppel and Waiver* § 197 (2000) (defining waiver as the voluntary and intentional relinquishment of a known right, claim, or privilege). We can envision a situation in which a state agency might relinquish the protections afforded by APRA's exceptions. If, for example, an agency allowed one party access to materials and then in turn denied another party access to the same materials based upon an exception to APRA, the agency might well be held to have waived the applicable APRA protections. *Cf. Cooper*, 594 F.2d at 487-88; *Zuern*, 564 N.E.2d at 84. Nor do we believe that such a conclusion would frustrate the underlying purpose of the APRA exceptions, for if the agency has already disclosed the allegedly non-discloseable materials, the purpose of the APRA exceptions will have already been compromised. Moreover, in such a case, the decision to deny access after allowing others access could be considered an arbitrary and capricious abuse of discretion. See I.C. § 5-14-3-9(f)(2).

*Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 919 (Ind. Ct. App. 2005).

Here, I can not ascertain whether the Corporation previously disclosed the record to anyone other than employees of the Corporation. It is my opinion the decision in the *Indianapolis Newspapers*, since it did not address disclosure to employees of the agency, cannot be applied to the present issue to compel disclosure based on waiver of discretion. While the agency would bear the burden of proving the denial of access in response to your request was not arbitrary and capricious, I see no evidence to show the denial was arbitrary and capricious.

On the issue of the Corporation's discretion, you enclose a copy of an electronic mail message from my office indicating an agency cannot exercise discretion regarding to whom it discloses records. While I did not personally write this message, it is my belief the meaning of the message was broad and was a characterization of I.C. § 5-14-3-3(a), which provides that a request may not be denied because the requester refuses to state the purpose of the request.

Finally, I understand that in your June 26 letter to me you make allegations regarding the School Board's role in denying access. Further, you claim the Board has not indicated what if any policy was allegedly violated by any unauthorized release. The establishment of internal procedures of a board and the enforcement of any policies set by a board are issues not addressed by the APRA and outside the purview of the public access counselor.

#### CONCLUSION

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

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Barbra Stooksbury, Bose McKinney & Evans LLP  
William Gall, Hanover Community School Corporation