



STATE OF INDIANA

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June 25, 2009

Ted Titus
6145 North Lake Road 65 East
Monticello, Indiana 47960

Re: Formal Complaint 09-FC-131; Alleged Violation of the Access to Public Records Act by the North White School Corporation

Dear Mr. Titus:

This advisory opinion is in response to your formal complaint alleging the North White School Corporation ("Corporation") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by denying you access to records. The Corporation's response to the complaint is enclosed for your reference. It is my opinion the Corporation may exercise its discretion to withhold from disclosure the electronic mail messages sent and received by a Corporation employee so long as the messages are indeed personal in nature and are not related to public business.

BACKGROUND

You allege the Corporation violated the APRA by denying you access to electronic mail messages sent and received by an employee of the Corporation. You submitted to the Corporation a letter dated April 20, 2009 wherein you requested copies of electronic mail messages sent and received by a Corporation employee. The Corporation denied you access on the basis of the personnel files exception, I.C. § 5-14-3-4(b)(8). You filed the present complaint on May 26 (postmarked on May 21).

The Corporation responded to the complaint by letter dated May 27. The Corporation contends the employee was suspended for five days without pay for using school equipment in an inappropriate manner. The superintendent explains that the discipline was a direct result of the electronic mail messages the employee sent. The superintendent contends the messages were personal in nature and are now maintained as part of the employee's personnel file. As such, the Corporation has denied access to the messages on the basis of the personnel files exception.

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(m). 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 the disclosure, at the discretion of the agency, the following records (among others):

Personnel files of public employees and files of applicants for public employment, 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.

However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name.

I.C. § 5-14-3-4(b)(8).

Here, the Corporation contends the electronic mail messages to which you request access are records maintained in the personnel file of a Corporation employee. Because the messages do not consist of any of the records required to be disclosed pursuant to I.C. § 5-14-3-4(b)(8), the Corporation has exercised its discretion to withhold those records from disclosure. 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 for that reason is placed in the personnel file of the employee is certainly excepted from disclosure pursuant to this exception.

In this case, the messages might not be public records in their own right. If the messages are truly personal in nature and not related to public business, they are not necessarily public records just by virtue of being communicated using Corporation equipment. For instance, if a Corporation employee receives a doctor's note regarding his/her child and it is received via the Corporation's facsimile transmission machine, that

doctor's note does not become a public record by virtue of being communicated using the Corporation's equipment. In that case, the doctor's note was received by the employee in his/her individual capacity, and the document was unrelated to public business. Whether this use of Corporation-owned equipment is appropriate is a matter for the Corporation or other appropriate agency to determine. Many agencies have in place a limited use policy that would allow use of agency equipment in certain circumstances. Similarly, an electronic mail system is a communication system by which written messages are transmitted. If indeed the messages at issue were personal in nature and not related to public business, they are not public records in their own right. *See I.C. § 5-14-3-2(n), defining "public record."*

Here, the messages became public records when the Corporation began maintaining them for use during the investigation into the disciplinary matter. The messages were collected as part of the disciplinary matter and as such are appropriately maintained in the personnel files of the Corporation. The messages fall under the exception for personnel files found at I.C. § 5-14-3-4(b)(8). Further, the records are not required to be disclosed under the exceptions to the exception, found in subsections (A) through (C). As such, the Corporation has the discretion to either withhold or provide access to the messages.

CONCLUSION

For the foregoing reasons, it is my opinion the Corporation may exercise its discretion to withhold from disclosure the electronic mail messages sent and received by a Corporation employee so long as the messages are indeed personal in nature and are not related to public business.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Steven Wittenauer, North White School Corporation