



STATE OF INDIANA

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May 14, 2012

Matthew Parker Voors
Indiana Department of Education
151 West Ohio
Indianapolis, IN 46204
Via email: mvoors@doe.in.gov

Re: *Informal Inquiry 12-INF-23; Disclosure of records pursuant to the
Access to Public Records Act*

Dear Mr. Voors:

This is in response to your informal inquiry whether the Indiana Department of Education (“Department”) may receive student directory information from the Indianapolis Public Schools (“IPS”) and use that information under the Family Educational Rights and Privacy Act of 1974 (“FERPA”) and Indiana’s Access to Public Records Act (“APRA”). Roberta Sabin Recker, Attorney, provided a response to the Department’s inquiry on behalf of IPS. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on the applicable provisions of the APRA, Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

In August 2011, the State Board of Education (“SBOE”) assigned the intervention of a special management team (“SMT”) to five schools within the state, four of which are part of IPS. The 2011-12 academic school year was designated as an “observational year”, with the aim of allowing SMTs access to evaluate each school’s needs and design an intervention strategy for the 2012-13 school year, at which time the SMTs will have full administrative control. The SMTs have provided that they have faced certain challenges in obtaining information from IPS, which have negatively affected their ability to provide students with information about the SMTs and negatively affected the SMTs’ ability to plan for the 2012-13 school year. In response to the difficulties encountered by the SMTs, the Department requested the names and addresses of all IPS students with the intention of providing a mailing to students with information about each SMT.

IPS has permissive authority under FERPA to released education records to the

Department. The information that is sought by the SMTs is, by definition, an education record protected under FERPA. *See* 20 U.S.C. § 1232g; 34 CFR Part 99. FERPA grants parents, guardians, and students certain rights and privacies regarding students' educational records. FERPA defines educational records as records that are "directly related to a student" and "maintained by an educational agency or institution or by a party acting for the agency or institution. *See* 34 CFR § 99.3. Under FERPA, Local Education Agencies ("LEA") and/or State Education Agencies ("SEA") are prohibited from disclosing "Personally Identifiable Information" ("PII") contained within an education record without written parental consent, unless an exception applies.

A LEA or SEA may disclose directory information when the agency has provided parents/guardians the required disclosure and opt out period. The contour of what constitutes directory information is determined by the record holder. Each LEA or SEA that holds and intends to disclose such directory information has to establish the definition and provide a parental disclosure that explains what student-level information may be released as well as provide parents the opportunity to opt-out of any such disclosures. Once the disclosures and opt-out period have been provided, then a school may disclose the directory information. The FERPA provision is permissive, not obligatory, and is limited by the terms of the parental disclosure and opt-out notice.

IPS has provided the necessary disclosure defining directory information and opt-out period as required under FERPA that would allow the disclosure of the information within the scope of how the SEA defined directory information. Specifically, the IPS disclosure provided that the students' addresses would only be considered directory information for release to a state or federal agency. Thus, consistent with FERPA, IPS may provide the directory information to the Department and the Department may thereafter use that information to perform a mailing that would provide information about the SMTs to students who reside within the IPS corporation boundaries and who would be eligible to enroll with the SMTs.

Irrespective of FERPA, the Department has provided that the APRA provisions regarding commercial purposes do not apply to the Department's intended release of student information for the purpose of facilitating the prescribed intervention. IPS claims to have adopted a policy prohibiting the disclosure of such lists to commercial entities for commercial purposes. The Department would argue that regardless of whether IPS has developed such a policy, the policy is not relevant here; as the Department's intended distribution of the SMT information to students within the IPS district does not constitute a commercial purpose.

IPS may attempt to rely on a prior opinion of the Public Access Counselor issued in January 2008, however the Department would argue that it is not controlling. ("*Lighthouse*"). *See Opinion of the Public Access Counselor 08-FC-15*. In *Lighthouse*, a charter school, through a staff person with the title of "Business Development Associate," sought student directory information from IPS as part of its recruitment effort. The charter school was part of the general school choice model adopted by Indiana and not part of a turnaround intervention. Since dollars follow the student in Indiana, the more

students the charter school was able to enroll, the more state tuition dollars that would follow. Given the title of the staff member making the request and the definition of “commercial”, the opinion reasoned that the charter school’s purpose in seeking the information was commercial and therefore the request could be rightfully denied by IPS pursuant to I.C. § 5-14-3-3(f). *Id.*

The definition of commercial, as provided in *Lighthouse*, included “of or belonging to a trade” or “made or put up for market.” *Id.* In *Rice v. Allen County Plan Comm’n*, the Indiana Court of Appeals addressed the definition of “commercial purpose.” *Rice v. Allen County Plan Comm’n*, 852 N.E.2d 591, 598 (Ind. Ct. App. 2006). “The accepted definition of “commercial” is: “Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce.” “Commerce is defined as “the exchange of goods, productions, or property of any kind; the buying, selling, and exchange of articles.” *Id.* Applying these definitions to “commercial” and “commercial purpose”, the character of the disclosure here is not commercial and the APRA would not prohibit the disclosure of informational from IPS to the Department, with the Department performing the intended informational mailing.

The character and purpose of the disclosure is to ensure that the students who are the intended beneficiaries of a state intervention have access to the information necessary to make informed decisions about the school they will attend in the upcoming year. Unlike *Lighthouse*, the entity seeking the information is a state educational agency, not a business development associate at a competitor school. Providing public school students with information about SMTs, who will be managing schools at which recipient students are eligible to enroll tuition-free, does not constitute “connected with trade and traffic or commerce in general” as provided in *Rice*.

Under the current Indiana Administrative Code, a Turnaround Academy must accept students who reside within the school’s attendance zone. *See* 511 IAC 6.2-9-5. Beyond that, whether a Turnaround Academy may accept students turns on whether the school corporation in which it is located has a policy that permits students to attend schools within the corporation other than their boundary school and whether the corporation has a policy that permits students who live outside the corporation to attend schools within the corporation without the payment of transfer tuition. *Id.* The limitations of an academy’s enrollment policies are completely different from the operations of a charter school and how it attracts students. Rather than one of any of the various charter school organized under I.C. § 20-24-3 with an attendance zone defined by the state, the information intended to be provided here regards specific SMTs selected by the Department to perform an intervention in the state’s lowest performing schools. The information is to be provided to students residing within a corporation that allows intra-district transfer, who are the explicitly intended beneficiaries of the turnaround intervention assigned by the Department.

In response to the Department’s informal inquiry, Ms. Recker advised that I.C. § 5-14-3-3(f) speaks directly to the issue of how a public school system must respond to a public records requests for student directory information. A list of students who are

enrolled in a public school corporation “may not be disclosed by public agencies to commercial entities for commercial purposes” if the governing body adopts a policy prohibiting such disclosure. *See* I.C. § 5-14-3-3(f)(3)(A). Absent a policy prohibiting disclosure for a commercial or political purpose, the public agency “must permit a person to inspect and make memorandum abstracts from the list unless access to the list is prohibited by law.” *See* I.C. § 5-14-3-3(f).

On August 3, 2007, the Board of School Commissioners of the City of Indianapolis adopted a nondisclosure policy, which provides that:

The Board recognizes that IPS should not assist commercial entities in initiating unsolicited communications for commercial purposes to IPS students and their families.

The Board, therefore, prohibits disclosures to commercial entities for commercial purposes of any list of names and addresses of IPS students. Any list of names and addresses of IPS students may not be used by commercial entities for commercial purposes.

The Department’s argument that the intended distribution of SMT information to students within the IPS district does not constitute commercial purposes does not hold up to scrutiny. As an initial matter, there is no dispute that the SMTs who have contracted with the Department are commercial entities. Further, the SMTs want access to the IPS student directory information so that it can market their services to those families. To the extent that the materials induce families to send their children to an SMT, the SMT receives further government funding. Facilitating an SMT’s marketing efforts is contrary to the purpose of IPS’s nondisclosure policy. As further evidence of the commercial purposes behind the Department’s request, the request was not limited to the names and addresses of those students whose grade levels would allow them to consider enrolling in one of the SMTs, rather the request sought the names of all IPS students. The only purpose IPS can imagine for requesting the contact information is that it would be useful to the SMTs in marketing its charter school operations to Indianapolis, a wholly separate commercial purpose.

The Department’s argument that it does not fall within IPS’s nondisclosure rule because the request was made by the Department, not the SMT, would do violence to the APRA to permit SMTs, through an agent, what the APRA would not allow them to do directly. The Department is clearly acting on behalf of the SMTs in requesting the names and addresses for the purposes of the proposed mailing. The Department’s argument that it would only provide “objective information and materials” would be more persuasive if the Department provided examples of those materials to demonstrate that they have no marketing purpose.

Lastly, *Lighthouse* spoke directly to this issue and the Department is unable to distinguish the previous advisory opinion. Counselor Neal advised in *Lighthouse* that an entity, even a non-for-profit entity, “that markets its products or services with the intent

to encourage others to utilize or purchase its products or services is a commercial entity.” See *Opinion of the Public Access Counselor 08-FC-115*. Further, in “marketing those products or services would therefore be a commercial purpose.” *Id.* As in *Lighthouse*, the SMTs are commercial entities who have the intent of encouraging others to utilize their services. The facts of *Lighthouse* and the issue at hand are indistinguishable; as such the same result should follow. Further, as stated in *Lighthouse*, the APRA would not require IPS to provide the Department a copy of the list of student names and addresses; rather, APRA would, at most, require the public agency to permit an inspection and memoranda to be made. *Id.*

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. Accordingly, any person has the right to inspect and copy IPS’s 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).

I.C. § 5-14-3-3(f) provides the following regarding student directory information retained by a public school corporation:

(f) Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. However, if a public agency has created a list of names and addresses (excluding electronic e-mail addresses) it must permit a person to inspect and make memoranda from the list unless access to the list is prohibited by law. The lists of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to any individual or entity for political purposes and may not be used by any individual or entity for political purposes. In addition, the list of names and addresses (including electronic mail account addresses) described in subdivisions (1) through (3) may not be disclosed by public agencies to commercial entities for

commercial purposes and may not be used by commercial entities for commercial purposes. The prohibition in this subsection against disclosure of lists for political and commercial purposes applies to the following lists of names and addresses (including electronic mail account addresses):

(3) A list of students who are enrolled in a public school corporation if the governing body of the public school corporation adopts a policy:

(A) with respect to disclosure related to a commercial purpose, prohibiting the disclosure of the list to commercial entities for commercial purposes;

(B) with respect to disclosure related to a commercial purpose, specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes. I.C. § 5-14-3-3(f).

Pursuant to section 3 of the APRA, on August 3, 2007, the Board of School Commissioners of the City of Indianapolis adopted a nondisclosure policy, which states:

The Board recognizes that IPS should not assist commercial entities in initiating unsolicited communications for commercial purposes to IPS students and their families.

The Board, therefore, prohibits disclosures to commercial entities for commercial purposes of any list of names and addresses of IPS students. Any list of names and addresses of IPS students may not be used by commercial entities for commercial purposes.

The APRA does not provide a definition for “commercial.” In *Lighthouse*, “commercial” was defined by as “of or belonging to trade” or “made or put up for market. See *Opinion of the Public Access Counselor 08-FC-15*; *New Illustrated Webster’s Dictionary of the English Language*, Pamco Publishing Company, Inc. 1992, at 202. As cited by the Department, *Rice* addressed the definition of commercial purpose and held that the accepted definition of “commercial” is “relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. *Rice*, 852 N.E. 2d at 598. “Commerce” is defined as “the exchange of goods, productions, or property of any kind; the buying, selling, and exchanging of articles. *Id.* (quoting Black’s Law Dictionary 270, 269 (6th ed. 1990)).

There is no dispute that the SMTs are considered to be commercial entities. However, an SMT has not requested the student directory information from IPS; the Department has. The Department is a statutorily created public agency, directed by the State Superintendent of Public Instruction. See I.C. § 20-19-3 *et seq.* The fact that the Department has contracted with an outside entity does not mean that it no longer retains

its status as a public agency, separate and distinct from the SMT. *Lighthouse* is distinguishable due to a charter school made the request in *Lighthouse* in order to market its services to prospective students of the charter school; the charter school in turn would receive additional funding for each new student that it enrolled. Here, the Department, a state education agency, has provided that the student directory information was requested so that that it may provide an objective informational mailing to all students to ensure they have the necessary information to make an informed decision regarding which school they will attend. As opposed to *Lighthouse*, the argument has not been made that the Department will receive any financial incentives for each student that enrolls at an SMT. Counselor Neal advised in *Lighthouse* that an entity that “markets its products or services with the intent to encourage others to utilize or purchase its products or services is a commercial entity.” See *Opinion of the Public Access Counselor 08-FC-15*. IPS has argued that to the extent that the materials provided by the Department induce families to send their children to an SMT, the SMT will receive further government funding. Again, it is the Department that made the request and will be providing the information, not the SMT; and it is the SMT that will receive additional government funding if students choose to enroll, not the Department. There has been no indication that the Department will provide a copy or allow inspection of the student directory information to anyone outside the Department. Accordingly, it is my opinion that the Department is not a commercial entity for the purposes of I.C. § 5-14-3-3(f) and IPS Board Policy prohibiting nondisclosure of student directory information.

Even if the Department could be found to be a “commercial entity”, I do not believe that providing objective information and materials to students by a public agency can be considered a “commercial purpose” for the purposes of section 3 of the APRA and the IPS Board policy. I would agree with the Department that providing public school students with objective information regarding their education alternatives in the upcoming school year does not constitute “marketing” or that it is “connected with trade and traffic or commerce in general.” The Department’s intended release is for the purpose of facilitating the prescribed intervention and ensuring that all students are apprised of their options. As such, it is my opinion that a public agency issuing an objective informational mailing does not constitute a “commercial purpose” under section 3(f) of the APRA and the IPS Board Policy.

In regards to FERPA, IPS has not challenged the analysis provided by the Department that IPS has permissive authority to provide the student directory information to the Department in order to perform the requisite information mailing. Lastly, as noted by IPS and *Lighthouse*, section 3(f) of the APRA provides that if a public agency has created a list of names and addresses, it must permit a person to inspect and make memoranda abstracts from the list; the APRA would not require an agency to provide a copy of the list. See *Opinion of the Public Access Counselor 05-FC-162 and 08-FC-15*.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "H".

Joseph B. Hoage
Public Access Counselor

cc: Roberta Sabin Recker