

April 22, 2004

Ms. Karen Weaver  
11895 Glass Overlook Road, S.E.  
Elizabeth, Indiana 47117

*Re: Formal Complaint 04-FC-53; Alleged Violation of the Access to Public Records Act by the South Harrison School Corporation*

Dear Ms. Weaver:

This is in response to your formal complaint alleging that the South Harrison School Corporation (School Corporation) violated the Indiana Access to Public Records Act (APRA) (Ind. Code §5-14-3-1 *et seq.*), when it denied your request for public records. A copy of the School Corporation's written response is attached for your review. For the reasons set forth below, it is my opinion that the School Corporation improperly denied your request for records.

#### BACKGROUND

Your complaint alleges that you made a written request for public records with the School Corporation. The copy of the request submitted with your complaint is not dated or signed. Neither does it indicate whether it was served in person or by mail or facsimile; however, for purposes of this opinion I assume that it was mailed. The request seeks the names of the persons serving on the curriculum committee concerning a new grading system known as ICAN (Individual Curriculum and Assessment Notebook). The request further seeks access to any records, including email communications, that are in any way related to the curriculum committee for ICAN. Finally, the request seeks any documentation from the school board meetings or meetings led by the school superintendent in which the ICAN system was discussed.

On March 18, 2004, the School Corporation responded to your request in writing and acknowledged that it received your request seven days earlier. The School Corporation further acknowledged that it was able to identify documents responsive to your request, but nonetheless denied your request as to all responsive records. In support of the denial, the School Corporation cited to two statutory exemptions for nondisclosure. The School Corporation asserted that all of the members of the curriculum committee were "public employees" of the School Corporation and as such their names were exempt from production pursuant to Indiana Code 5-14-3-4(b)(8),

as personnel file information. With regard to the balance of your request, the School Corporation asserted that all of the records and every part of them were subject to nondisclosure pursuant to Indiana Code 5-14-3-4(b)(6) as intra-agency deliberative material made for the purpose of decision making. The School Corporation made no effort to identify disclosable from nondisclosable material in these records and to separate and produce the disclosable material.

This complaint followed. In response to your complaint, the School Corporation maintains its assertion that the records fall under the personnel file information and deliberative privilege exemptions. Relevant to the personnel file information exemption, the School Corporation states that each of the members of the curriculum committee are volunteers and it does not “wish to subject these employees to harassment from groups such as the one that [you] [purport] to represent.” Relevant to the deliberative privilege exemption alleged to pertain to the other responsive records, the School Corporation asserts that all of the records at issue were advisory in nature and include the personal observations and present sense impressions of the members of the committee, as well as the summaries of the meetings and deliberations of the committee. With the possible exception of the agendas for the meetings, which the School Corporation concedes “may be disclosable as a Public Record,” the School Corporation declines to produce any part of those responsive records. In that regard, the School Corporation again does not acknowledge that any portion of any record contains any measure of disclosable information pursuant to Indiana Code 5-14-3-6, but rather asserts that the entire contents of all of the records are nondisclosable.<sup>1</sup>

## ANALYSIS

The public policy of the APRA states:

[I]t is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Providing 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.

IC 5-14-3-1. Furthermore, “[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.” *Id.* Accordingly, “[a]ny person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter.” IC 5-14-3-3(a). Moreover, when a public record contains disclosable and nondisclosable information, the public agency is required to separate the material that may be disclosed and

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<sup>1</sup> In the letter requesting a response to the complaint, this office requested that the School Corporation address the issue of separation, noting that when a record contains disclosable and nondisclosable information, the public agency must separate and produce the disclosable information. IC 5-14-3-6; see *An Unincorporated Operating Division of Indiana Newspapers, Inc. v. The Trustees of Indiana University*, 787 N.E.2d 893, 913-14 (Ind. Ct. App. 2003).

make it available for inspection and copying. IC 5-14-3-6(a). Because the public policy of the APRA requires a liberal construction in favor of disclosure (*see* IC 5-14-3-1), exemptions to disclosure must be construed narrowly. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995). However, a liberal construction of the APRA does not mean that the exemptions set forth by the legislature should be contravened. *Hetzel v. Thomas*, 516 N.E.2d 103, 106 (Ind. Ct. App. 1987).

The School Corporation's response to your record request denied you access to all of the records responsive to your request, and to every part of the responsive records. However, the School Corporation has not, in my opinion, met its burden of supporting nondisclosure. Certainly, the School Corporation has failed to meet its burden of establishing that no part of the requested and responsive records could be separated and disclosed pursuant to statute.

The School Corporation asserts that the identity of the members of the curriculum committee are exempt from production as "personnel file" information of public employees. *See* IC 5-14-3-4(b)(8). The School Corporation has not established that this information falls within the personnel file information exemption or that the records that are responsive to your request contain personnel file information. *See* IC 5-14-3-9(g)(1). Indeed, the mere fact that the members of the curriculum committee are public employees does not render all records that may identify them as members of that committee "personnel" records within the meaning of that exemption. If that were the case, then every record of a public agency containing the name of any public employee could be alleged to be a "personnel" record of that agency. While the employees' personnel records reflecting their status as volunteers serving on the committee may be withheld under the personnel files exemption, a list of the members of the committee, or any other record containing that information and compiled for the committee or for the committee's business, cannot be withheld from production under this exemption.<sup>2</sup>

The School Corporation fares better on the merits of the deliberative privilege exemption, but only in part. The School Corporation quite correctly I think asserts that curriculum development and the work of the committee addressing the ICAN grading system is a deliberative process. In that regard, the School Corporation asserts that the "materials developed and reported to the School Corporation Administration were deliberative, advisory, and considered by the Administration before making a final decision to implement the ICAN grading system." The School Corporation goes on to describe the records responsive to your request *to include* "personal observations and present sense impressions of committee meetings," including summaries of the meetings and deliberations of the committee."

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<sup>2</sup> The School Corporation's response on this point also supports the inference that the denial is based on the anticipated use of the information. Specifically, the School Corporation notes that it does not "wish to subject these employees to harassment from groups such as the one that [you] [purport] to represent *by disclosing the names of the employees who serve on the committee.*" (Emphasis added). Of course, a request for records may not be denied for the reason that the requesting party refuses to state the reason for the request. IC 5-14-3-3(a). On the same basis, neither should a request be denied because the requesting party may use the information to express their dissatisfaction with the actions of the public agency or its employees. There is, of course, a line that can be crossed in that process, but the proper remedy in that regard is not the nondisclosure of records that are otherwise not confidential, but rather civil or criminal action against the requesting party who misuses the information obtained from disclosure.

Despite the general and conclusory nature of the foregoing description, I have no difficulty believing that some portion of some or all of the responsive records may meet the deliberative privileges exemption to disclosure in Indiana Code 5-14-3-4(b)(6). This exemption provides that “records that are intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making” are excepted from public disclosure at the discretion of the public agency. IC 5-14-3-4(b)(6). The purpose of this exemption is to “prevent injury to the quality of agency decisions” by encouraging “frank discussion of legal or policy matters in writing.” *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002); see *Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 909-10 (Ind. Ct. App. 2003). The School Corporation establishes the general nature of the records with sufficient specificity for me to understand that they at least contain the opinions, advice and recommendations of staff regarding curriculum development. Certainly, an exchange of ideas among the members of the committee in this regard fits within this exemption. In my opinion the School Corporation has made an adequate showing that some portion of some or all of the responsive records fall within the deliberative materials exemption.

That said, the exemption does not protect all matters within the responsive records from disclosure. Rather, as noted above, the APRA requires a public agency to separate disclosable from non-disclosable information contained in public records. IC 5-14-3-6(a). Thus, the most recent court to address application of this exemption held that *factual matters* which are not inextricably linked with other non-disclosable materials (specifically, the opinions and speculation of the author) should not be protected from public disclosure. See *The Trustees of Indiana University*, 787 N.E.2d at 913-14. *But see Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 831 (Ind. Ct. App. 1998) (wherein the court applied the exemption to permit disclosure of a group of documents as a whole). In *Trustees of Indiana University*, disclosable factual matters included such information as whether or not an incident happened. In that manner the court distinguished disclosable factual matters from non-disclosable opinions or speculation concerning the incident or about the impact or effect of the incident. While the court acknowledged the contrary holding in *Board of Trustees of Purdue University*, it declined to follow the reasoning and holding of that court.

The School Corporation does not address the conflict in these decisions or otherwise seek to address the statutory requirement that it separate disclosable from nondisclosable information appearing in the same record and produce the disclosable information. See IC 5-14-3-6(a). However, applying the plain language of the statute and the most recent decision of the Indiana Court of Appeals, any factual or anecdotal information and data contained in a record that is otherwise deliberative and made for the purpose of decision making must be disclosed. It simply cannot be – and the School Corporation does not even attempt to allege – that every word or sentence or paragraph of every responsive document is an expression of opinion or speculation. Indeed, the request and the School Corporation’s own description of the records indicates that the records (including, *e.g.*, minutes of school board meetings, agendas, and memoranda) contain information that is neither the opinion nor the speculation of the committee members. It is my opinion that any such factual data or material is disclosable, and its nondisclosure violates the

APRA. The School Corporation should therefore review the responsive records consistent with this opinion and disclose any factual data or material previously withheld. The School Corporation's failure to do so would in my opinion constitute a continuing violation of the APRA.

In summary, it is my opinion that the School Corporation's blanket denial of your request under the personnel file information and deliberative privilege exemptions constitutes a denial of your right to access to public records under the APRA. While I agree that some of the information in the responsive documents may fall within the deliberative privilege exemption, all of the content of all of the records cannot be exempted from disclosure. For this reason, the School Corporation's continuing failure to provide you with disclosable information from the responsive records constitutes a continuing violation of that statute. Should you need to enforce your rights under the APRA as outlined in this opinion and as provided by law, you have the right to bring a civil action in a court of competent jurisdiction against the School Corporation pursuant to Indiana Code 5-14-3-9. Because you sought this opinion first, if you substantially prevail in any such action you will be entitled to your attorney fees and the reasonable costs and expenses of the litigation. IC 5-14-3-9(i).

#### CONCLUSION

For the reasons set forth above, it is my opinion that School Corporation's denial of your records request violates the APRA. The School Corporation should separate the disclosable information from any information that is properly nondisclosable, and produce the disclosable information. The School Corporation's continuing failure to do so constitutes a continuing violation of the APRA.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Mr. Buren E. Jones