

November 18, 2005

John M. Irvine
1900 W. Burma
Gosport, IN 47433

Re: Formal Complaint 05-FC-219; Alleged Violation of the Open Door Law and the Access to Public Records Act by the Monroe County Community School Corporation

Dear Mr. Irvine:

This is in response to your formal complaint alleging that the Monroe County Community School Corporation (“MCSC”) violated the Open Door Law and the Access to Public Records Act because its Graduation Work Group does not hold open meetings, and refuses to disclose any of its records.

BACKGROUND

You complain that the Graduation Work Group (“Work Group”) of the MCSC does not hold public meetings, and that the MCSC has denied you the Work Group’s records. Sometime in late September or early October, you asked for records related to the Work Group’s activities. In one e-mail message dated October 10 to Mr. Bruce Law, Director of Research and School Improvement for the MCSC, you asked for copies of “raw material” and any preliminary reports. This request was apparently followed by a request of the MCSC that you make your request more particular. On October 10, you sent Mr. Law an e-mail message asking that the School forward to you “each and every document the committee collects...”

You filed your formal complaint with the Office of the Public Access Counselor on October 19, 2005. I sent a copy of your complaint and attachments to Mr. Bruce Law. The MCSC sent a written response, with a copy to you. In its response, the MCSC provided some background pertaining to the formation of the Work Group and its purpose. The Work Group is studying high school reform. Its members include stakeholders from the school district, including parents, teachers, students, business and civic leaders, Indiana University, Ivy Tech and others.

The Work Group will submit proposals for MCSC Superintendent John Maloy, who will present the proposals to the School Board.

The MCSC argued that the Graduation Work Group was established by the administration of the MCSC, not the MCSC School Board. Hence, it is not subject to the Open Door Law, and its meetings are not required to be open to the public. The MCSC also contends that records relating to the Work Group's activities are not required to be disclosed by the Work Group because it is not a public agency, and the MCSC may deny any of the Work Group's records under the deliberative materials exception. The MCSC stated: "The materials produced by the Work Group for the School Corporation fit squarely into the exception of IC 5-14-3-4, and are in line with the legislative intent of the statute. The Work Group provides the School Corporation with deliberative materials and opinions that facilitate decision-making regarding educational policies in Monroe County."

ANALYSIS

Open Door Law

It is the intent of the Open Door Law that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. Ind. Code 5-14-1.5-1. All meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. IC 5-14-1.5-3(a). "Public agency" is defined in the Open Door Law in several parts. The definition most relevant to your complaint is: "[a]ny advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff. IC 5-14-1.5-2(a)(5). A "governing body means "two (2) or more individuals who are:

(1) a public agency that:

(A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and

(B) takes official action on public business;

(2) the board, commission, council, or other body of a public agency which takes official action upon public business; or

(3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter."

IC 5-14-1.5-2(b).

The MCSC has stated in its complaint response that the committee was formed by the MCSC administration, not the School Board. You believe that the Work Group is but an indirect appointment by the School Board. In any case, you do not dispute that the Work Group was appointed by the MCSC administration, but argue that the Work Group's escaping public scrutiny by limiting the Open Door Law to only those committees directly appointed by the School Board is an exception that would effectively "swallow the statute."

A committee that is not appointed directly by a governing body or its presiding officer does not constitute a governing body, under the plain language of the Open Door Law. Further, the Indiana Court of Appeals has considered an argument similar to yours in *Robinson v. Indiana University*, 638 N.E.2d. 435 (Ind. Ct. App. 1994). *Robinson* was decided after the legislature had amended the definition of “governing body” to add the word “directly” after “any committee appointed.” The court held that a committee and a subcommittee that were appointed by an Indiana University associate vice president, at the behest of the IU president, who in turn derived his authority from the I.U. Board of Trustees, were not governing bodies under the Open Door Law. *Id.* at 437:

“It is apparent to us that the legislature’s enactment of the amendment [adding the word “directly”] effectively limits the types of committees that are subject to the Open Door Law...The legislature has clearly narrowed the scope of the Open Door Law’s effect as it applies to various committees.”

Id. at 438.

Here, the Work Group was not directly appointed by the School Board. Further, there is no evidence that the Work Group was even indirectly appointed by the School Board. The members of the MCSC administration that appointed the Work Group are not a governing body; therefore, the Work Group is not a governing body. Further, the Work Group is not a public agency under any of the definitions of “public agency” contained in the Open Door Law. In particular, it is not an advisory committee created by statute, ordinance, or executive order to advise the governing body of a public agency. The plaintiff in a lawsuit under the Open Door Law has the burden of proving that the defendant entity is a “public agency” within the meaning of the statute. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999).

In my opinion, the Work Group is not a public agency or a governing body under the Open Door Law. The meetings of the Work Group consequently are not subject to the Open Door Law.

Access to Public Records Act (“APRA”)

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act. IC 5-14-3-3(a). A request for records must identify the record with “reasonable particularity.” IC 5-14-3-3(a)(1). If a public agency denies a written request for a record, it must deny the request in writing and the denial must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record, and state the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c). If a public record contains disclosable and nondisclosable information, the public agency shall separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a).

Although I have opined that the Work Group is not itself a public agency, the MCSC is a school corporation that is a public agency under the Access to Public Records Act. IC 5-14-3-2. A “public record” is any material that is “created, received, retained, maintained, or filed by or with a public agency. IC 5-14-3-2. For the purposes of this opinion, I am assuming that the MCSC retains or maintains records relating to the Work Group or its activities. These materials are the public records of MCSC, and the records must be disclosed to you upon request, unless the records are exempt under section 4 of the APRA.

You have requested copies of “raw material,” any preliminary reports created by the Work Group, and “each and every document the committee collects...” It is true that your request must identify the records requested with reasonable particularity. However, this standard must be met with due consideration for the requester’s ability to precisely identify records, which will vary for different public agencies. Here, the records of the Work Group would be virtually impossible to identify with much precision because it is a new entity that has not met publicly and whose work product is probably anomalous. In my opinion, your request for any preliminary reports and for every document that the committee collects are not fatally imprecise; in any case, the MCSC should seek to be more helpful to confirm what records you are seeking. To assist you, it is the obligation of the MCSC to explain what additional information the MCSC needs to more precisely define or limit your request.

In the MCSC response to your complaint, the MCSC claims that the materials produced by the Work Group are deliberative materials and opinions that facilitate decision-making regarding educational policies in Monroe County.

Under IC 5-14-3-4(b)(6), an agency may withhold 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. The burden of proof is on the public agency to sustain its denial of a record. IC 5-14-3-1; IC 5-14-3-9(f).

If the MCSC intends to deny any of the records that you have requested, it must identify the record and state the exemption that applies to each record, as required under IC 5-14-3-9(c). Although some or even many of the reports or other records that MCSC maintains relating to the Work Group may be deliberative material, it is not sufficient to classify all records relating to or created by the Work Group as deliberative material. For example, if the MCSC has a record that contains purely factual material that is not inextricably linked to the opinions and recommendations of the Work Group, it must separate and disclose those records. *See Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2003). For each record that the MCSC claims is exempt, the MCSC must be able to prove that the record is 1) interagency or intra-agency material, 2) contains expressions of opinion or is of a speculative nature, and 3) is communicated for the purpose of decision making. The MCSC bears the burden of showing that the records are exempt, either because they are deliberative or under any other exemption in section 4 of the APRA.

CONCLUSION

For the foregoing reasons, I find that the Work Group is not a public agency or a governing body; consequently, its meetings are not subject to the Open Door Law. I also find that the MCSC should communicate with you regarding how to better define the records you are seeking. Further, the records relating to the Work Group are not exempt merely because they are the work product of an advisory or deliberative body. The APRA exemption for deliberative materials is not so broad as to encompass every record relating to or created by an advisory or deliberative body. Once the MCSC clarifies what records you are seeking, if the MCSC intends to deny any records, the MCSC should issue a denial that meets the requirements of the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Thomas Bunger
Bruce Law