

November 30, 2005

Mr. Timothy R. Morgan
4606 Tamarack Drive
Fort Wayne, IN 46835

Re: Formal Complaint 05-FC-228; Alleged Violation of the Access to Public Records Act by the Fort Wayne Community Schools

Dear Mr. Morgan:

This is in response to your formal complaint alleging that the Fort Wayne Community Schools ("School") violated the Access to Public Records Act by denying you a copy of a memorandum from the Superintendent to the School Board regarding the Read 180 reading program. I find that the School's response did not adequately specify the basis for denial. Also, the School has the burden of proving that the memorandum is wholly deliberative or that any factual material cannot be separated and disclosed to you.

BACKGROUND

On September 26, 2005, you requested of the School the memorandum to school board members "summarizing the need for Read 180 – Aug. 22, 2005," among other records. In response, you received an e-mailed letter, dated October 10, 2005, from Debbie Morgan, PIO of the School. She denied your request for the memo, stating "this memo is exempt as it was used for deliberative purposes."

You filed your formal complaint with the Office of the Public Access Counselor on October 31, 2005. You state in your complaint that there were no "deliberative purposes." The Board voted to buy the software, and the School is denying access to all e-mails.

I sent a copy of your complaint to the School. I received a letter from William L. Sweet, General Counsel for the School. I enclose a copy for your reference. According to Mr. Sweet, it is customary for the Superintendent to give her opinions to the Board on matters on the Board agenda in the week prior to the meeting for the Board to consider as part of their decision-

making process. You are seeking a communication that occurred on August 18. That communication expressed the Superintendent's opinions on the following matters: 1) the efficacy of the Read 180 program; 2) what results the District should expect from its use; 3) its potential use in other schools/programs; and 4) its expense relative to other programs. Further, he stated that the substance of the Read 180 program and its costs were made available to the Board in other ways; these documents have already been made available to you. Mr. Sweet avers that the August 18 communication was not a factual piece, but was precisely the type of communication described in the deliberative materials exception.

ANALYSIS

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 ("APRA"). Ind. Code 5-14-3-3(a). If a request is made in writing, a public agency may deny the request if the denial in writing and the denial includes a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

Under section 4(b) of the APRA, a public agency may withhold certain types of records, in the agency's discretion. 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" may be withheld. IC 5-14-3-4(b)(6).

Three elements comprise this category of records. First, the record must be intra-agency or interagency advisory or deliberative material. Second, the record must be an expression of opinion or be of a speculative nature. Finally, the record must be communicated for the purpose of decision making. The APRA places on the public agency that denies a record the burden of proof for the nondisclosure of a record. IC 5-14-3-1. Exceptions to disclosure are to be narrowly construed to effectuate the purpose of the APRA. IC 5-14-3-1.

Also, the APRA states that if a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a). In a case considered by the Indiana Court of Appeals, the court distinguished between purely factual material and opinion or speculation, although the public agency had claimed that the factual material was deliberative because it was part of a group of documents compiled as part of an investigation. *The Indianapolis Star v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003). The Court of Appeals held that under the APRA's section 6, factual matters that are not inextricably linked with other nondisclosable materials should not be protected from public disclosure. *Id. at 914*. The Court observed in dicta that interviewees' knowledge of whether Bobby Knight removed Myles Brand from a session of basketball practice was a factual matter, not opinion or speculation. *Id. at 913*.

Hence, in order for the School to maintain that the memorandum is entirely nondisclosable, it must be able to prove that all the matters in the memorandum are opinion or

speculation, or that no factual matters that are in the memorandum may be separated from the opinion and disclosed to you. I have not reviewed the memorandum, so I express no opinion regarding whether the School has properly withheld the entire memorandum. However, I note that some of the matters on which the Superintendent gave her opinion may be factual, such as the expense of the Read 180 reading program relative to other programs. Of course, “expense” may mean more than just the price tag of an item, so I make no firm conclusion that the matter of expense could not have been an opinion or speculation. Rather, I write to offer guidance as the School may wish to reconsider its denial. For example, if the memorandum contained factual data relating to the expense of the program compared with other programs, and the data are not inextricably linked to the speculative or opinion material, the factual matters should be disclosed to you. This is true regardless whether the same or similar information has been offered to you from other records.

The School has violated the APRA in one respect. The School was required to cite the specific exemption authorizing it to withhold the record. Ms. Morgan, the PIO denied your request #3 stating “this memo is exempt as it was used for deliberative purposes.” The denial should have included the citation to the exemption, IC 5-14-3-4(b)(6).

CONCLUSION

It is my opinion that the Fort Wayne Community Schools violated the Access to Public Records Act when it denied your request for a copy of the August 18 memorandum without citing the specific exemption. Also, the School has the burden of proving that the memorandum is wholly deliberative or that any factual material cannot be separated and disclosed to you.

Sincerely,

Karen Davis
Public Access Counselor

cc: William L. Sweet