

December 19, 2005

Sent Via Facsimile

Krista J. Stockman
The Journal Gazette
600 West Main Street
Fort Wayne, IN 46802

Re: Formal Complaint 05-FC-238; Alleged Violation of the Access to Public Records Act by the Timothy L. Johnson Academy

Dear Ms. Stockman:

This is in response to your formal complaint alleging that the Timothy L. Johnson Academy (“Academy”), a charter school, violated the Access to Public Records Act by refusing to disclose a personnel file of a former teacher at the Academy.

BACKGROUND

You are interested in obtaining a copy of the personnel file of Terri Payne, a former teacher and school leader at the Timothy L. Johnson Academy in Fort Wayne. The Academy is a charter school. On November 8, 2005, you telephoned Kelly Updike, communications director for The Leona Group (“Leona”). At that time, you left a voice mail message requesting the personnel file of Terri Payne. You received on November 9 an e-mail from Ms. Updike, stating that Leona is a private company, and the information from the personnel file of Ms. Payne would not be provided.

On November 11, 2005, you sent a formal request for the record to the Academy School Leader Steve Bollier. You received in response another communication from Ms. Updike, stating that Leona is a private company not subject to the Access to Public Records Act.

You filed your formal complaint with the Office of the Public Access Counselor on November 18, 2005. I sent a copy of your complaint to the Academy. In response, I received a

letter from Ms. Updike, a copy of which I have enclosed for your reference. In her response, Ms. Updike explains that Leona is a full-service educational management company. Leona's letterhead shows that it has offices in Phoenix, Arizona and East Lansing, Michigan. Leona is contracted by the board of directors of the Academy to manage the daily operations of the Academy. Leona has hired all the teachers at the Academy, as set out in the management agreement which provides that Leona is responsible for all recruiting, payroll, certification compliance, licensure and permitting, and benefits and personnel matters. While acknowledging that the Charter School Act states that records of a charter school relating to the school's operation and charter are subject to inspection and copying under IC 5-14-3, Ms. Updike contends that the records requested by the newspaper are not subject to the Public Information Act because employee records are those of the Leona Group, and not those of the public charter school or its board of directors.

Other facts will be developed in the Analysis below.

ANALYSIS

The Access to Public Records Act states:

“A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it 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 the 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. This 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.”

Ind. Code 5-14-3-1.

To that end, any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). A “public record” means, in pertinent part, any writing, paper, report, study, or other material that is created, received, retained, maintained, or filed by or with a public agency. IC 5-14-3-2(m). A “public agency” means, in pertinent part, any school corporation, IC 5-14-3-2(l)(2), and any entity or office that is subject to an audit by the state board of accounts, IC 5-14-3-2(l)(3)(B).

A personnel file of a public employee is exempt from disclosure at the discretion of the public agency, except that the following information from a personnel file of a public employee or former public employee is required to be disclosed:

- “(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) information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged.

However, all personnel file information shall be made available to the affected employee or his 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.”

IC 5-14-3-4(b)(8)(A)-(C). The term “public employee” as used in this section is not defined in the Access to Public Records Act. I was unable to find a definition of “public employee” in the Indiana Code that applied to the APRA.

The Charter School Act

Charter schools are established pursuant to IC 20-24 [hereinafter “the Charter School Act”]. A charter school may be established to provide innovative and autonomous programs that serve the different learning styles and needs of students. IC 20-24-2-1. A charter school is allowed freedom and flexibility in exchange for exceptional levels of accountability. IC 20-24-2-1. A charter school is a public school. IC 20-24-4-1. With limited exceptions, a charter school may not charge tuition for a student to attend the school. IC 20-24-8-2(a)(2).

A “charter school” means a public elementary school or secondary school established under the Charter School Act that is nonsectarian and nonreligious and operates under a charter. IC 20-24-1-4. A “charter” is the contract between an organizer and a sponsor for the establishment of a charter school. IC 20-24-1-3. An organizer is a group or an entity that operates as a nonprofit or has applied to the IRS for such treatment, and enters into a contract to operate a charter school. IC 20-24-1-7. A sponsor of a charter school may be either a governing body, a state educational institution that offers a four year baccalaureate degree, or the executive of a consolidated city. IC 20-24-1-9.

A charter must meet certain requirements. Among other requirements, the charter must specify that records of a charter school relating to the school’s operation and charter are subject to inspection and copying to the same extent that records of a public school are subject to inspection and copying under IC 5-14-3 [the Access to Public Records Act]. IC 20-24-4-1(13). Also, the charter must specify that records provided by the charter school to the department of education or sponsor that relate to compliance by the organizer with the terms of the charter or applicable state or federal laws are subject to inspection and copying in accordance with IC 5-14-3. IC 20-24-4-1(14).

A charter school may enter into contracts in its own name, including contracts for services. IC 20-24-8-1(4). A charter school and its organizer are accountable to the sponsor for ensuring compliance with applicable federal and state laws, the charter, and the Constitution of the State of Indiana. IC 20-24-8-3. A “conversion charter school” means a charter school established by the conversion of an existing school into a charter school, or a new school to which students from other schools in the school corporation are assigned or transferred. IC 20-24-1-5. Under IC 20-24-6-1(a), individuals who work at a charter school are employees of the charter school or of an entity with which the charter school has contracted to provide services, unless they are teachers in a conversion charter school; the latter are employees of both the charter school and the school corporation that sponsored the charter school. However, for any other purpose not otherwise stated in section 1, a teacher is an employee of the charter school. IC 20-24-6-1(e). An individual who teaches in a charter school must either hold a license to teach in a public school in Indiana under IC 20-28-5, or be in the process of obtaining a license to teach under the transition to teaching program established by IC 20-28-4-2. IC 20-24-6-5(a).

The Academy is sponsored by Ball State University. Its organizer is the Fort Wayne Interdenominational Ministerial Alliance, according to Mr. Bollier. The Academy is *not* a conversion charter school. Mr. Bollier is employed by Leona, as are most of the individuals and teachers who work at the Academy. Mr. Bollier confirmed the position of Ms. Updike that a personnel file of an employee of Leona would not be disclosed by Leona. Mr. Bollier also told me that teachers execute employment contracts between the teacher and Leona, and those contracts would not be subject to disclosure.

Except as specifically provided in the Charter School Act and the statutes listed in IC 20-24-8-5, an Indiana statute applicable to a governing body or school corporation does not apply to a charter school. IC 20-24-8-4(1). Many of the provisions of Indiana law that apply to a school corporation also apply to a charter school, including compulsory school attendance and parental access to education records, to name two. *See* IC 20-24-8-5. Charter schools are subject to audit by the state board of accounts. IC 20-24-8-5(1). As I noted earlier, the Charter School Act states that records of a charter school relating to the school’s operation and charter are subject to inspection and copying to the same extent that records of a public school are subject to inspection and copying under IC 5-14-3. IC 20-24-4-1(13).

Although IC 20-24-8-5 does not specifically make the APRA applicable to a charter school, the legislature clearly intended that the charter school’s records be open to inspection and copying. First, a charter school is a public school. Second, a charter school is subject to audit by the state board of accounts, which is one condition for which an entity would be deemed a public agency for the purposes of the APRA. Third, the purpose for which charter schools were created, to stimulate innovation and provide autonomy, come with “exceptional levels of accountability.” Finally, the Charter School Act specifically provides that records relating to the charter school’s operation and charter are subject to inspection and copying *to the same extent that records of a public school are subject to inspection and copying under IC 5-14-3*. IC 20-24-4-1(13)(emphasis added). It is difficult to conclude that information about a teacher does not relate to the charter school’s operation. In my opinion, the records maintained by Leona that relate to a current or former teacher at the Academy are required to be disclosed pursuant to IC 20-24-4-1(13), if not by virtue of the Academy being a public agency under IC 5-14-3-2(1)(3)(B).

This is true whether or not the personnel file is created or maintained only by Leona, and whether or not the teacher is employed by Leona for the Academy. Leona makes much of its management agreement with the Academy, which sets out the contractual obligations of Leona with respect to recruiting, payroll, licensure, benefits and other personnel matters. Leona argues that because it is a separate legal entity from the Academy, its records are not subject to the APRA.

I requested and received a copy of the management agreement between The Leona Group and the Academy [also called the “Organizer”]. I have enclosed a copy of the management agreement for your reference. The agreement is signed on behalf of the Academy by the Board President, Rev. Mike Nickleson. According to Article IX., paragraph G.,

“the Organizer is subject to the Indiana Access to Public Records Act (Indiana Code 5-14-3-1 *et seq.*) and must make all public records accessible in either physical or electronic form. TLG [Leona] shall make any such public records available upon request and shall not impede or restrict any access to such records. To the extent provided by Law, because TLG is a private enterprise, records pertaining to TLG, its operations and personnel may be exempt from disclosure under the Access to Public Records Act if such records *do not in any way relate to the Academy.*”(Emphasis added).

In addition, the management agreement states that the Organizer shall own outright all financial, educational and other records pertaining to the Academy, whether or not generated or maintained by TLG. *Management Agreement*, Article IX, paragraph A.

I do not find compelling Leona’s argument that because the personnel records relate to its own employees and are maintained only by Leona, the records are not subject to disclosure. A record created and maintained by a private enterprise acting on behalf of the public agency are public records under the APRA. *Knightstown Banner vs. Town of Knightstown, No. 33A04-0504-CV-200, slip op., (Ind. Ct. App., December 13, 2005)*. I also note that although your complaint was against the Timothy L. Johnson Academy and I forwarded the complaint to the Academy’s facsimile number, only Leona personnel responded to my inquiries, suggesting to me that Leona considers itself the Academy for all intents and purposes.¹

Also, there is some support for the notion that teachers in a charter school are employed by the charter school, IC 20-24-6-1(e), and are entitled to participate in the teacher’s retirement fund. IC 20-24-6-7(b) (“a person who teaches in a charter school is a member of the Indiana state teachers’ retirement fund”), although Leona alleges that the Academy teachers are not entitled to participate in “the state retirement program” citing an unspecified “state ruling.”

Following my investigation into your complaint and my reading of the Charter School Act, there was much left to interpretation regarding the status of charter schools. I do not intend by this opinion to issue interpretive guidance about the Charter School Act, which is outside my

¹ The Timothy L. Johnson Academy, Inc. is registered as a non-profit domestic corporation in Indiana, with an entity address of c/o The Leona Group LLC, at the East Lansing, Michigan address.

bailiwick and expertise. However, although some provisions of the Charter School Act are open to interpretation, I am persuaded that information about a former teacher and school leader at the Academy in the possession of Leona as employer on behalf of the Academy is a public record subject to inspection and copying.

CONCLUSION

In my opinion, you were entitled to information about a former teacher at the Timothy L. Johnson Academy, pursuant to IC 20-24-4(13) and the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Kelly Updike, The Leona Group
Marty Dezelan, Ball State University