January 17, 2006

Sent Via Facsimile

Mr. Eric Cox
The *Banner*
24 N. Washington Street
Knightstown, IN 46148

Re: Formal Complaint 05-FC-256; Alleged Violation of the Access to Public Records Act by the Charles A. Beard Memorial School Corporation Board of Trustees

Dear Mr. Cox:

This is in response to your formal complaint alleging that the Charles A. Beard Memorial School Corporation Board of Trustees ("CAB" or "Board") violated the Access to Public Records Act ("APRA") by failing to disclose the redacted parts of memoranda that were sent to the CAB by the Superintendent.

BACKGROUND

The *Banner* requested records consisting of memoranda from CAB Superintendent Hal Jester to the CAB from January 1, 2004 to the present. The request was sent via facsimile on August 19, 2005. The request was directed not just to the CAB, but also named the Superintendent and E. Edward Dunsmore, the CAB attorney. On August 22, Dr. Jester sent you a letter estimating that the time for production would be about thirty (30) days. Dr. Jester sent you the records in two parts, one set on September 17, and the remainder on September 22. The memoranda that were produced contained partial redactions.

On October 31, 2005, you sent to the CAB and its members a request for unredacted copies of 24 of the memoranda, all memoranda that were included in the production provided by Dr. Jester in response to your earlier request. You stated in your request that

> "many of the memos that [Dr. Jester] provided contained significant redactions of material that was within CAB's discretion to release. Jester advised the *Banner*

> that he had consulted with legal counsel and had been responsible for deciding what portions of the memos to black out. As the school board is the proper governing body for CAB, the *Banner* is directing this request to the school board directly and requests that it, not CAB's superintendent, respond."

On November 2, Dr. Jester sent you a letter indicating that your request was being reviewed by the appropriate parties and a response would be forthcoming by November 18. On November 16, Attorney Dunsmore issued you a letter stating that "there is no further Board requirement under APRA to respond again to the request."

You filed your formal complaint on December 16, the date that your complaint to me was postmarked. In your complaint, you assert that Dr. Jester's initial response to your August 19 request did not constitute a sufficient response to your October 31 request to the school board only. You also contend that some of the redactions made by the CAB were not proper. Specifically, you take issue with redactions made pursuant to the deliberative materials exception (Ind. Code 5-14-3-4(b)(6)), the exemption for diary or journals (IC 5-14-3-4(b)(7)), and for materials prepared for discussion or developed during discussion in an executive session (IC 5-14-3-4(b)(12)), among other exemptions.

I sent a copy of your complaint to the CAB. In response, Attorney David R. Day sent me a letter dated January 10, 2006. I previously faxed you a copy of his letter and enclosures. In the CAB's response to your complaint, it makes several assertions. First, the CAB states that your complaint is untimely, because your second request for records on October 31 was just a reiteration of your original request, in a transparent attempt to come under the timeliness provisions of the Public Access Counselor's formal complaint statute. The CAB also contended that the redactions it made were proper. It also stated that it would not agree to provide the records to me for an *in camera* review, as my office does not have the same authority as a court to perform a review of disputed records. In addition to the letter, the CAB provided me with a log listing each record, the part of the record that was redacted, and the basis for the redaction with specific citation to the statute or statutes allowing the CAB to withhold the record.

ANALYSIS

Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. Ind. Code 5-14-3-3(a). A person who has been denied the right to inspect or copy a public record may file a complaint with the Office of the Public Access Counselor. IC 5-14-5-6(1). A person who chooses to file a formal complaint with the counselor must file the complaint not later than thirty (30) days after the denial. IC 5-14-5-7(a)(1). The Public Access Counselor may also issue an informal inquiry response. IC 5-14-4-10(5). If a person requests and receives an informal inquiry response *or* a formal advisory opinion from the Public Access Counselor prior to filing a lawsuit to compel a public agency to disclose a public record, the person is entitled to attorney fees, court costs, and reasonable expenses of litigation if he prevails. IC 5-14-3-9(i).

Because the APRA is to be liberally construed in keeping with the remedial purposes of the APRA, exemptions to disclosure of a record are to be narrowly construed. *See* IC 5-14-3-1.

The burden of proof for the nondisclosure of a public record is on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. IC 5-14-3-1. A public agency that receives a written request for a record may deny the request if the denial is in writing and if it includes a statement of the specific exemption or exemptions authorizing the public agency to withhold the record, and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

Two preliminary matters are raised by the parties to the complaint. First, the *Banner* has asked that the CAB present me with the unredacted records so that I may review them and advise whether I believe the redactions were consistent with the exemptions that were asserted. The CAB did not agree to submit the records to me for this purpose, for two reasons. First, the statute establishing my office does not provide me with explicit authority to review records *in camera*. Second, disclosing the records to me would have the effect of making them public records maintained by my office, a public agency. I agree with these concerns and add a third basis on which to decline to conduct an *in camera* review. Disclosing the records to me could violate confidentiality provisions of federal law that were asserted by the CAB, or, where the records are nondisclosable in the CAB's discretion, could waive the CAB's rights. Primarily because my office does not have statutory authority to conduct an *in camera* review, I decline to review the records, even if the CAB were not opposed.

Second, the CAB contends that the complaint is untimely filed. The CAB states that because the October 31 request for unredacted memos was nothing more than an objection to the redactions, and the October 31 request was to the same public agency, the school corporation, as the August 19 request, the *Banner's* complaint is untimely. The *Banner* does not seem to take issue with the fact that its October 31 request was a direct result of the denial of part of the records received from the CAB on September 22. However, the *Banner* asserts that the October 31 request was to the CAB (the Board), not to the Superintendent, and that the discretion to be exercised should have been exercised by the Board. Therefore, the *Banner's* October 31 request is timely.

I agree with the CAB that the *Banner*'s requests of August 19 and October 31 were to the same public agency, the Charles A. Beard School Corporation. The CAB is the governing body of the school corporation; the superintendent is an employee of that same public agency. However, it is difficult for me to distinguish this situation from a similar situation commonly encountered by this office, where a requester will renew a request for a record, once denied. Even conceding that the public agencies are the same, and the requests for records were identical except that some of the memos were omitted from the second request (the first request was also for unredacted memos), the October 31 request resulted in a second denial. This is indistinguishable from a situation where the requester has asked the public agency to reconsider its exercise of discretion to deny part of the records in the form of another records request. Nothing in the APRA prevents this type of renewed request for records; hence, if a second denial occurs, in the absence of other circumstances, I do not believe that I have the discretion to find that a complaint filed within 30 days of the second denial is untimely filed. In any event, the effect of an informal inquiry response and a formal advisory opinion following a complaint is the same. Thus, the CAB suffers no detriment by my finding the *Banner*'s complaint timely.

Adequacy of the CAB's Response to the October 31 Request

The *Banner* posits that Attorney Dunsmore's November 16 letter declining to give any additional response to the request for the 24 memos did not suffice to state the position of the CAB (Board) with respect to the denial of portions of the memos. The *Banner* believes that CAB's governing body should have asserted its own denial of the records (or, preferably, disclosed the records). Under the APRA, a public agency may deny a record if its denial states the exemption that applies to the record being withheld, and states the name and title or position of the person responsible for the denial of the record. IC 5-14-3-9(c). The school corporation, through its governing body, the Board of Trustees, may delegate the responsibility for handling public records requests to the superintendent. The *Banner* does not argue that such a delegation may not occur. The *Banner* appears to regard the school corporation and a school board as two separate entities. This does not find support in IC 20-26. Hence, although the CAB was required to issue a response to the October 31 request within the timeframes set out by APRA, its November 16 letter did just that. The letter sufficed as a means for the CAB to state that the response of its superintendent to the August 19 requests were ratified by the CAB. Therefore, there was nothing improper about the CAB's response to the October 31 request.

Specific Exemptions

The *Banner* challenges all the redactions made in the 24 memos that it includes in its complaint. Consequently, it asks this office to issue an opinion that either approves or disapproves each discrete redaction. Because it is impossible for me to evaluate each and every redaction where I do not have the benefit of seeing the material that was redacted, I decline to issue an opinion that is specific to each and every redaction. For each redaction, it is the burden of the CAB to sustain its denial of that part of the record for which it claims an exemption under the APRA. Specific challenges of the *Banner* to redactions are discussed below.

Ind. Code 5-14-3-4(b)(6)

Some of the records were redacted pursuant to IC 5-14-3-4(b)(6), commonly referred to as the "deliberative materials exception." A public agency may except 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. IC 5-14-3-4(b)(6). The *Banner* argues that the CAB has made redactions based on this exemption where the material redacted was not opinion, but rather fact, or opinions not communicated for purposes of decision making of the public agency. A public agency that relies on IC 5-14-3-4(b)(6) to deny part of a record must, upon court review, be able to sustain its burden to show that each part of the record meets all the elements of the exemption, or else is "inextricably linked" to material that is not deliberative. *See An Unincorporated Operating Division of Indianapolis Newspapers, Inc. v. The Trustees of Indiana University, 787 N.E.2d 893 (Ind. Ct. App. 2003)*. Neither the amount of material blacked out, nor the fact that some of the redactions

may have involved the Superintendent's opinion about the accuracy of the *Banner*'s reporting, leads me to conclude that the redactions were improper.

IC 5-14-3-4(b)(7)

A public agency may withhold, in its discretion, diaries, journals, or other personal notes serving as the functional equivalent of a diary or journal. IC 5-14-3-4(b)(7). The *Banner* takes issue with the withholding of certain portions of four of the memos under this exemption, because the exemption would be inapplicable where the superintendent transmitted this material to seven members of the Board. The CAB disputes that the journal exception could not apply for this reason, citing *Journal Gazette v. Board of Trustees of Purdue University, 698 N.E.2d 626 (Ind. Ct. App. 1998).* Specifically, you point out four memos for which the CAB cited the diary exemption. For the first three memos that you reference, the CAB did not include the diary exemption on the document log supplied in its complaint response. For the fourth memo dated February 18, 2005, the CAB did cite the (b)(7) exemption in the document log. Although the Court of Appeals has held that the diary exemption does not require that personal notes not be shared with anyone, ever, I agree with the *Banner* that the superintendent's setting out in memo form information to each Board member may not meet the exemption for diaries or journals. In any event, the CAB does not describe this part of the record with adequate specificity to allow me to determine whether the exemption is met. A reviewing court would require more specificity in the description of the record, or may perform an *in camera* review, in order to render an opinion.

IC 5-14-3-4(b)(12)

The *Banner* contends that for the ten memos containing redactions under IC 5-14-3-4(b)(12), the mere recitation of items that are related to executive sessions is not sufficient to sustain the redactions for this exemption. Under IC 5-14-3-4(b)(12), a public agency may withhold records specifically prepared for discussion or developed during discussion in an executive session under Indiana Code 5-14-1.5-6.1. The CAB is correct to observe that the redacted material must relate to a proper executive session under IC 5-14-1.5-6.1(b). There are several executive sessions that specifically relate to schools that could be held, in addition to nine more general executive session purposes. *See* IC 5-14-1.5-6.1(b)(3), (8), and (11). However, it is not sufficient that the record must merely relate to an executive session. It must also have been *specifically prepared for discussion* in an executive session. Hence, if the material excepted from disclosure by the CAB sets out specific agenda items to be discussed in an upcoming executive session, the excepted material would meet the exception. As with the exception for deliberative materials, to the extent that material redacted under this exemption is not exempt or "inextricably linked" to exempt material, it should be disclosed.

Other Exemptions

The *Banner* disputes other redactions that were made by the CAB. First, the CAB claimed that material in the November 12, 2004 memo, item 7 on the second page, was confidential under IC 5-14-3-4(a)(3). Under this exemption, records that are required to be kept confidential by federal law may not be disclosed. The *Banner* notes that this exception was used

in other memos, and disputes that Dr. Jester's memos to the CAB could constitute records that are required to be kept confidential by federal law. The CAB answers that when this exemption was used, it was for information about a student education record that is required to be kept confidential under the Family Educational Rights and Privacy Act ("FERPA"), codified at 20 U.S.C. 1232g. So long as the redacted material concerned a student education record as defined in federal law, the redactions are valid. *See* 34 CFR §99.3. The *Banner* argues that the memos to the CAB, as a whole, are not student educational records. Because records containing partially disclosable and partially nondisclosable material must be separated under IC 5-14-3-6(a), it is not persuasive for the *Banner* to argue that the memos in whole must meet the exemption for records required to be kept confidential by federal law. However, the CAB violated IC 5-14-3-9(c) when it failed to cite the federal law that gave it authority to withhold the records under IC 5-14-3-4(a)(3). It is never adequate to cite IC 5-14-3(a)(3) alone, because IC 5-14-3-9(c) requires that the public agency cite to the law that makes the record, or part of the record, confidential.

Also, the *Banner* correctly notes that the redactions that cite to IC 5-14-3-4(a)(12) are inappropriate. The exception at IC 5-14-3-4(a)(12) makes confidential records containing social security numbers in the records of a public agency. However, the CAB admits that it did not redact a social security number. Rather, the CAB meant to cite to IC 5-14-3-4*(b)*(12), which is discussed above.

Finally, the *Banner* contends that the redaction for IC 5-14-3-4(b)(18) in the February 26, 2004 memo was improper. The *Banner*'s only argument seems to be that 4(b)(18) could never justify such an extensive redaction (the entire page of the memo). A public agency may withhold, in its discretion, "school safety and security measures, plans, and systems, including emergency preparedness plans developed under 511 IAC 6.1-2-2.5." IC 5-14-3-4(b)(18). The CAB asserts that the redacted material, while extensive, nevertheless fell within this exemption. The CAB described the record as relating to an incident involving a breach of security at the high school and the response of the CAB and law enforcement officials to the incident. Again, it is not difficult to imagine that such a redaction could be substantial, and I do not disapprove of it on that basis alone. I note only that, as with other exemptions, the redaction must meet the elements of the exemption, or be non-exempt material that is "inextricably linked" to the exempt material.

CONCLUSION

For the foregoing reasons, I find that the Charles A. Beard Memorial School Corporation Board of Trustees must sustain its burden to show that confidential records and nondisclosable records meet at least one of the stated exemptions in the Access to Public Records Act. Also, the Charles A. Beard Memorial School Corporation Board of Trustees violated the Access to Public Records Act when it failed to cite to the federal law requiring that student education records to be kept confidential.

Sincerely,

Karen Davis
Public Access Counselor

cc: David R. Day