

July 31, 2006

Timothy R. Morgan  
4606 Tamarack  
Fort Wayne, IN 46835

*Re: Formal Complaint 06-FC-112; 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 failing to acknowledge receipt of your request in a timely manner, and by denying you a record without citing the statutory authority. I find that the School violated the Access to Public Records Act.

#### BACKGROUND

You sent to Deborah Morgan, Public Information Officer for the School, an e-mailed request for records concerning materials sent to the School Board in preparation for the Board's May 22 meeting, including personnel reports and financial information. You sought both electronic and paper versions of the material. You also asked for agendas of the May 22 meeting, as well as agendas and information for the Board's May 8 and April 24 meetings.

On May 30, Ms. Morgan sent an e-mail stating that pursuant to your May 19 request, she was enclosing an electronic copy of the May 22 agenda. In addition, Ms. Morgan stated that she has no other documents that are responsive to your other requests "except those that are exempt as they are used for deliberative purposes." Ms. Morgan also indicated that she had available documents responsive to an earlier request not involved in this complaint.

You filed your formal complaint with the Office of the Public Access Counselor, alleging that the School's May 30 response was untimely and that the exemption referred to by the School did not contain a citation. You also alleged that your request would have included factual

material that would have to be disclosed. I sent a copy of your complaint to the School, but have not received a response as I write this Opinion.

## 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 public agency receives a request for a record in person, the public agency is required to respond within 24 hours or the record is deemed denied. IC 5-14-3-9(a). If the public agency receives a request for a record via U.S. Mail or facsimile, the public agency is required to respond within seven calendar days, or the request is deemed denied. IC 5-14-3-9(b). Section 9 of the APRA does not address requests received by the agency via e-mail, but my office has stated that e-mailed requests should be responded to within seven days. If a request is made orally, either in person or by telephone, a public agency may deny the request orally. IC 5-14-3-9(c). However, if a request initially is made in writing, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny a written request for a record if the denial states the exemption or exemptions authorizing the public agency to withhold the record, and the name and title or position of the person responsible for the denial. IC 5-14-3-9(c).

The School issued its first response to your May 19 request with an e-mail on May 30, 2006. This was eleven days after receiving your e-mail; therefore, the School failed to respond within seven days. In addition, the e-mail message acknowledges that certain records that were sent to the Board exist, but are denied as “exempt as they are used for deliberative purposes.”

First, this denial was not sufficiently specific to pass muster under IC 5-14-3-9(c). The denial did not contain a statement of the specific exemption. There is an exemption in the APRA for

“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 School failed to cite the exemption by reference to either the specific language of the exemption or its citation. In addition, the School omits any reference to the record or records to which the exemption applies. It is my opinion that it is not sufficient under section 9(c) to refer to “other requests” as subject to an exemption. Rather, the denial must include “a statement of the specific exemption or exemptions authorizing the withholding of *all or part of the public record*. Without describing the record being withheld, it is not evident how the exemption may apply to that record.

More troubling, however, is the assertion that the records may be denied because they are used for deliberative purposes. This greatly expands the exemption in section 4(b)(6),

commonly called the deliberative materials exemption. Nearly all records generated within government are used for deliberative purposes. The record is exempt only if it meets all the conditions within the deliberative materials exemption. The record must be intra- or interagency deliberative material that contains expression of opinion or is of a speculative nature, and is communicated for purposes of decision making.

The School has denied a record or records without specifying the exemption that authorizes the School to withhold the record and without identifying the record, in violation of the Access to Public Records Act. I urge the School to reexamine the responsive records and determine whether each record meets an exemption, and disclose the remainder. In addition, if any records are exempt, I ask that the School issue a denial that identifies the record (e.g., letter to Board members from Superintendent of May 13, 2006), and states the exemption by citation to the statutory authority that allows or requires the School to not disclose the record.

### CONCLUSION

For the foregoing reasons, I find that the Fort Wayne Community Schools violated the Access to Public Records Act.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Deborah Morgan