

June 18, 2007

Eric Cox
Publisher and Owner
The Banner
24 North Washington Street
Knightstown, IN 46148

Re: Formal Complaint 07-FC-137; Alleged Violation of the Access to Public Records Act by the Charles A. Beard Memorial School Corporation

Dear Mr. Cox:

This is in response to your formal complaint alleging that the Charles A. Beard Memorial School Corporation ("CAB") violated the Access to Public Records Act by failing to disclose a hard copy of an e-mail that the School retained. I find that the CAB violated the Access to Public Records Act.

BACKGROUND

This complaint follows the opinion of the public access counselor in 07-FC-58. In that complaint, you alleged that the CAB had denied your request for e-mails in response to your requests dated January 22 and February 2, 2007. In your January 22 request you had asked for "all memos, correspondence, or written communication...whether generated on paper...or electronically stored data" sent since December 1, 2006 from Amanda Zurwell to the CAB's school board or superintendent David McGuire. No e-mails were given to you in response to the January request. You sent a second request dated February 2, 2007, in which you clarified that the original request for the described correspondence included e-mails.

CAB responded on February 7 to the February 2 request by stating that there were no additional items, and that according to the CAB's technology director, all e-mails were lost in the recent upgrade. After you filed your formal complaint alleging that the CAB failed to protect public records in the form of the e-mails, the CAB responded that its failure to preserve the e-mails did not result in a loss concerning any of the records you had requested, since no e-mails responsive to your request were among those lost in the upgrade.

On May 3, the Henry County prosecutor Kit Crane faxed the *Banner* copies of recently-filed court documents charging Zurwell with several criminal offenses. In the narrative of the probable cause affidavit, the investigating officer related that the CAB revealed during a meeting on February 6 that Zurwell had previously sent McGuire an e-mail in which she said she did not understand why she had been asked to resign. The narrative indicated that a copy of this e-mail was attached to the affidavit. The e-mail by Zurwell had been sent January 12 to McGuire.

While the *Banner* was denied a copy of the e-mail by the prosecutor, the *Banner* sent the CAB a renewed request for the January 12 e-mail. The CAB hand-delivered the requested e-mail less than 30 minutes after the *Banner* delivered its request to the CAB. Superintendent McGuire apologized and explained that the failure to provide the e-mail was an unintentional oversight.

The *Banner* argues that the CAB violated the Access to Public Records Act when it failed to timely produce the e-mail, failed to disclose its existence in its responses to the *Banner's* January 22 and February 2 requests, and failed to cite a statutory exemption for the e-mail.

In the CAB's response to your complaint, which I have provided to you previously, the CAB addressed the *Banner's* contention that the CAB had failed to disclose the existence of and provide a copy of an e-mail in response to two record requests. The CAB claimed in its complaint response that the e-mail in question was withheld from disclosure pursuant to IC 5-14-3-4(b) for "investigatory records of law enforcement agencies." The document in question was given to Detective Elmer New of the Henry County Sheriff's Department during his investigation of a former employee. When the corporation was notified by the Henry County Prosecutor that the information was no longer necessary for their investigation the correspondence was immediately hand-delivered to the *Banner*. The CAB stated that it understood that items disclosed during an on-going investigation were "considered confidential and not pursuant to open door laws."

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 orally, either in person or by telephone, a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if:

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and

(B) the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

A record should be produced within a reasonable time of the request. What is reasonable depends upon a number of factors including whether the request is voluminous or includes records that must be reviewed for nondisclosable information.

Here, the CAB states for the first time in its complaint response that the records were actually nondisclosable as investigatory records of law enforcement agencies. The CAB does not argue that the e-mail was not part of your requests, and indeed, your requests would have included this e-mail, since it was paper correspondence (in printed form) or electronically stored data (when created) that involved communication between Zurwell and McGuire.

If a public agency intends to deny a written request for a record, the agency must put its denial in writing and cite the specific exemption or exemptions that apply to the record. The CAB violated the Access to Public Records Act when it failed to deny the record by citing the specific exemption that applies. The public agency's obligation to put its denial in writing includes the obligation to state that the record exists. In other words, even though a public record is exempt from disclosure, the public agency is not permitted to deny the record's existence.

The CAB now says that the record was exempt as an investigatory record of law enforcement. IC 5-14-3-4(b)(1) allows a public agency to withhold in its discretion "investigatory records of law enforcement agencies." "Investigatory record" means information compiled in the course of the investigation of a crime. IC 5-14-3-2(h). The APRA also defines "law enforcement agency" as part of the definition of "public agency." "Any law enforcement agency...means an agency or a department of any level of government that engages in the investigation, apprehension, arrest, or prosecution of alleged criminal offenders..." IC 5-14-3-2(1)(6).

It is my opinion that a school corporation is not a law enforcement agency under this definition. Therefore, the e-mail retained by the CAB was not an "investigatory record of law enforcement agencies." Even if the e-mail had met one of the exceptions to disclosure, the CAB would have to issue a denial stating that the e-mail was a responsive record but was exempt under a specific statutory exemption. The CAB had no authority to withhold the e-mail. Therefore, the CAB should have produced this record by the day that the CAB was able to produce it for the Henry County sheriff's detective, which was after the *Banner's* second request for records.

CONCLUSION

For the foregoing reasons, I find that the Charles A. Beard Memorial School Corporation violated the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Jena Schmidt