

July 16, 2007

Timothy Morgan
4606 Tamarack Drive
Fort Wayne, Indiana 46835

Re: Formal Complaint 07-FC-161, parts 1, 2 and 3; Alleged Violation of the Access to Public Records Act by Fort Wayne Community Schools

Dear Mr. Morgan:

This is in response to your formal complaint alleging Fort Wayne Community Schools ("FWCS") violated the Access to Public Records Act (APRA) (Ind. Code 5-14-3) by failing to respond to your request for records. A copy of FWCS's response to your complaint is enclosed for your reference. FWCS provides evidence it did respond to your request. While the response was untimely, I find that FWCS did not otherwise violate the APRA unless it has reasonable access to a machine capable of reproducing the South Side School Improvement Plans for 2004-2007.

BACKGROUND

Your complaint alleges that on March 30, 2007 you appeared in person and requested from FWCS access to three public records, namely the following:

- "Weekly newsletter sent out by Robinson informing them of graduation situation"
- "Written notification of Superintendent requesting Kevin Morgan be expelled. From Mark Bailey to Superintendent and all other support with this written request."
- "South Side School Improvement Plans for 2004-2007."

FWCS responded to your requests on May 16, 2007. FWCS denied your first request, citing IC 5-14-3-4(b)(6). Regarding your second request, FWCS indicated you had already received the only record responsive to your request. Regarding your third request, FWCS indicated you were granted access to view the documents onsite, as they are not available in electronic format.

You filed your complaint on June 15, 2007. FWCS responded by an undated letter received by this office on June 26, 2007. I am enclosing a copy for your reference.

ANALYSIS

Indiana Code 5-14-3-3(a) provides that any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of APRA. A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. IC 5-14-3-2.

A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is made in person or by telephone, the request is deemed denied when the person designated by the public agency as being responsible for public records release decisions refuses to permit inspection and copying of a public record or twenty-four hours elapse after any employee of the public agency refused to permit inspection and copying of a public record when a request has been made. IC 5-14-3-9(a). Previous public access counselors have interpreted that provision to mean twenty-four business hours.

You indicate, and FWCS concedes, that a response to your March 30 request was not issued until May 16. FWCS indicates the delay was not intentional but due to a vacancy in the Public Information Officer position. Nothing in the APRA allows a vacancy or staff shortage to delay the statutory deadline for responding to a request.

FWCS addresses the three documents you requested individually. First, FWCS asserts the “weekly newsletter” you request contains the Superintendent’s expressions of opinion communicated to the FWCS Board of School Trustees for the purpose of decision making. The APRA allows the public agency discretion in providing access to records that are intra-agency or interagency advisory or deliberative material . . . that are expressions of opinion or are of a speculative nature, and are communicated for the purpose of decision making. IC 5-14-3-4(b)(6). If, however, a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate that material that may be disclosable and make it available for inspection and copying. IC 5-14-3-6(a). FWCS indicates the document addresses matters which the School Board may see in the next week and expresses the Superintendent’s opinion. It does not contain source documents or other factual information. I find the FWCS is allowed to exercise its discretion in denying access to the “weekly newsletter” under section 4(b)(6).

As to the second document requested, FWCS indicates this document does not exist. FWCS further indicates you have requested and received the only document containing the requested information. Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request. The APRA requires the public agency to *provide access* to records already created. Therefore, I find FWCS’s denial of access to be appropriate since there are no further responsive records.

Finally, as to the third document you requested, FWCS indicates you were not denied access to the plans. FWCS indicates the documents do not exist in electronic format nor are they easily photocopied. It is my understanding FWCS has granted you access to personally inspect the records. Pursuant to the APRA, a public agency shall either: (1) provide the requested copies to the person making the request; or (2) allow the person to make copies: (A) on the agency's equipment; or (B) on the person's own equipment. IC 5-14-3-3(b). The public agency may charge a fee not to exceed the actual cost of certifying, copying, or facsimile transmission of the document by the agency and the fee must be uniform throughout the public agency and uniform to all purchasers. "Actual cost" means the cost of paper and the per-page cost for copying and does not include labor costs or overhead costs. IC 5-14-3-8(d). However, if a public agency does not have reasonable access to a machine capable of reproducing the record or if the person cannot reproduce the record by use of enhanced access under section 3.5 of this chapter, the person is only entitled to inspect and manually transcribe the record. IC 5-14-3-8(e).

FWCS indicates the documents are not easily photocopied. While FWCS is required to provide you a copy or allow you to make a copy on equipment you bring to the office, FWCS may charge you a fee not to exceed the actual cost of creating the copy. FWCS may require you make payment in advance pursuant to IC 5-14-3-8(e). If FWCS does not have reasonable access to a machine capable of reproducing the record, it was correct in granting you access to only inspect and manually transcribe the record. If FWCS has reasonable access to a machine which can make a copy of the record, it should do so.

CONCLUSION

For the foregoing reasons, I find that while the response was untimely, Fort Wayne Community Schools did not otherwise violate the APRA unless it has reasonable access to a machine capable of reproducing the South Side School Improvement Plans for 2004-2007.

Best regards,

Heather Willis Neal
Public Access Counselor

cc: Susan Imler, Fort Wayne Community Schools