

July 30, 2007

Kelly Soderlund and Ron Shawgo
The Journal Gazette
600 West Main Street
Fort Wayne, Indiana 46802

Re: Formal Complaint 07-FC-183; Alleged Violation of the Access to Public Records Act by East Allen County Schools

Dear Ms. Soderlund and Mr. Shawgo:

This is in response to your formal complaint alleging East Allen County Schools (“EACS”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying your request for records. A copy of EACS’s response to your complaint is enclosed for your reference. I find that your request was not made with reasonable particularity but that if you work with East Allen County Schools to narrow your request, the records you seek are required to be disclosed under the Access to Public Records Act.

BACKGROUND

In your complaint you allege you submitted a request to EACS on April 9, 2007 for “a copy of discipline actions taken against all certified teachers for the last 10 years . . .” You offered in your original request to “work with EACS to narrow this request to speed it along.” On April 12, J. Timothy McCaulay, General Counsel for EACS, responded by letter seeking clarification from you. On May 16 you sent a letter to Mr. McCaulay requesting in writing a status report regarding your request. It appears the May 16 letter is the first time you responded to Mr. McCaulay’s request for clarification by indicating you wanted to include written warnings and disciplinary actions not approved by the EACS Board in your request. Mr. McCaulay again responded to you on May 21. With that letter, EACS indicated the records responsive to your request related to three teachers. Mr. McCaulay further indicated EACS denied your request related to information regarding warnings and other actions that did not result in final action.

You responded in writing to Mr. McCaulay on June 5, indicating you were seeking further information beyond the information he submitted to you regarding the three teachers. You indicated you had spoken with former Counselor Karen Davis who told you a “final action” under

the APRA is not limited to a vote by a governing body and referred you to her *Office of the Public Access Counselor Formal Opinion 06-FC-40*. Mr. McCaulay responded to your letter on June 11, citing IC 20-28-9-22, which limits the authority to suspend a teacher without pay to the local school board. He further contended that written warnings and reprimands are not, in his opinion, a form of disciplinary action that resulted in a teacher's suspension, demotion or discharge. Mr. McCaulay further explains that there is no provision in law to demote a teacher, so there would not be records responsive to that request. Mr. McCaulay further invited you to review the Board's minutes to determine whether there were any further records you seek. Finally, Mr. McCaulay refers to *Office of the Public Access Counselor Formal Opinion 06-FC-40* and indicates it is not on point in this particular matter because teachers, unlike the employees at issue in that opinion, cannot be suspended administratively without pay.

You filed your complaint June 28. EACS responded to your complaint on July 25. In his response, Mr. McCaulay reiterates much of the history related to the request outlined in the preceding paragraphs. He further indicates that on June 14 he spoke with Counselor Davis, who advised him a public employer was not required to search each individual employee personnel file to respond to a request like yours but could rely upon institutional memory or other records, like Board minutes, to narrow the number of personnel files actually reviewed. He indicated Counselor Davis also agreed that written reprimands, warnings, and investigative notices were not subject to mandatory disclosure because such actions were not final actions.

In response to your complaint, EACS refers to *Office of the Public Access Counselor Formal Opinion 07-FC-170* in claiming your request was not made with reasonable particularity. Regarding written warnings and written reprimands, EACS asserts the only disciplinary actions the records of which must be disclosed are those resulting in the employee being suspended, demoted or discharged. Regarding your request for records relating to suspensions with pay and involuntary administrative leaves with pay pending investigations, EACS claims that such are preliminary matters and not final actions subject to disclosure under IC 5-14-3-4(b)(8)(C). EACS further cites *Office of the Public Access Counselor Formal Opinion 07-FC-170* in claiming preliminary investigations into allegations of misconduct do not rise to the level of formal charges. Regarding your request for information required to be disclosed under IC 5-14-3-4(b)(8)(A), EACS believed you wanted such information only as it related to records of disciplinary actions. If you are requesting that information for the 1478 names provided, EACS denies the request due to lack of reasonable particularity. Finally, as to your IC 5-14-3-4(b)(8)(B) request, Mr. McCaulay explains you have received information related to the only teacher against whom formal charges were pending at the time of your request.

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with 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." Ind. Code 5-14-3-1. EACS is clearly a public agency for the purposes of the APRA. IC 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of EACS during regular business

hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. IC 5-14-3-3(a).

Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of the public agency: . . .

(8) Personnel files of public employees and files of applicants for public employment, except for:

(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) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

. . . This subdivision does not apply to the 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).

A request for inspection and copying must:

(1) identify with reasonable particularity the record being requested; and

(2) be, at the discretion of the agency, in writing on or in a form provided by the agency.

No request may be denied because the person making the request refuses to state the purpose of the request, unless such condition is required by other applicable statute.

IC 5-14-3-3(a).

A request for records may be oral or written. IC 5-14-3-3(a); 5-14-3-9(c). If the request is delivered by mail or facsimile, the agency must respond to the request within seven days of receipt. IC 5-14-3-9(b).

In this case, you requested a copy of discipline actions taken against all certified teachers for the last ten years. You specifically cited the exceptions within the exception for personnel records in IC 5-14-3-4(b)(8). And in your original request, you offer to “work with EACS to narrow the request to speed it along.”

One issue here is whether your request is reasonably particular under the APRA. I find it is not. I have addressed the issue in detail in *Office of the Public Access Counselor Formal Opinion 07-FC-170*. Because of the similarity of the request, I will not address the issue further here. My opinion in that matter stands and applies to this matter as well.

Indiana Code 5-14-3-4(b)(8) creates an exception to disclosure, at the discretion of the public agency, for personnel files of public employees and files of applicants for public employment. Within that exception is a list of three groups of records excepted from the exception, or access to inspection and copying of which shall be granted by the public agency. The first of those, listed in subsection (A), is “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.” IC 5-14-3-4(b)(8)(A). I have reviewed the communications between you and EACS, and it appears to me EACS did not expressly deny access to records requested under this provision but instead focused on records requested under subsection (C). Mr. McCaulay has indicated he believed your request under subsection (A) was directly tied to your requests under subsections (B) and (C) and did not serve as a stand-alone request. I agree with you the personnel records specified in subsection (A) are required to be disclosed as a rule, but I find the request must be made with reasonable particularity as described in *Office of the Public Access Counselor Formal Opinion 07-FC-170*.

Under IC 5-14-3-4(b)(8)(B), EACS must disclose “information relating to the status of any formal charges against the employee.” After reviewing the communications between you and EACS, it appears to me EACS did provide you with the requested information under subsection (B) since there were pending charges against only one teacher at the time of your request and the information related to that teacher was provided to you.

To the extent your subsection (B) request is directed toward records related to suspensions with pay and involuntary administrative leaves with pay, I rely again on my opinion of the definition of “formal charges” as described in *Office of the Public Access Counselor Formal Opinion 07-FC-170*. It is my opinion “formal charges” would include a statement or assertion of illegality or other complaint rising to the level of being made or asserted using established form, custom or rule. While this does not necessarily limit “formal charges” to solely assertions of illegality, it is my opinion “formal charges” implies records relating to misconduct rising to the level of being alleged through an established formal complaint process. Here, if you are requesting information related to suspensions or other leaves with pay while an investigation is conducted by EACS to determine whether to initiate formal charges, I believe this information is disclosable at the discretion of EACS but not required to be disclosed since this activity precedes formal charges.

Finally, IC 5-14-3-4(b)(8)(C) requires disclosure of personnel file records containing “the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.” As indicated in *Office of the Public Access Counselor Formal Opinion 07-FC-170*, I subscribe to Counselor O’Connor’s assertion that “final action” is not limited to action by the governing body but includes the final action of discipline or discharge taken against an employee. *Opinion of the Public Access Counselor 99-5*.

In this case, though, Mr. McCaulay has indicated that in EACS final action is not taken against an employee but by School Board action, which is reflected in the minutes of the Board. I agree with you the personnel records specified in subsection (C) are required to be disclosed as a rule, but I find the request must be made with reasonable particularity as described in *Office of the Public Access Counselor Formal Opinion 07-FC-170*. Further, subsection (C) requires disclosure of records containing the factual basis for disciplinary action in which final action has been taken *and* that resulted in the employee being suspended, demoted, or discharged. It is not my understanding you are complaining that there are records which meet both of those conditions to which you have been denied access. I agree with the informal opinion of

Counselor Davis that written reprimands, warnings and investigative notices are not subject to mandatory disclosure because such actions are not final actions.

It is therefore my recommendation you do as you have offered and work with EACS to narrow the request, whether by reviewing the minutes of the School Board or by some other means. Once you have identified the records you request with reasonable particularity beyond the information already provided to you regarding the three teachers, it is my belief based on the communications I have reviewed between you and EACS that EACS will then work to provide access to the particular records related to disciplinary action and other information required to be disclosed under IC 5-14-3-4(b)(8).

CONCLUSION

For the foregoing reasons, I find that your request was not made with reasonable particularity but that if you work with East Allen County Schools to narrow your request, the records you seek are required to be disclosed under the Access to Public Records Act.

Best regards,

Heather Willis Neal
Public Access Counselor

cc: J. Timothy McCaulay, General Counsel, East Allen County Schools