

November 14, 2007

Tim Morgan
4606 Tamarack
Fort Wayne, Indiana 46835

Re: Formal Complaint 07-FC-317; Alleged Violation of the Access to Public Records Act by Fort Wayne Community School Corporation

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 denying you access to records and redacting certain information from records it did provide to you. I have enclosed a copy of FWCS’s response to your complaint for your reference.

BACKGROUND

You allege that you submitted a request for access to public records to FWCS on September 10, 2007. You requested access to several records, numbered one through twenty in your request. FWCS responded to your request by letter dated September 13 (which you received on September 17) from Krista Stockman, public information officer for FWCS. Ms. Stockman’s response answered each of your requests, indicating for each item that the record was available for inspection, there were no records responsive, or there were responsive records to which you were being denied access based on a statutory exception to disclosure. Your complaint centers on the latter, and there are seven items about which you complain.

1. Notes taken by Jerry White during an appeal meeting, denied pursuant to I.C. §5-14-3-4(b)(7).
2. Notes taken by Douglas Coutts during an expulsion hearing, denied pursuant to I.C. §5-14-3-4(b)(7).
3. Written statements from Dr. Robinson provided to the school board regarding expulsion, denied pursuant to I.C. §5-14-3-4(b)(6).
4. Purchase order records, portions redacted pursuant to I.C. §5-14-3-4(a)(2) and I.C. §5-14-3-4(b)(2).
5. Purchase order records, portions redacted pursuant to I.C. §5-14-3-4(a)(2) and I.C. §5-14-3-4(b)(2).

6. Internal policies, FWCS requested clarification regarding this item.
7. Doug Coutt's communication with everyone on the fourth floor, FWCS indicated no responsive records exist because no communications were reduced to written form.

You filed your complaint on October 15, alleging FWCS denied you access to records and inappropriately redacted information from the purchase orders.

FWCS responded to your complaint by letter dated October 30 from Ms. Stockman. Ms. Stockman provides the following information relating to your seven complaints listed above.

1. Mr. White's notes taken during the appeal meeting were personal notes, which are exempt from disclosure at the discretion of the agency pursuant to I.C. §5-14-3-4(b)(7).
2. Mr. Coutts's notes were personal notes, which are exempt from disclosure at the discretion of the agency pursuant to I.C. §5-14-3-4(b)(7).
3. Dr. Robinson's written statements contained expressions of opinion or were speculative in nature and communicated for the purposes of decision-making and as such is exempt from disclosure under I.C. §5-14-3-4(b)(6).
4. FWCS provided the requested purchase orders and itemized list of expenses on the purchase orders. The names of students and staff were redacted as privileged under the Family Educational Right to Privacy Act ("FERPA"), 20 U.S.C.A §1232g *et seq.* and the personnel records exception listed in I.C. §5-14-3-4(b)(8). The further detailed documentation for the attorney invoices was not supplied because it is attorney client confidential communication and allowed to be withheld pursuant to I.C. §5-14-3-4(a)(2). Further, the information contains details of strategy and other information also covered by the attorney work product exception, I.C. §5-14-3-4(b)(2).
5. Same as #5.
6. The request was unclear to FWCS. Ms. Stockman indicates that you are welcome to request specific meeting minutes or policies.
7. Any communications were not recorded and not reduced to written form, so there are no records responsive to the request.

ANALYSIS

The public policy of the APRA states, "(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. FWCS is clearly a public agency for the purposes of the APRA. I.C. §5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of FWCS during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. §5-14-3-3(a).

A request for records may be oral or written. I.C. §5-14-3-3(a); §5-14-3-9(c). If the request is made by mail, electronic mail, or facsimile transmission and the agency does not

respond within seven days, the request is deemed denied. I.C. §5-14-3-9. Here, you seem to indicate the response was not produced within seven days because FWCS “backdated” the response. FWCS indicates that the response to your September 10 request was prepared and mailed on September 13, which is the same day Ms. Stockman sent you an electronic mail message indicating she was mailing the response that day. It is my opinion FWCS’s response was timely under the APRA, which requires the response to be sent within seven days.

Regarding your request for notes taken by two different individuals during two different proceedings, this issue was addressed by Counselor Karen Davis in *Opinion of the Public Access Counselor 06-FC-72*. A “public record” is any material that is created, received, retained, maintained, or filed by or with a public agency. See I.C. §5-14-3-2(m). Mere creation of handwritten notes during a public meeting by a public official, without more, does not demonstrate that a record is a “public record.” Only “public records” are required to be available for inspection and copying. *Id.* If the handwritten notes created by Mr. White and Mr. Coutts were not filed with or are not maintained by the FWCS office, they are not public records. If the notes were filed with or are maintained by FWCS, the FWCS argues they constitute personal notes serving as the equivalent of a diary or journal, which are excepted from disclosure at the discretion of the public agency under I.C. §5-14-3-4(b)(7). If those handwritten notes were used as reference by each individual for his own purposes, I would agree with that characterization. As such, it is my opinion FWCS did not violate the APRA by denying access to the notes.

Regarding your request for Dr. Robinson’s written statements, FWCS claims the statements are exempt from disclosure as intra-agency deliberative material. Intra-agency deliberative material, which contains expressions of opinion or is speculative in nature and is communicated for the purposes of decision making, may be excepted from disclosure at the discretion of the agency. I.C. §5-14-3-4(b)(6). FWCS bears the burden of proof to sustain a denial of access. I.C. §5-14-3-9(f). Without further information regarding the statements, I cannot determine whether the statements are indeed deliberative material. If FWCS can prove that the statements contained expressions of opinion or were speculative in nature and were communicated for the purposes of decision making, FWCS may appropriately rely on the exception listed in I.C. §5-14-3-4(b)(6).

Regarding your complaint related to the purchase orders, you claim the redacted portions should be provided to you because the public has a right to know how tax dollars are spent. While the public policy of the APRA states that providing persons with information is an essential function of a representative government (See I.C. §5-14-3-1), certain exceptions do apply.

When a state statute or federal law declares information confidential, those records may not be disclosed by the agency. I.C. §5-14-3-4(a). Here, FWCS claims that FERPA prevents disclosure of the names of students. The Court of Appeals of Indiana has stated that “for the purposes of I.C. §5-14-3-4(a)(3), FERPA is a federal law which requires education records to be kept confidential. *An Unincorporated Operating Division of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893 (Ind. Ct. App. 2003). Counselor Karen Davis, in *Opinion of the Public Access Counselor 06-FC-191*, opined that education records and personally identifiable information contained therein are records directly related to a student, maintained by an educational agency and including, but not limited to, a list of personal characteristics that would make the student’s identify easily traceable, or other information that would make the student’s identity easily

traceable. *Id.* It is my opinion that FWCS appropriately redacted student information from the purchase orders.

Regarding FWCS's assertion that some information was redacted from the purchase orders under the personnel records exception to disclosure found in I.C. §5-14-3-4(b)(8), I cannot agree absent further information. If the records are maintained as part of an employee's personnel file, the records could certainly be withheld under I.C. §5-14-3-4(b)(8), which excepts from disclosure at the discretion of the agency most personnel records. The section does provide an exception within the exception, though, and required the disclosure of certain information from an employee's personnel file including information related to formal charges against the employee or disciplinary action resulting in termination, suspension or demotion. I.C. §5-14-3-4(b)(8)(B) and (C). To the extent the redacted information fits into one of those categories, it must be disclosed. To the extent the redacted information is contained in the personnel file of an employee and does not fall into one of the categories of information required to be disclosed, FWCS has the discretion to except the information from disclosure.

Regarding FWCS's assertion that other information in the purchase orders, which were purchase orders or invoices for legal services, was excepted from disclosure as attorney client confidential communication or attorney work product, I agree in part and disagree in part. Under the APRA, records declared confidential by state statute may not be disclosed by a public agency. I.C. §5-14-3-4(a). Communications between attorneys and their clients are confidential by statute in Indiana. I.C. 34-46-3. However, as Counselor O'Connor opined in *Opinion of the Public Access Counselor 00-FC-16*, it is difficult to conceive of an invoice containing only confidential communication. To the extent a record contains disclosable and non-disclosable information, the agency shall separate the material that may be disclosed and make it available. I.C. §5-14-3-6. Here, FWCS may provide summary invoices, which I understand is what it did, or could redact the portions of the detailed invoices that are indeed confidential.

Regarding FWCS's assertion the invoices are attorney work product, the APRA allows the work product of an attorney representing a public agency to be excepted from disclosure at the discretion of the agency. I.C. §5-14-3-4(b)(2). The definition of work product in the APRA is information compiled by an attorney in reasonable anticipation of litigation, including the attorney's notes and statements taken during interviews of prospective witnesses and legal research, records, correspondence, reports or memoranda to the extent each contains the attorney's opinions, theories or conclusions. I.C. §5-14-3-2(p). I do not believe invoices fall under the definition of attorney work product for purposes of the APRA.

Regarding your complaint related to your request for minutes and policies, the APRA requires a request for access to records to identify with reasonable particularity the records being requested. I.C. §5-14-3-3(a). "Reasonable particularity" is not defined in the APRA. "When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the statute itself." *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. App. 1991). "Particularity" as used in the APRA is defined as "the quality or state of being particular as distinguished from universal." *Merriam-Webster Online*, www.m-w.com, accessed July 18,

2007. Ultimately, if a public agency cannot determine what records a requester is seeking, the request was likely not made with reasonable particularity. Here it is my opinion FWCS does not know what specific records you are seeking and as such has appropriately asked for clarification. I suggest that you respond to FWCS with further information regarding the specific records you seek.

Finally, regarding your request for records related to communication on the “fourth floor,” Ms. Stockman has indicated that no records responsive to your request exist. 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. As such, it is my opinion the FWCS has not violated the APRA by denying your request for records that do not exist.

CONCLUSION

For the foregoing reasons, it is my opinion FWCS has not violated the APRA so long as it can sustain its burden of proof regarding the written statements of Dr. Robinson.

Best regards,



Heather Willis Neal
Public Access Counselor

cc: Krista Stockman, Fort Wayne Community Schools