

November 26, 2007

Eric Cox
The Banner
24 North Washington Street
PO Box 116
Knightstown, Indiana 46148

Re: Formal Complaint 07-FC-327; Alleged Violation of the Access to Public Records Act by Charles A. Beard Memorial School Corporation

Dear Mr. Cox:

This advisory opinion is in response to your formal complaint alleging the Charles A. Beard Memorial School Corporation ("CAB") violated the Access to Public Records Act ("APRA") (Ind. Code 5-14-3) by redacting information from records it provided to you without indicating the reason for denial of access to the redacted information. You further allege that the length of time CAB took to produce one record was unreasonable. I have enclosed a copy of CAB's response to your complaint for your reference. It is my opinion that CAB did not take an unreasonable amount of time to produce the notice of tort claim and may rely on FERPA to deny access to some information, while bearing the burden of proof to sustain the denial. Further, it is my opinion that CAB violated the APRA by not providing the reasons for redacting information on each record provided to you in response to your request.

BACKGROUND

You allege that you submitted a request for access to public records to CAB on June 29, 2007. You requested access to several records, numbered one through six in your request. CAB responded to your request by letter dated June 29 from Jena Schmidt, public access officer for CAB. Ms. Schmidt's response contained an indication that it would take some time for CAB to compile the information. You submitted a subsequent request dated August 22 for copies of notice of tort claim filings received since July 1, 2006. You received a response from Ms. Schmidt dated August 29, again indicating it would take some time to compile the information. You received production of the records on September 25.

Your complaint arises from the response you received dated September 25. You allege that CAB improperly redacted information it was required to release, failed to state the reasons it

redacted information in each record, and took an unreasonable amount of time to produce a copy of a notice of tort claim it had received two months prior to your request. You mailed your complaint on October 25, and I received it on October 26.

CAB responded to your complaint by letter dated November 8 from Ms. Schmidt. Ms. Schmidt indicates that the time CAB spends responding to requests from The Banner is large and that Ms. Schmidt uses what time she has after fulfilling her other duties to comply with the requests. Regarding the information redacted from the tort claim notice, Ms. Schmidt indicates that because CAB is in a small, rural setting, students can easily be identified. She further indicates that on the advice of counsel and based on Counselor Davis's previous opinion regarding the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C.A. §1232 *et seq.*, CAB thought it was necessary to redact the information.

Regarding the time for production of the notice of tort claim, CAB contends it indicated to The Banner it would need time to consult with its attorney regarding the request. In the time period from June 29 through September 13, CAB claims it received seven records requests from The Banner. The requests consisted of 21 different categories and required time to compile, read and copy over 1000 pages of requested records. CAB contends The Banner was continually updated regarding the status of the requests, as CAB sent letters dated June 29, July 17, August 2, August 21, August 29, and September 14 prior to production on September 25. Ms. Schmidt contends CAB followed my advice to regularly communicate with a requester regarding the status of a request when the time to produce the request is lengthy.

Finally, regarding the reasons for redaction of the information in the records, CAB indicates it provided The Banner with a letter from the school board attorney indicating the statutory authority for the redactions. CAB indicates the reasons were provided in the letter in order to provide the records in a timely manner.

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. CAB 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 CAB 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.

If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. I.C. §5-14-3-6(a).

Regarding your complaint that CAB took an unreasonable amount of time to produce a copy of the tort claim notice you requested, there are, as you indicate no prescribed timeframes when the records must be produced by a public agency. A public agency is required to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. I.C. §5-14-3-7(a). However, section 7 does not operate to deny to any person the rights secured by section 3 of the Access to Public Records Act. I.C. §5-14-3-7(c). The public access counselor has stated that records must be produced within a reasonable period of time, based on the facts and circumstances. Consideration of the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to delete nondisclosable material are necessary to determine whether the agency has produced records within a reasonable timeframe.

Here, your complaint relates to one three-page document. You indicate that CAB received the notice of tort claim on June 26. You requested the copy of it on August 22. CAB provided the redacted copy on September 25. If these were the only facts at issue, I would say that 34 days seems to be a considerable amount of time to produce one three-page document. But in this instance, other factors are present. First, this is not the only record you sought with this one request. You asked for any tort claims, except one, received since July 1, 2006. Second, this is one of seven requests you submitted in a three-month period. While any person is well within the APRA in submitting numerous requests, it is my opinion it is reasonable to assume that numerous extensive requests will slow down other outstanding requests. Since a public agency must regulate any material interference with the regular discharge of duties (See I.C. §5-14-3-7(a)), an agency generally cannot dedicate a majority of time or resources to fulfilling records requests. While this one particular request was for a three-page document, it is my understanding the total of the requests received over a three month period constituted more than 1000 pages. Considering all of these factors, it is my opinion the time for production of the tort claim notice was not unreasonable.

Next is the issue whether CAB violated the APRA by improperly redacting the tort claim notice, blacking out portions of the document you claim it was required to release. 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). Information contained in a student education record is confidential unless the student consents to disclosure. 20 U.S.C. §1232g. “Education record” is defined as those records that are directly related to a student; and maintained by an educational agency or institution or by a person acting for such agency or institution. 34 C.F.R. 99.3. “Personally identifiable information” includes, but is not limited to, a list of personal characteristics that would make the student’s identity easily traceable, or other information that would make the student’s identity easily traceable. 34 C.F.R. 99.3 (defining “personally identifiable information”). 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).

Here, CAB claims that FERPA prevents disclosure of information in the tort claim notice. 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.*

I understand your initial argument to be that a notice of tort claim is not an education record. I do not find any Indiana case law directly on point. Because the definition of "education record" as it relates to FERPA is so broad an includes "records directly related to a student" and because this notice of tort claim does directly relate to a student of CAB, I am not prepared to agree that the notice of tort claim is not an education record. As such, CAB must withhold personally identifiable information contained in the tort claim notice.

As to your complaint that some information redacted from the tort claim notice should not have been redacted, I agree in part. I do agree with Counselor Davis's opinion provided to CAB in an electronic mail message of September 27, 2006, wherein she indicated that CAB should consider things like whether the record related to one student or several, the size of the school, and the size of the town. She advised CAB to consider how one might be able to trace the identity of a particular student when determining what information to release. Using this analysis, it is not my opinion that nondisclosable information is limited to only the name of the student and the parent involved. It is my opinion that other information in the record could reasonably lead to the identification of the student, particularly in a small community and small school corporation. Having said that, I agree with you that it appears some of the redacted information should have been disclosed. For instance, I do not believe the amount of damages being sought or the name of the school should be withheld, as I do not see how those could lead to the identification of the student. Regarding the names of the teachers as well as any other redacted information, CAB bears the burden of proof in sustaining the denial of access. I.C. §5-14-3-1. If CAB can show that a list of the involved teachers would make it easy to trace the student involved, that proof could sustain the denial. Otherwise, the names of the teachers must be disclosed. The same is true of any other information the denial of which CAB cannot bear the burden of proof.

Regarding your complaint that CAB violated the APRA by not providing the statutory reasons for redacting information from several electronic mail records you received, CAB contends that it included a letter from its attorney indicating the reasons for redaction. A denial of access must include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record. I.C. §5-14-3-9(c). It is my opinion that CAB must indicate which exemptions it relies upon for each record that contains redacted information. Otherwise, a public agency could theoretically list all exceptions in the APRA and include a cover letter with every records request indicating that one of the exceptions applies. In this matter, I would consider each electronic mail message to be a separate record, and for each record CAB would need to indicate the exemption(s) used to deny access.

CONCLUSION

For the foregoing reasons, it is my opinion that CAB did not take an unreasonable amount of time to produce the notice of tort claim and may rely on FERPA to deny access to some information, while bearing the burden of proof to sustain the denial. Further, it is my opinion that CAB violated the APRA by not providing the reasons for redacting information on each record provided to you in response to your request.

Best regards,

A handwritten signature in black ink that reads "Heather Willis Neal". The signature is written in a cursive, flowing style.

Heather Willis Neal
Public Access Counselor

cc: Jena Schmidt, Charles A. Beard Memorial School Corporation