

April 4, 2007

*Sent Via Facsimile*

Mr. Eric Cox  
Publisher and Owner  
*The Banner*  
24 N. Washington Street  
P.O. Box 116  
Knightstown, IN 46148

*Re: Formal Complaint 07-FC-58; 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 protect e-mails from loss or destruction and by denying certain e-mails.

#### BACKGROUND

*The Banner* first requested records of the CAB on January 22, 2007, by facsimile. Among other things, *The Banner* asked for a “copy of any and all memos, other correspondence or written communication, whether generated on paper, paper substitutes, electronically stored data or any other medium” sent since December 1, 2006 from Amanda Zurwell, the school’s former business manager, to the school board members or superintendent. The CAB timely responded to this request on January 23 and provided copies of records, including Zurwell’s letter of resignation, five memos Zurwell had sent to the superintendent, and three monthly financial reports Zurwell had prepared for the school board.

*The Banner* filed a follow-up request with the CAB on February 2. The expanded request asked for, among other things, “a copy of any and all memos, other correspondence or written communication... (including e-mails)...” that Zurwell had, since November 1, 2006, sent to or

received from the school board, superintendent, any other CAB administrator and or current or former member of CAB's central office staff. The CAB responded to this request in a letter dated February 7, 2007.

In this response, the CAB advised *The Banner* that there were no additional items other than what had already been provided. With respect in particular to e-mails, the CAB stated that "according to our technology director, due to the restructuring of Central Office technology, all electronic e-mails were lost in the recent upgrade."

*The Banner* complains that the CAB violated the Access to Public Records Act by failing to protect public records—the e-mails sent or received by Zurwell—from loss, alteration, mutilation, or destruction, and by denying *The Banner's* request for copies of the e-mails. The CAB's response stating that the e-mails had not been maintained is not a proper basis for denial of a public record under IC 5-14-3-9(c), alleges *The Banner*.

The CAB responded to *The Banner's* complaint. I have sent you a copy of the CAB's response from D. Michael Wallman, attorney for the CAB. The CAB argues that e-mail is a format that may contain a public record, but is not a public record itself. The CAB maintains that it did not destroy public records when it failed to save e-mails that "cover" a document that is a public record, where the underlying public record sent using the e-mail has been maintained.

Further, the specific e-mail account of Zurwell was not upgraded when the transition occurred because she was a former employee at the time of the upgrade. The accounts of the individuals who were named as part of the e-mail correspondence chain, the school board, superintendent, and central office staff, were upgraded, but no e-mail between those accounts showed any incoming or outgoing messages to Zurwell. In that case, it is demonstrated that no e-mails that are part of the request were lost; they simply were never created.

Two employees in the central office would be covered by your expanded request, but their accounts were not retained. Both are no longer employees, with one of the employees having left before, and one after, the upgrade occurred. The e-mail account of the former employee who left after the upgrade was deleted when she left. This account may be retrievable, but only with the assistance of a software company. The CAB would expect *The Banner* to pay the cost of recovery of this account if *The Banner* believes it still wants to examine these records.

Further, it is incorrect to assert that e-mail has an independent existence as a public record and is subject to retention. Stated simply, e-mail with an attachment conveys what may be a public record subject to a specific retention schedule; e-mail without an attachment is invariably correspondence.

Retention is the domain of the local public records commissions, under IC 5-15-16 (*read* IC 5-15-6). The retention schedule of public schools in Clay County shows that "what can fairly be described as correspondence," without regard to format of the correspondence, is not subject to any specific retention period, and can be destroyed when no longer needed. In summary, all information requested has been provided. The CAB does not believe any public records, whether in hard copy or digital, have been wrongfully destroyed.

## 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). A public agency may deny a written request for a record if the denial is in writing and includes a statement of the specific exemption or exemption that authorizes the withholding of all or part the record. IC 5-14-3-9(c).

A public agency shall protect public records from loss, alteration, mutilation, or destruction. IC 5-14-3-7(a). Notwithstanding IC 5-14-3-4(d)(making confidential records open for inspection 75 years after the record’s creation) and IC 5-14-3-7(a), public records subject to Indiana Code 5-15 may be destroyed only in accordance with record retention schedules under Indiana Code 5-15; or public records not subject to Indiana Code 5-15 may be destroyed in the ordinary course of business. IC 5-14-3-4(e).

A public record is any material that is “created, received, retained, maintained, or filed by or with a public agency...regardless of form or characteristics.” IC 5-14-3-2(m). Hence, there is no question that the e-mails created and maintained by the CAB are public records of the CAB. Those records are disclosable unless exempt under section 4 of the APRA.

I agree with the CAB that the disclosure and retention of the e-mails is dependent not on the form of the e-mail but rather on the content of the e-mail. I also agree that some e-mail is not subject to retention other than in the ordinary course of business, just as some paper records may be discarded in the ordinary course of business. Specifically, records not subject to IC 5-15 can be destroyed in the ordinary course of business.

That said, it seems that the bulk of CAB’s argument is nothing more than a generalized discussion regarding the e-mail accounts of those employees that were lost due to the upgrade or deleted after the departure of the employee, with the result being that the e-mail accounts were destroyed in toto consistent with the Clay County retention schedule. I note that the CAB has not provided me a copy of the record retention schedule that the CAB refers to, nor have I been provided a link to the internet page containing the schedule.

In any case, whether the record retention guidelines support the CAB’s blanket statement that all e-mail falls into either “cover to an attachment” or “correspondence” (neither of which must be retained beyond the time that the person needs it, according to the CAB, with reference to a Clay County schedule that would not apply to a Henry County school corporation), is beyond the scope of this office’s expertise. I find that if any of the individual e-mails were subject to retention under IC 5-15, and were not otherwise destroyed in accordance with record retention schedules under Indiana Code 5-15, then the CAB violated IC 5-14-3-7(a).

The CAB has also asserted that, in spite of the loss of the Zurwell e-mail account, the e-mail accounts of the other correspondents do not show that any e-mail to or from Zurwell existed. If a public agency does not have a public record because one was never created, there is no denial of the record. It simply does not exist.

In addition, *The Banner* argues that the CAB did not properly deny the records because no exemption was cited. This is not valid where the CAB either did not have a record to disclose (as in the case of the non-existent e-mails) or did not retain the e-mail accounts containing e-mails. In both cases, the CAB explained that no e-mail existed. A public agency is required to cite an exemption only where a record exists but is withheld from disclosure.

Finally, *The Banner* requests that I issue an informal inquiry response with respect to whether the January 22 request should have elicited the e-mails sent to or received by the various correspondents and Zurwell. The letter of January 22 specifically requested “a copy of any and all memos, other correspondence or written communication—whether generated on paper, paper substitutes, **electronically stored data or any other medium**—sent from Amanda Zurwell to...” (Emphasis supplied.) *The Banner* argues that the CAB failed to either provide the e-mails or to state that none existed. I agree that the e-mail that is the subject of this complaint would have fallen within the request of January 22, and accordingly the CAB should have notified the CAB of the loss or non-existence of e-mail when it produced the other records in response to the January 22 request.

#### CONCLUSION

For the foregoing reasons, I find that the CAB was required to protect its public records, including e-mail, from loss, alteration, mutilation, or destruction. I also find that if any of the individual e-mails were subject to retention under IC 5-15, and were not destroyed in accordance with record retention schedules under Indiana Code 5-15, then the CAB violated IC 5-14-3-7(a).

Sincerely,

Karen Davis  
Public Access Counselor

cc: D. Michael Wallman