STATE OF INDIANA

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The Banner
Eric M. Cox, Owner and Publisher
24 N. Washington St.
P.O. Box 116
Knightstown, Indiana 46148

Re: Formal Complaint 11-FC-257; Alleged Violation of the Access to Public Records Act by the 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 ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. David R. Day and Alexander P. Pinegar responded to your complaint on behalf of the School. Their response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on August 5, 2011, you hand-delivered a written request to Gary Storie, School Superintendent, which provided in part, a request for the following records:

> "2. Access to inspect complete, unredacted e-mail correspondence sent by, or to, the following central office's personnel's e-mail accounts since May 1, 2001:
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> a. Superintendent Gary Storie;
> b. Jena Schmidt;
> c. Michelle Swift;
> d. Stephanie Madison; and
> e. Phyllis Hines
>
> 3. From the e-mail archiving program used by the School, full and complete, unredacted copies of screen shots (printouts of what is seen on the monitor) taken today, August 5, 2011, of displays showing the total number of

> items received and sent to the five e-mail accounts referenced above in item 2 from 12 a.m. May 1, 2011, through 9 a.m. this morning."

After you submitted your request, you had an ongoing dialogue with the School regarding the records that were sought. Initially, Mr. Storie expressed uncertainty as to whether he would grant the request, and indicated he would need to consult with the School's technology director and legal counsel. From the outset, Mr. Storie maintained he believed that Item 2 had not been identified with reasonable particularity, at which point although disagreeing with his contentions, you offered a compromise to address his concerns.

You provided that if the School would provide the screen shots requested in Item 3, you would go through those printouts and specifically identify which emails you would like to have a copy of. Mr. Storie advised that after checking with the School's technology director, they were able to pull up all emails sent and received from the respective e-mail accounts from May 1, 2011 through August 5, 2011, along with the names of the sender, recipient, and subject lines of the e-mails. The list was comprised of over 3,000 e-mails and Mr. Storie indicated to you that it would require 150 pages to print. In response, you confirmed that you still desired a copy of the printouts.

On August 29, 2011, you inquired with Mr. Storie as to the status of the printouts. At that time, Mr. Storie denied your request for Items 2 and 3. As to Item 2, the request was "far too broad (and) lacking reasonable particularity." With respect to Item 3, Mr. Storie provided that the records did not exist. Mr. Storie provided that the screen shots were only available when certain parameters are programmed into a search. He further maintained that the query had not been performed on any of the five (5) specified e-mail accounts, which contradicted his earlier correspondence with you.

As an initial matter, you believe that the request does not lack reasonable particularity, as the request specifically identifies the five (5) School employees and limits the request to those e-mails sent or received from May 1, 2011 through August 5, 2011. The School has been the subject of similar prior formal complaints filed with the Public Access Counselor's Office, where former counselors have found that your requests of the School did not fail for reasonable particularity. You provide that you followed the guidance of Counselor Neal's prior formal complaint and that the School should not have difficulty in ascertaining the e-mails identified in Item 2. You do acknowledge the scope of your request is broad and that it will take a significant amount of time for the School to comply with your request. However, the request does not lack for reasonable particularity.

You further challenge the assertion that the records identified in Item 3 do not currently exist as public records and assert that the records exists now as electronically stored data that needs to be extracted. You further provide that Mr. Storie had previously indicated that he already conducted a query of his own e-mail account. Thus, at a

minimum, the School should be required to provide the requested information identified in Item 3 for Mr. Storie's e-mail account.

In response to your formal complaint, the School advised that your request failed to meet APRA's requirement that public record requests "identify with reasonable particularity the record being requested." The School provides that prior Public Access Counselor's have already addressed the issue presented in your formal complaint, specifically 09-FC-124 and 10-FC-57, and have advised that a request of this nature was not for a particular record, but for a form of communication. As such, a request that identifies the records only by the particular method of communication utilized does not meet the requirements of I.C. § 5-14-3-3(a). The request made here, as opposed to the request that was the subject of formal complaint 09-FC-24, is not limited in scope as it failed to identify both the sender and recipient of the respective e-mails.

As to the Item 3, as an initial matter the School disputes that Mr. Storie has produced a record showing the total numbers of items sent and received from his e-mail account from May 1, 2011 through August 5, 2011. The "3,000 e-mails" referenced in your formal complaint was Mr. Storie's approximation of the number of e-mails that would have been listed should such a record be created. Further, at no time did Mr. Storie produce the requested information for the other four individuals listed in your request.

As to the substance of complaint regarding Item 3, the definition of "public record" does not encompass any and all categories of information, which in essence the School maintains you are requesting information, not a public record. If a public agency does not have any records responsive to a request, it does not violate the APRA by denying the request and further and is not required to produce a new record in response to a 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." *See* I.C. § 5-14-3-1. The School is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School's public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in

writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the School responded to your request within the seven (7) day time-frame as required by the APRA.

As to your request in Item 2 for all e-mails sent or received by five (5) School employees from May 1, 2011 through August 5, 2011, prior public access counselors had opined on this issue. APRA requires that a request for inspection or copying identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). Counselor Neal provided the following under in a 2009 opinion:

> With your request, you seek "all emails sent and received by you in the last 100 days." The County argues this request does not identify with reasonable particularity the record(s) being requested. The APRA requires that a request for access to records identify with reasonable particularity the record being requested. *See* 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. Ct. 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. Ct. 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.
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> In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain form of communication. It is important to remember that electronic mail is a method of communication and not a type of record. Electronic mail is one way an agency might receive correspondence. As Mr. Murrell indicates, and as I often advise people, electronic mail messages are similar to snail mail or facsimile transmissions. And certainly few individuals would disagree that a request for any piece of mail sent or received by an agency or official within the last one hundred days would be considered an overly broad

> request which does not identify with reasonable particularity the record being requested. The same is true for electronic mail messages. That the correspondence is communicated using a different medium does not change the scenario; in my opinion a request which identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits.
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> I have previously issued an advisory opinion in a similar matter regarding a request for access to electronic mail messages. In *Informal Opinion 08-INF-23*, I wrote the following:
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> If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure. *Informal Opinion 08-INF-23*, available at www.in.gov/pac.
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> Similarly, it is my opinion here that your request is overly broad. If your request identified particular records in such a way that the agency could identify which records you seek, the agency could better address your request. For instance, you might narrow your request to messages between a county official and certain other individual(s) for certain dates. In some cases, an agency may also be able to sort messages on the basis of the subject of the email. But this type of search is only as good as the information which appears in the "Subject" line of each electronic mail and is only feasible where an agency has the technology to conduct a search other than a manual search. *Opinions of the Public Access Counselor 09-FC-124 and 11-FC-12.*

I agree with Counselor Neal's and Kossack's analysis in regards to this issue. As such, it is my opinion that your request was not reasonably particular and did not meet the requirements of I.C. § 5-14-3-3(a). If you would narrow your request by providing the sender, recipient, and a particular range of dates, the School should comply with the request unless an exception to the APRA permits or requires withholding all or part of any records responsive to your request. Therefore, it is my opinion that the School did not violate the APRA in responding to Item 2 of your request.

As to Item 3 of your request is in essence was an extension of the records that were sought in Item 2. You specifically requested the following:

> From the e-mail archiving program used by the School, full and complete, unredacted copies of screen shots (printouts of what is seen on the monitor) taken today, August 5, 2011, of displays showing the total number of items received and sent to the five e-mail accounts referenced above in item 2 from 12 a.m. May 1, 2011, through 9 a.m. this morning.

As provided supra, the APRA requires that a request for inspection or copying must identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). "A request that identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits." *See Opinion of the Public Access Counselor 09-FC-124.* While the term "reasonable particularity" is not defined in the APRA, it has been addressed a number of times by the public access counselor. *See Opinions of the Public Access Counselor 99-FC-21, 00-FC-15, 09-FC-24, 11-FC-12.* Counselor Hurst addressed this issue in *Opinion of the Public Access Counselor 04-FC-38*:

> A request for public records must "identify with reasonable particularity the record being requested." IC 5-14-3-3(a)(1). While a request for information may in many circumstances meet this requirement, when the public agency does not organize or maintain its records in a manner that permits it to readily identify records that are responsive to the request, it is under no obligation to search all of its records for any reference to the information being requested. Moreover, unless otherwise required by law, a public agency is under no obligation to maintain its records in any particular manner, and it is under no obligation to *create* a record that complies with the requesting party's request. *Opinion of the Public Access Counselor 04-FC-38.*

If a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. *See Opinions of the Public Access Counselor 01-FC-61 and 08-FC-113.* A public agency is not required to conduct research on your behalf. *See Opinion of the Public Access Counselor 03-FC-146; see also Opinion of the Public Access Counselor 05-FC-25*. That said, your request under Item 3 seeks general information rather than records. Further, even if it was determined that you request sought a record, the request identifies the record only by the particular method of communication utilized. Under either scenario, it is my opinion that your request fails to comply with the reasonable particularity requirements of I.C. § 5-14-3-3(a).

The issue remains whether the School, in the process of responding to your records request, produced a record that would be responsive to your request in Item 3. You maintain that the School did so and indicated as such in your correspondence with

them. The School has responded that it no such record was created and the only information given to you were approximations. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* If the School produced a record that would have been responsive to your request noted in Item 3, it is my opinion that the School would be required to disclose it or cite to an applicable provision of the APRA that would allow or require it to deny your request. However, if no such record existed, then the School did not violate the APRA.

CONCLUSION

For the foregoing reasons, it is my opinion that if the School produced a record that was responsive to your request noted in Item 3, it would be required to disclose it to you in response to your request or cite to an applicable section of the APRA in denying your request. But, if no such record existed, the School did not violate APRA. As to all other issues, it is my opinion that the School did not violate the APRA.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: David R. Day, Alexander P. Pinegar