STATE OF INDIANA

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July 11, 2012

Michael B. Pell
223 Perimeter Center Parkway Northeast
Atlanta, Georgia 30346

Re: Formal Complaint 12-FC-145; Alleged Violation of the Access to Public Records Act by the Indiana Department of Education

Dear Mr. Pell:

This advisory opinion is in response to your formal complaint alleging Indiana Department of Education ("Department") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Christopher P. Greisl, Attorney, responded on behalf of the Department. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that you submitted a request pursuant to the APRA for records of complaints alleging improprieties on standardized tests by teacher and school administrators from January 2007 through the present. You sought an actual copy of the complaint, investigative material, and resolution for each case. You allege that the Department denied your request as the records sought were private personnel records and certain documents consisted of attorney-work product. You believe that the Department improperly relied on the personnel records exception in denying your request, as the APRA requires the disclosure of information relating to the status of any formal charges against the employee and the factual basis for a disciplinary action in which final action has been taken that resulted in the employee being suspended, demoted, or discharged.

In response to your formal complaint, Mr. Greisl advised that on or about March 9, 2012; April 3, 2012; and May 9, 2012, the Department received your request for information relative to allegations or investigations of cheating in Indiana's public schools. The request consisted of the following:

- Records of complaints alleging improprieties on standardized tests by teachers and school administrators from January 1, 2007 through the present. These records include, but not be limited to, complaints, investigative records, and documents that reflect the resolution of each case.

- Documents showing the results of any test screening activities, such as erasure analysis, for standardized tests administered each year since 2007.
- Records of personnel actions taken since 2007 related to testing improprieties.
- Any and all documents stemming from or relating to any and all investigations of K-12 standardized testing in the public school district in Gary, Indiana from January 1, 2002 through April 2, 2012.
- All investigative records of schools, teachers, and school administrators accused of cheating in the Indianapolis school district from 2006 through the present. The should include, but not be limited to, erasure analysis results, statistical analysis of testing results, and interview transcripts of teachers or administrators, [as well as] documents that reflect the outcome of any investigations.

On or about March 16, 2012 and April 5, 2012, the Department acknowledged the rest in writing. On or about May 10, 2012, Mr. Greisl orally acknowledged you request during a phone conversation with you. On June 6, 2012, the Department denied your request for the records that were sought as the records were confidential, privileged, and deliberative.

When the Department initially receives information relative to allegations of cheating, the allegations have the potential to carry significant consequences both for the adults involved and the students affected by the breach or alleged breach. Any allegations of an educator participating in or aiding a student cheating on a standardized test are initially investigated by the local school corporation ("LSC"). The LSC, not the Department, is also responsible for maintaining records of any personnel actions relating to testing improprieties. Upon completion of its investigation, the LSC submits an irregularity report to the Department. The Department's Office of Legal Affairs ("OLA") evaluates the report and decides, for purposes of the Department own internal investigation, whether to pursue a license suspension or revocation action against an employee of the LSC. While the Department's Office of Student Assessment is making a determination about the validity of the test, the licensing determination is a byproduct of the OLA's investigation.

The OLA's investigation is withheld from disclosure for a number of reasons. First, the records sought by WTHR are privileged attorney-client communication and attorney-work product pursuant to I.C. § 5-14-3-4(a)(8), citing to Indiana Rules of Professional Conduct 1.6(a), and I.C. § 5-14-3-4(b)(2). The Superintendent of Public Instruction ("Superintendent") has the authority and responsibility to bring actions for the revocation or suspension of teaching licenses for various reasons. The OLA provides legal advice and representation to the Superintendent. *See* I.C. § 20-28-5-7. When allegations of educators participating in or aiding a student cheating on a standardized test come to the Department, the OLA must seek and obtain information in the course of its internal investigation for purposes of providing legal guidance and advice to the Superintendent. Thus, the records sought and obtained by the OLA pursuant to this investigation to provide legal advice to the Superintendent constitute attorney-work product. *See Opinion of the Public Access Counselor 09-INF-28*.

In conjunction with advising the Superintendent, the OLA engaged in interagency communications with effected school corporations concerning the allegations and subsequent investigations. *See Opinion of the Public Access Counselor 10-FC-52*. The records, in addition to being attorney-work product, are also deliberative pursuant to I.C. § 5-14-3-4(b)(6). *See Opinion of the Public Access Counselor 09-INF-28*. The records obtained by the OLA are communicated for the purposes of providing legal guidance to the Superintendent regarding his decision making authority related to teacher licensing. Thus, they are exempt from disclosure in response to a request made pursuant to the APRA.

As to the allegation that the Department has cited to I.C. § 5-14-3-4(b)(8) in denying your request, Mr. Griesl advised that the Department does not maintain personnel files on any public school teachers and did not deny your request pursuant to this exemption. The OLA evaluates the irregularities report submitted by the LSC, and decides, for purposes of the Department own internal investigation, whether to pursue a license suspension or revocation action against an employee of the LSC. If, after legal evaluation, the OLA determines that a licensure action is merited, the Department will file a complaint and an administrative law judge will be assigned to the matter. Once a complaint is filed, the complaint and any pleading or hearings that follow are disclosable public records, unless otherwise determined by the administrative law judge. To the extent that you seek information regarding previous licensure actions invoked by the Department, the information is available on the Department's website.

As to your request for test screening activities, such erasure analysis is prohibited for a variety of reasons. I.C. § 5-14-3-4(b)(3) states that "[t]est questions, scoring keys, and other examination date used in administering . . .[an] academic examination before the examination is given or it if is to be given [are exempted from public disclosure]." Further, I.C. § 5-14-3-4(b)(10) provides that administrative or technical information that would jeopardize a record keeping or security systems are exempt. Lastly, the records would be disclosable at the discretion of the Department pursuant to I.C. § 5-14-3-4(b)(6) to the extent that the records contained an expression of opinion or where speculative nature, that was communicated for the purpose of a decision making.

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 Department 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 Department'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). A response from the public agency could be an acknowledgement that the request has been received and include information regarding how or when the agency intends to comply. The Department advised that it received three, separate requests from you on or about March 9, 2012; April 3, 2012; and May 9, 2012. On or about March 16, 2012 and April 5, 2012, the Department acknowledged the initial two requests in writing. On or about May 10, 2012, Mr. Greisl orally acknowledged your request during a phone conversation. As such, it is my opinion that the Department complied with the requirements of section 9 of the APRA in responding to your requests.

Under the APRA, a public agency denying access in response to a written public records request must put that denial in writing and include the following information: (a) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (b) the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). Counselor O'Connor provided the following analysis regarding section 9:

> Under the APRA, the burden of proof beyond the written response anticipated under Indiana Code section 5-14-3-9(c) is outlined for any *court action* taken against the public agency for denial under Indiana Code sections 5-14-3-9(e) or (f). If the public agency claimed one of the exemptions from disclosure outlined at Indiana Code section 5-14-3-4(a), then the agency would then have to either "establish the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit" *to the court*. Similarly, if the public agency claims an exemption under Indiana Code section 5-14-3-4(b), then the agency must prove to the court that the record falls within any one of the exemptions listed in that provision and establish the content of the record with adequate specificity. There is no authority under the APRA that required the IDEM to provide you with a more detailed explanation of the denials other than a statement of the exemption authorizing nondisclosure, but such an explanation would be required if this matter was ever reviewed by a trial court. (emphasis added). *Opinion of the Public Access Counselor 01-FC-47.*

There is no dispute that the records that have been requested are "public records" pursuant to the APRA. *See* I.C. § 5-14-3-2(n). The Department has cited to certain specific under state law that would mandate and/or allow the Department discretion to produce the records in response to a public records request. The Department would satisfy its obligation in responding to a formal complaint filed with the Public Access Counselor's Office by complying with section 9(c) of the APRA. If, however, the matter

proceeded to litigation before a court, who would be allowed to conduct an in-camera review, the burden of proof would be on the Department to sustain the denial of access to the records that were requested. *See* I.C. § 5-14-3-4(f); *Opinion of the Public Access Counselor 09-FC-285.*

The APRA provides that personnel files of public employees and files of applicants for public employment may be excepted from the APRA's disclosure requirements, 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. I.C. § 5-14-3-4(b)(8).

In other words, the information referred to in (A) - (C) above must be released upon receipt of a public records request, but a public agency may withhold any remaining records from the employees personnel file at their discretion. Under the APRA and applicable to your request, the Department would have been unable to deny the request pursuant to I.C. § 5-14-3-4(b)(8), as the parties involved are employed by the LSC, not the Department. The Department has provided that it did not deny your request pursuant to this subsection of the APRA as it does not maintain a personnel file on LSC employees. 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.* As such, if the Department denied your request for records pursuant to I.C. § 5-14-3-4(b)(8), it is my opinion that it violated the APRA as the parties involved were not employees of Department.

The APRA excepts from disclosure, at the discretion of the agency, the following:

> Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making. I.C. § 5-14-3-4(b)(6).

Deliberative materials include information that reflects, for example, one's ideas, consideration and recommendations on a subject or issue for use in a decision making

process. *See Opinion of the Public Access Counselor 98-FC-1.* Many, if not most documents that a public agency creates, maintains or retains may be part of some decision making process. *See Opinion of the Public Access Counselor 98-FC-4; 02-FC-13; and 11-INF-64.* The purpose of protecting such communications is to "prevent injury to the quality of agency decisions." *Newman v. Bernstein*, 766 N.E.2d 8, 12 (Ind. Ct. App. 2002). The frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public, and the decisions and policies formulated might be poorer as a result. *Newman*, 766 N.E.2d at 12. In order to withhold such records from disclosure under Indiana Code 5-14-3-4(b)(6), the documents must be interagency or interagency, that are advisory or deliberative, are an expression of opinion or speculative in nature, and communicated for the purposes of a decision making. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.*

The "interagency or intra-agency" requirement of the exception implies that the documents are created and shared within a public agency or between public agencies. *See Opinion of the Public Access Counselor 02-FC-69; 03-FC-17; 11-INF-64.* The exception would not be applicable to records containing communication between a public agency and a non-public agency, as such records are not "interagency or intra-agency." *See Opinions of the Public Access Counselor 02-FC-13; 04-FC-194; 05-FC-206.* The records sought here were passed from the LSC to the Department. There is no dispute that the Department and local school district are considered public agencies under the APRA. *See* I.C. § 5-14-3-2(a). As such, it is my opinion that the Department has satisfied this requirement of the exception.

The deliberative materials exception only allows for the redaction of material that is advisory or deliberative and constitutes an opinion or is speculative in nature. When a record contains both disclosable and nondisclosable information and an agency receives a request for access, the agency shall "separate the material that may be disclosed and make it available for inspection and copying." *See* I.C. § 5-14-3-6(a). The burden of proof for nondisclosure is placed on the agency and not the person making the request. *See* I.C. § 5-14-3-1. Any factual information which can be separated from the non-discloseable matters must be made available for public access, unless the material is inextricably linked. *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893, 913-14 (Ind. Ct. App. 2005). Lastly, the exception requires that the communication be part of a decision making process. *See Opinion of the Public Access Counselor 03-FC-17.* Here the Department has provided that the records were received from the local school district in order for the OLA to make a recommendation to the Superintendent regarding the status of certain teacher licenses. Accordingly it is my opinion that the Department has met the decision making element under the exception.

To the extent that the Department has cited to deliberative materials exception found under I.C. § 5-14-3-4(b)(6) to deny access, it is my opinion that the Department has met its burden to demonstrate that is has complied with the requirements of the statute in denying the request. I would note that the Department is not required to include a statement in its denial that it was aware of and complied with the requirements of I.C. §

5-14-3-6. If the records contained information that did not meet the requirements of I.C. § 5-14-3-4(b)(6), and were not covered by any other applicable exception, the APRA provides that the remaining portion of the record be provided. If the Department complied with the requirements of I.C. § 5-14-3-6 in issuing its denial of your request, it would not have violated the APRA.

I.C. §5-14-3-4(b)(2) provides that a public agency has the discretion to withhold a record that is the work product of an attorney representing, pursuant to state employment or an appointment by a public agency: a public agency; the state; or an individual.

> "Work product of an attorney" means information compiled by an attorney in reasonable anticipation of litigation and includes the attorney's:
> (1) notes and statements taken during interviews of prospective witnesses; and
> (2) legal research or records, correspondence, reports, or memoranda to the extent that each contains the attorney's opinions, theories, or conclusions. I.C. § 5-14-3-2(p).

In a 2009 informal, the counselor analyzed a request that was made of the Department for certain records maintained in connection with the termination of an employee from a LSC. *See Informal Opinion of the Public Access Counselor 09-INF-28*. The Department cited, in part, to I.C. § 5-14-3-4(b)(2), in denying a request for records connected with the investigation. The Department noted that the Superintendent has the authority and responsibility to bring actions for the revocation or suspension of teaching licenses for certain reasons under I.C. § 20-28-5-7. The opinion further noted that the OLA provides advice and representation to the Superintendent and the Department obtained information in the course of its investigation in order to advise the Superintendent. The informal opinion found that the Department complied with the requirements of the APRA and could properly cite to I.C. § 5-14-3-4(b)(2) in denying the request. *Id.* As applicable here, I would concur with the analysis provided by 09-INF-28 as the factual circumstances involved here are almost similar. It is my opinion that that the Department could properly cite to I.C. § 5-14-3-4(b)(2) in denying your request for records received by the Department in connection with the investigation performed by the OLA, as long as the records met the requirements provided in the subsection.

The Department further cited to I.C. § 5-14-3-4(a)(8) in denying your request, which provides that "records declared confidential by or under rules adopted by the supreme court of Indiana" are prohibited from disclosure. In furtherance of (a)(8), the Department cited to Indiana Professional Rules of Conduct 1.6(a) which provides that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." The Indiana Court of Appeals has held that government agencies may rely on the attorney-client privilege when they communicate with their attorneys on business within the scope of the attorney's profession. *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. Ct. App. 1991). *Morely* held that:

> "The communications sought are communications between a client (PERF) and its attorney (the Attorney General) discussing potential legal problems concerning the way in which PERF was carrying out its duties. These fall within exceptions to disclosure under the public records statute because they are protected by the attorney client privilege which makes them confidential under statute and supreme court rule. See IC 34-1-14-5; IC 34-1-60-4; Prof.Cond.R. 1.6(a)."

As applicable here, the Department has provided that the OLA represents the Superintendent in matters pursuant to I.C. § 20-28-5-7. Although you submitted your request to the Department, not an attorney; the Department has provided that the OLA received the records from the LSC in order to make a recommendation to the Superintendent. As to the facts provided, it is my opinion that the Department has met its burden in denying your request for records under I.C. § 5-14-3-4(a)(8), pursuant to Indiana Professional Rules of Conduct 1.6(a).

As to the portion of your request seeking test screening activity, the Department denied your request pursuant to I.C. §§ 5-14-3-4(b)(3), (6), and (10). I.C. § 5-14-3-4(b)(3) provides that test questions, scoring keys, and other examination data used in administering a licensing examination, examination for employment, or academic examination before the examination is given or if it is to be given again may be disclosed at the discretion of the agency. As provided *supra*, the deliberative materials exception provides an agency with discretion in providing records that are intra-agency or interagency advisory or deliberative material, that are expressions of opinions or are of a speculative nature, and that are communicated for the purposes of decision making. Further, I.C. § 5-14-3-4(b)(10) allows an agency discretion to disclose administrative or technical information that would jeopardize a record keeping or security system. As to the test screening activity, the Department has provided that the records that are sought are not confidential; rather it is relying on three exceptions found under I.C. § 5-14-3-4(b) that allow it to disclose the records as its discretion. It is my opinion that the Department has properly denied your request pursuant to I.C. § 5-14-3-9(c) as to your request for records related to the test screening activity.

I have not reviewed any of the records sought, thus I cannot definitively say whether any record contains information which is not excepted from disclosure. Public agencies bear the burden of proof to sustain their denials of public access to records. *See* I.C. §§ 5-14-3-1, 5-14-3-9(f). Based on the information that has been provided, it is my opinion that the Department could sustain its denial of your request under the exceptions that have been cited. The Department has provided that to the extent that you seek information regarding previous licensure actions that have been invoked, the information is available on the Department's website.

CONCLUSION

For the foregoing reasons, it is my opinion that if the Department denied your request for records pursuant to I.C. § 5-14-3-4(b)(8), it acted contrary to the requirements of the APRA. As to all other issues, it is my opinion that the Department did not violate the APRA.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Christopher P. Greisl