# STATE OF INDIANA

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September 4, 2012

Leslie R. Hanson
15 E. Berry Street
Greencastle, Indiana 46135

*Re: Formal Complaint 12-FC-232; Alleged Violation of the Access to Public Records Act by the Greencastle Community School Corporation*

Dear Ms. Hanson:

This advisory opinion is in response to your formal complaint alleging the Greencastle Community School Corporation ("School") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq*. Dr. Lori Richmond responded in writing on behalf of the School. Her response is enclosed for your reference.

BACKGROUND

In your formal complaint, you provide that on August 3, 2012 you telephoned the School to request a copy of the Personnel Report ("Report") that would be on the agenda at the upcoming August 8, 2012 School Board meeting. On August 7, 2012, Dr. Richmond responded in writing to your request and provided that the Report was available to be picked up. For the August 8, 2012 meeting, the Report was divided into two parts and you were only allowed access to the portion that listed the recommended terminations. You were given no information regarding why the remaining portion of the report was not being provided. You note that you were given access to the previously non-disclosed portion of the report after the August 8, 2012 meeting.

In response to your formal complaint, Dr. Richmond advised that on August 7, 2012 the Report was made available to all persons. The Report contained ten resignations that had been accepted by Dr. Richmond pursuant to Board Policy 3140, which authorizes the Superintendent to accept resignations on behalf of the Board. Part 1 of the Report was prepared as information for the School Board members for the August 8, 2012 public meeting. Part 2 of the Report was prepared specifically for the Board's August 8, 2012 executive session and constituted Dr. Richmond's employment recommendations to the School Board for their consideration regarding who to employ, assign, or reassign. Thus, Part 2 of the Report would qualify as a deliberative material pursuant to I.C. § 5-14-3-4(b)(6) and would be disclosable at the discretion of the School.

Dr. Richmond's recommendations are not always approved by the School Board; the recommendation are sometimes tabled or rejected by the School Board.

In addition, Part 2 of the Report would be exempt pursuant to I.C. § 5-14-3-4(b)(12), which specifically exempts from mandatory disclosure records specifically prepared for discussion or developed during discussion in an executive session. Part 2 of the Report was prepared for discussion in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(5), I.C. § 5-14-1.5-6.1(b)(6)(B), and I.C. § 5-14-1.5-6.1(b)(9). The adopted Report becomes part of the School Board minutes and the public is welcome to a copy of the approved personnel report which is made available online by end of the business the following work day.

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 twenty-four 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 days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA a public agency denying access in response to a written public records request must put the 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. *Opinion of the Public Access Counselor 01-FC-47.*

Here, you allege that the School Board failed to provide you with the specific statutory citation authorizing withholding of Part 2 of the Report. The School's response to your formal complaint does not address whether a statutory citation was provided when the request was actually denied. As such, it is my opinion that the School acted contrary to the APRA by failing to comply with the requirements of Section 9(c) in denying your request.

As to the substance of the School response to your formal complaint, the APRA excepts from disclosure, among others, 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).

Pursuant to I.C. § 5-14-3-4(b)(6), the General Assembly has provided that records that qualify as deliberative materials may be disclosed at the discretion of the public agency. 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 also be interagency or interagency records that are advisory or deliberative and that are expressions of opinion or speculative in nature. *See Opinions of the Public Access Counselor 98-INF-8 and 03-FC-17.*

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. The Indiana Court of Appeals provided the following guidance on a similar issue in *Unincorporated Operating Div. of Indianapolis Newspapers v. Trustees of Indiana Univ.*, 787 N.E.2d 893 (Ind. Ct. App. 2005):

> However, *section 6 of APRA* requires a public agency to separate dislcosable from non-dislcosable *information* contained in public records. *I.C. § 5-14-3-6(a)*. By stating that agencies are required to separate "information" contained in public records, the legislature has signaled an intention to allow public access to whatever portions of a public record are not protected from disclosure by an applicable exception. To permit an agency to establish that a given document, or even a portion thereof, is non-dislcosable simply by proving that some of the documents in a group of similarly requested items are non-discloseable would frustrate this purpose and be contrary to section 6. To the extent that the *Journal Gazette* case suggests otherwise, we respectfully decline to follow it.
>
> Instead, we agree with the reasoning of the United States Supreme Court in *Mink, supra*, i.e., that those factual matters which are not inextricably linked with other non-discloseable materials, should not be protected from public disclosure. See *410 U.S. at 92*. Consistent with the mandate of *APRA section 6*, any factual information which can be thus separated from the non-discloseable matters must be made available for public access. *Id*. at 913-14.

To the extent that Part 2 of the Report contains information that would be considered deliberative material pursuant to I.C. § 5-14-3-4(b)(6), the School would not violate the APRA by exercising its discretion and denying a request for records. As provided *supra*, the School would be required to cite to I.C. § 5-14-3-4(b)(6) and provide the name and title of the person responsible for the denial should it chose to exercise it discretion and deny access to the record.

Pursuant to I.C. § 5-14-3-4(b)(12), the School would retain discretion to disclose records specifically prepared for discussion or developed during discussion in an executive session under I.C. § 5-14-1.5-6.1. As noted by Counselor Davis:

> However, it is not sufficient that the record must merely relate to an executive session. It must also have been *specifically prepared for discussion* in an executive session. Hence, if the material excepted from disclosure by the CAB sets out specific agenda items to be discussed in an upcoming executive session, the excepted material would meet the exception. As with the exception for deliberative materials, to the extent

> that material redacted under this exemption is not exempt or "inextricably linked" to exempt material, it should be disclosed. *See Opinion of the Public Access Counselor 05-FC-256.*

Dr. Richmond provided that Part 2 of the Report was created for discussion or developed during discussion in an executive session for purposes authorized by I.C. § 5-14-1.5-6.1. Specifically, the Report was prepared for discussion in a properly held executive session pursuant to I.C. § 5-14-1.5-6.1(b)(5), (6)(B), and (9). To the extent that Part 2 of the Report was prepared for discussion for a properly held executive session, the School would not be in violation of the APRA in denying your request.

CONCLUSION

For the foregoing reasons, it is my opinion that the School acted contrary to the APRA by failing to comply with the requirements of section 9(c) in response to your request. 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: Dr. Lori Richmond