STATE OF INDIANA

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September 14, 2012

Brian Vukadinovich
1129 E. 1300 N.
Wheatfield, Indiana 46392

Re: *Formal Complaint 12-FC-240; Alleged Violation of the Access to Public Records Act by the Hanover Community School Corporation*

Dear Mr. Vukadinovich:

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

BACKGROUND

In your formal complaint, you allege that the School improperly denied your request for information required to be provided under I.C. § 5-14-3-4(b)(8)(B)-(C).

In response to your formal complaint, Ms. Rogers advised that that there are no documents that are responsive to your request for information requested pursuant to I.C. § 5-14-3-4(b)(8)(B)-(C).

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, 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.

The APRA provides that certain personnel records may be withheld from disclosure:

> (b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:
>
> > (8) Personnel files of public employees and files of applicants for public employment, 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.
> >
> > However, all personnel file information shall be made available to the affected employee or the employee's representative. This subdivision does not apply to disclosure of personnel information generally on all employees or for groups of employees without the request being particularized by employee name. I.C. § 5-14-3-4(b)(8).

"[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA." *Opinion of the Public Access Counselor 01-FC-61*; *see also Opinion of the Public Access Counselor 08-FC-113* ("If the records do not exist, certainly the [agency] could not be required to produce a copy…."). The School has advised in response to your request that there are no records that are responsive to it. The requirements of I.C. § 5-14-3-4(b)(8)(B)-(C) assume the existence of a record in which the status of formal charges or factual basis is contained. If formal charges had never been filed against an employee or if the employee was never suspended, demoted,

or discharged after final action had been taken, it would be logical to assume that no documents would exist.

In an advisory opinion written interpreting the prior version I.C. § 5-14-3-4(b)(8)(C), of the law ("information concerning disciplinary actions..."), Counselor O'Connor stated that the minimum information relating to disciplinary action that must be disclosed is: 1) the type of disciplinary action lodged against the employee; 2) when the discipline was lodged, including the time period for the discipline; and 3) why the discipline was lodged (i.e., a description of the conduct and whether it was a violation of personnel rules or another code of conduct, etc.). *See Opinion of the Public Access Counselor 02-FC-22.* Counselor Davis endorsed Counselor O'Connor's analysis of the law in a subsequent informal opinion. *See Informal Opinion – September 15, 2005, Evansville Courier* (http://www.in.gov/pac/informal/files/Evansville_Courier_and_Press_and_City_personnel_file.pdf). Counselor Davis specifically provided the following:

> The second part of the question is whether the Press is entitled to more than the contents of the Minutes of the Merit Commission meeting at which the final action was taken. The answer is "it depends." I have not seen the minutes of the Merit Commission meeting. If the minutes contain the factual basis as described above, it would be sufficient for the City to disclose the minutes to fulfill the request. If the minutes are not adequate, the City would have to supplement its response to the Press's records request by providing the factual basis from other records or *by creating a record to supply the factual basis*. (emphasis added). *Id*.

However, in subsequent 2006 advisory opinion, Counselor Davis opined that in regards to the issue of record creation relating to I.C. § 5-14-3-4(b)(8)(C), that if a person requests a record containing the "factual basis" for a final disciplinary action, the agency must disclose the factual basis from any responsive records maintained by the agency. *See Opinion of the Public Access Counselor 06-FC-2 & 06-FC-3.* Counselor Neal, relying in part on Counselor Davis's 2006 advisory opinion, provided in 2008:

> It is certainly my opinion that the General Assembly has made it clear the public has a right to know the factual basis for a disciplinary action leading to the suspension, demotion or discharge of a public employee when the factual basis is contained in the agency's personnel files. *See* I.C. § 5-14-3-4(b)(8)(C). But I do not agree with the assertion that this provision requires a public agency to create a record containing a certain minimum amount of information. It is my opinion the City is not required by the APRA to create a record responsive to a request but instead

> to provide access to records which already exist. *See* I.C. § 5-14-3-3, requiring disclosure, and I.C. § 5-14-3-2(n), defining "public record" as a record that has been created, received, retained, maintained, or filed by or with a public agency. *Emphasis added*.
>
> The General Assembly has, in another provision in the APRA, provided an affirmative duty on the part of law enforcement agencies to maintain a certain record:
>
> An agency *shall maintain* a daily log or record that lists . . . I.C. § 5-14-3-5(c), *emphasis added*.
>
> Absent a similar provision related to personnel file records, it is my opinion the APRA does not require a public agency to maintain specific records but instead protects the right of the public to inspect and copy records which already exist at the time of the request. *Opinion of the Public Access Counselor 08-FC-184.*

Since 2008, I am not aware of any case law provided by the Indiana Supreme Court or Court of Appeals that has addressed the issue of record creation as it relates to (b)(8)(B)-(C). As such, in order to maintain consistency of the guidance provided by the Public Access Counselor's Office, it is my opinion that an agency is not required to create a record in response to a request received pursuant to I.C. § 5-14-3-4(b)(8)(B)-(C). As the School has provided that it does not maintain any records that are responsive, it is my opinion that it did not violate the APRA.

Although the APRA does not specifically require a public agency to create a record in response to a request made pursuant to (b)(8)(C), it *may* disclose this information by drafting a record. *See Opinions of the Public Access Counselor 02-FC-22; 05-FC-7, 06-FC-02, 06-FC-03, & 10-FC-212.* The following information has been held in previous advisory and informal opinions issued by the Public Access Counselor's Office to comply with the requirements of (b)(8)(C) for those agencies who elected to create a record in response to a request made under this section of the APRA:

- "suspended from duty on June 7, 2011, for a period of ten (10) working days for neglect of duty" – *See Opinion of the Public Access Counselor 11-FC-149.*
- "demoted on November 28, 2010, for failure to follow a direct order and misuse of state property" – *Id*.
- "suspended from duty on January 7, 2008, for a period of ten (10) working days for acts unbecoming an officer and/or conduct that would tend to bring the Division into disrepute, or impair its efficient and effective operation" – *Id.*
- "suspended from duty on June 6, 2011, for a period of five (5) working days for neglect of duty." *Id*.

- “suspended for violating a direct order” – *See Opinion of the Public Access Counselor 10-FC-212.*
- “an incident involving conduct becoming an officer” – *See Opinion of the Public Access Counselor 09-FC-75.*
- “violation of the Standard Operating Procedures of the Greenfield Police Department.” *See Opinion of the Public Access Counselor 08-FC-184*.
- “Mr. King was terminated for disclosing confidential personnel matters, marketing programs and strategic planning, as well as for the misuse and distortion of information known to him only by virtue of his role as Vice President and Chief Financial Officer. Such conduct constituted substantial cause as that term was defined by his employment agreement, i.e. the ‘failure to comply with established [Porter] policies and procedures’ and the ‘unauthorized disclosure or use of a trade secret or other confidential’ information.” *See Opinions of the Public Access Counselor 06-FC-2 & 06-FC-3.*
- Mr. Grant was dismissed from the faculty of Indiana University on the grounds that he engaged in serious personal and professional misconduct. The finding of misconduct was primarily based on representations he made at the time of his hiring and subsequently during his tenure at Indiana University. Mr. Grant is grieving the decision concerning his employment through the Faculty Board of review at IU South Bend. *See Informal Opinion of the Public Access Counselor 12-INF-08.*

CONCLUSION

For the foregoing reasons, it is my opinion that the School did not violate the APRA if it did not maintain any records that are responsive to your request.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Joanne Rogers