

October 29, 1999

Mr. Martin L. Hensley  
7205 Mohawk Lane  
Indianapolis, IN 46260

Re: *ADVISORY OPINION No. 99-FC-7:*  
Denial of Access to Public Records by the Carmel-Clay School Corporation.

Dear Mr. Hensley:

You filed six formal complaints<sup>1</sup> against the Carmel-Clay School Corporation (hereinafter, "School Corporation") on October 1, 1999. In your complaints, you allege that the School Corporation failed to comply with the requirements of the Access to Public Records Act, Indiana Code chapter 5-14-3, concerning requests that you made between June, 1999 and October, 1999. In addition, you allege that the School Corporation did not comply with the Indiana Open Door Law, Indiana Code chapter 5-14-1.5, when you asked to be placed on the School Board's agenda to address your public records requests. Copies of your complaints were faxed to Robert Hebert, attorney for the School Corporation, on the date they were received.

Mr. Hebert provided a written response on October 15, 1999<sup>2</sup>. A copy of his letter and the attachments are enclosed for your review. There were several legal issues raised in your complaints, each of which will be addressed in the following sections.

### BACKGROUND

According to your complaints, you made requests to the School Corporation over a four-month period asking for copies of various public records and requested an opportunity to address the Carmel-Clay School Board concerning your public records requests. In sum, you asked for responses to approximately fifty (50) different requests to the School Corporation in six (6) different letters<sup>3</sup> and the School Corporation responded as follows:

Request No. 1

August 26, 1999 A letter to Tom Schoeller, Manager of WHJE (School Corporation's radio station) requesting copies of correspondence from the Federal Communications Commission and copies of any responses to that correspondence by the School Corporation.

The School Corporation claims to have received this request on September 7, 1999, and responded to this request and provided copies of the documents in question on October 1, 1999.

#### Request No. 2

June 8, 1999 A letter from Hoosier Broadcasting Corporation (HBC), and signed by you, with ten (10) requests for a variety of documents.

The School Corporation claims to have received this request on June 18, 1999, and did not respond at the direction William Mays, a director of HBC. Once it was clarified that this was your request, the School Corporation responded to the ten (10) requests in letters dated October 1 and 8, 1999.

#### Request No.3

June 8, 1999 Another request on behalf of HBC for seventeen (17) different items and a request to appear at meetings of the Carmel-Clay School Board to speak about your problems in obtaining access to public records from the School Corporation.

The School Corporation responded on June 15, 1999 to the public records request and to your request for time on the Carmel-Clay School Board's agenda.

#### Request No. 4

September 1, 1999 You made a request for eleven (11) items.

The School Corporation responded in letters dated October 1 and 8, 1999.

#### Request No. 5

September 8, 9, 10 and 11

You made a request for three (3) items.

The School Corporation responded in letters dated October 1 and 8, 1999.

In my review of the public records requests, and the School Corporation's responses, I have identified three major legal questions:

1. Did the School Corporation violate the Access to Public Records Act when it did not respond to your written requests within seven (7) days after receipt of the requests?
2. Does the School Corporation have a duty to create or produce public records that do not currently exist?
3. Did the School Corporation violate the Access to Public Records Act when it did not produce the following records or parts of records:
  - a. Personnel records;
  - b. Selector disks;<sup>4</sup>
  - c. Documents related to legal representation by a law firm; or
  - d. A list of students' names and addresses?

It is my opinion that the School Corporation, with respect to your requests numbered 1, 2, 4 and 5, violated Indiana Code section 5-14-3-9 by failing to respond within seven (7) days after receipt of the requests. The School Corporation is not obligated to create new records in order to comply with a request for public records.

With respect to the specific public records at issue, it is my opinion that the School Corporation had the discretion to withhold certain personnel records related to the discipline of an employee, but could not withhold a copy of a teacher's contract as that document is disclosable under Indiana Code section 20-6.1-4-3. If a selector disk or information either did not or no longer exists, and it was properly destroyed under Indiana Code article 5-15, the School Corporation did not violate the Access to Public Records Act. Public agencies may rely upon the attorney-client privilege to prohibit disclosure of communications concerning the representation and the redaction of such communications from public records is permissible under the Access to Public Records Act. Finally, under federal law, specifically, the Family Educational and Right to Privacy Act, FERPA, 20 U.S.C. § 1232g, schools are not required to disclose directory information from education records, such as names and addresses.

## ANALYSIS

### *Response Time*

Under the Access to Public Records Act, Indiana Code chapter 5-14-3, a public agency must respond to requests within certain time periods and the failure to respond in a timely manner constitutes a denial.

- a. A denial of disclosure by a public agency occurs when the person making the request is physically present in the office of the agency, makes the request by telephone, or requests enhanced access to a document and:
  - (1) the person designated by the public agency as being responsible for public

- records release decisions refuses to permit inspection and copying of a public record when a request has been made; or
- (2) twenty-four (24) hours elapse after any employee of the public agency refuses to permit inspection and copying of a public record when a request has been made; whichever occurs first.
- b. If a person requests by mail or by facsimile a copy or copies of a public record, a denial of disclosure does not occur until seven (7) days have elapsed from the date the public agency receives the request.

Indiana Code section 5-14-3-9. If a request is made orally or in person, the public agency must, therefore, respond to the request within twenty-four (24) hours after the receipt of the request. Public agencies must respond to written requests received by mail or facsimile within seven (7) days of the receipt of the request.

There is often confusion of the above-mentioned time periods as being the time periods in which public records must be produced under the Access to Public Records Act. While "(a)ny person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4 of this chapter," public agencies are not required to produce public records within the time periods stated under Indiana Code section 5-14-3-9. Ind. Code  $\text{rc}$  5-14-3-3(a). A public agency's response does not require that the public agency produce the public records within any specified time period, only that the requestor receive communication within twenty-four (24) hours or seven (7) days as to whether there are records that will be produced in response to the request. The requestor should also be alerted as to when any public records will be made available for copying and inspection and if access will be denied to any public records that are confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4.

In four of the five requests that are the subjects of your complaints, it is clear that the School Corporation did not respond to your requests within the time periods required under Indiana Code section 5-14-3-9. It is my opinion that the failure of the School Corporation to respond to your requests numbered 1, 2, 4 and 5 constituted denials of access to public records. As a result, you were entitled upon those denials to file an action in circuit or superior court in the county of the denial and ask the court to require the School Corporation to produce any disclosable public records. Indiana Code section 5-14-3-9(d). Additionally, after July 1, 1999, if a plaintiff in a civil action for denial under Indiana Code section 5-14-3-9 has first contacted the Office of the Public Access Counselor, and the judge finds in the plaintiff's favor, the judge must award attorneys fees, court costs and litigation to be paid by the public agency.

### *Duty to Produce or Create New Records*

The Access to Public Records Act defines public records as

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, used, or filed by or with a public

agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Indiana Code § 5-14-3-2. The general rule under the Act is that any person may inspect and copy the public records of a public agency, except as provided under Indiana Code section 5-14-3-4, the exceptions to access when public records are confidential or nondisclosable at a public agency's discretion.

There is no obligation for a public agency to create a new record in order to respond to a public records request, although there is nothing that prevents a public agency from accommodating such requests. The School Corporation, in its October, 1999 responses to your various requests, notes that in some instances no documents exist that are responsive to your request. This is an appropriate response to a public records request. In some instances, the School Corporation asked for more particularity so that they may respond to your request. This is also permissible and commendable, but as noted above, should have been communicated to you in a timely manner. For these reasons, it is my opinion that the School Corporation's failure to create new records in order to respond to your requests for public records did not violate the Indiana Access to Public Records Act.

### *Specific Records Issues*

#### *1. Personnel Records*

Under Indiana Code section 5-14-3-4(b)(8), a public agency has discretion whether to disclose the contents of an employee's personnel file, except for the following information, which must be disclosed upon request:

- (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) information concerning disciplinary actions in which final action has been taken and that resulted in the employee being disciplined or discharged.

In the various responses to your public records requests, the School Corporation denied access to records on the basis that they were not required to disclose such information under Indiana Code section 5-14-3-4(b). The School Corporation denied you access to information concerning alleged sexual harassment complaints as public records that, if they exist, were not required to be disclosed under Indiana Code section 5-14-3-4(b)(8). It is my opinion that, to the extent that there are no pending formal charges against the subject employee and there has been no final discipline against that employee, the School Corporation was not required to disclose other information from a public employee's personnel file that concerned sexual harassment.

With respect to the disclosure of teacher Tom Schoeller's contract, the School Corporation denied

access based upon Indiana Code section 5-14-3-4(b)(8), claiming that this is part of the personnel file of the public employee that is not required to be disclosed. While I agree that an employee's contract may be retained in personnel files for the School Corporation, a teacher's contract must be disclosed under Indiana Code section 20-6.1-4-3.

(a) Each contract entered into by a teacher and a school corporation must:

- (1) be in writing;
- (2) be signed by both parties; and
- (3) contain:

(A) the beginning date of the school term as determined annually by the school corporation;

(B) the number of days in the school term as determined annually by the school corporation;

(C) the total salary to be paid during the school year; and

(D) the number of salary payments to be made during the school year.

**\* \* \* (b) . . . These contracts are public records open to inspection by the people of each school corporation.**

Emphasis added.

If a teacher's contract is a public record that is required to be disclosed under Indiana Code section 20-6.1-4-3, then it would be inconsistent for the School Corporation to refuse access to the same record using the discretionary exception provided at Indiana Code section 5-14-3-4(b). The Access to Public Records Act provides that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees" and that the Act is to be liberally construed in favor of disclosure. Ind. Code §5-14-3-1. Accordingly, it is my opinion that the School Corporation should have disclosed a copy of the teacher contract you requested.

## *2. Selector Disks*

In addition to your complaint for denial of access to the selector disk by the School Corporation's radio station, you submitted a detailed letter dated October 9, 1999, explaining the intricacies of the selector system. In your letter, you assert that the School Corporation's response that they do not have any selector disks that are responsive to your request is not plausible. Your letter was helpful in my understanding of the selector system as a computer program that allows radio stations to track the play of songs so as to prevent replay of the same songs during the same time periods day after day. The question, which is relevant for this opinion, however, is whether the School Corporation's response that no selector disks exist-or that such disks were destroyed or erased-is a violation of the Access to Public Records Act.

Public agencies may not destroy public records except as permitted under Indiana Code section 5-14-3-4(f), which provides that if a public record must be maintained in accordance with the

Indiana Public Records Act, Indiana Code article 5-15, then such a public record may not be destroyed except as permitted by an order of the local public records commission or a duly adopted retention schedule. See, Ind. Code ch. 5-15-6. If a public record is not subject to Indiana Code article 5-15, then a public agency may destroy the public record in the ordinary course of business.

In this case, it is unclear from the School Corporation's response whether any such selector disks did ever exist. I understand that you are very knowledgeable about the selector programs and appreciate your frustration over the response you received. It is my opinion, however, that if the School Corporation did have a selector disk which would have been responsive to your request, but destroyed that disk in accordance with Indiana Code section 5-14-3-4(f), the School Corporation did not violate the Access to Public Records Act. Conversely, if such disks were destroyed without complying with Indiana Code section 5-14-3-4(f), the School Corporation may have violated the Access to Public Records Act.

### *3. Documents Related to Legal Representation*

With respect to attorney-client communications, there is a privilege recognized under Indiana statutory and case law that prohibits disclosure of such communications without the client's consent. The Indiana Court of Appeals has held that government agencies may also rely upon this privilege when they communicate with their attorneys. See, *Board of Trustees of Public Employees Retirement Fund of Indiana v. Morley*, 580 N.E.2d 371 (Ind. App. 1991). See also, Indiana Code section 34-46-3-1 and Indiana Rules of Professional Conduct, 1.6(a). The Access to Public Records Act recognizes that public records may be confidential by state statute and under rules adopted by the Indiana Supreme Court. See, Ind. Code  $\text{\textasciix}5-14-3-4(a)$ .

Certainly, the record concerning the elements of a contractual relationship with a public agency is a public record under Indiana Code section 5-14-3-2. Public agencies, however, are not prohibited from relying upon the attorney-client privilege. In fact, the Access to Public Records Act specifically requires public agencies to make efforts to redact or remove any nondisclosable information from a public record to the extent possible in order to ensure that disclosable information is provided upon request. Ind. Code  $\text{\textasciix}5-14-3-6(a)$ . The redaction of information from the letter outlining the contractual terms between the School Corporation and its attorneys was appropriate to the extent that the information removed reflected such communications and not other information.

### *4. List of students' names and home addresses*

Under the Access to Public Records Act, a public agency is not required to disclose public records that are confidential under federal law. Ind. Code  $\text{\textasciix}5-14-3-4(a)(3)$ . The release of education records, or records that contain information directly related to a student, is governed not only by the Access to Public Records Act, but the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C.  $\text{\textasciix}1232g$ . Generally, education records that contain information directly related to a student and that are maintained by an educational facility may only be disclosed in

accordance with FERPA. Educational facilities may, however, disclose directory information, such as names and addresses, if they have provided the parents with an opportunity to inform the facility that certain information may not be disclosed about their children. 20 U.S.C. §1232g(a)(5)(B).

The School Corporation, in response to your request for a list of the names and addresses of students who are involved with the school radio station program, indicated that they cannot release the names and addresses of these students under FERPA. While there is no specific citation to a provision of FERPA, it appears that an educational facility is not required to have a policy permitting the public disclosure of directory information. Assuming that the School Corporation has such a policy, it was not a violation of the Access to Public Records Act to deny you access to this information about students.

### *Denial of Opportunity to Speak at Public Meetings*

Under the Indiana Open Door Law, the general rule is that a person has the right to attend, observe and record meetings of governing bodies of public agencies. Ind. Code §5-14-1.5-3. There is, however, no right to speak guaranteed by the Open Door Law.

The Carmel-Clay School Board is the governing body for the School Corporation. You requested an opportunity to speak at the School Board's meetings, and the response from the School Corporation was that the practice was to permit public comment at school board meetings, but that they did not accommodate requests to be placed on the Board's agenda to speak. You could make comments during the public comment period provided at the School Board's meetings as other persons do. The failure to honor your request for time on the School Board's agenda was not, therefore, a violation of the Indiana Open Door Law.

## CONCLUSION

It is my opinion that the Carmel-Clay School Corporation failed to provide timely responses to four of the five requests you submitted between June, 1999 and July, 1999, which constituted denials of access which are actionable under Indiana Code section 5-14-3-9. There was no obligation for the School Corporation to create new records in order to comply with your requests for public records. It is also my opinion that the School Corporation had the discretion to withhold certain personnel records that concern the discipline of an employee, but could not withhold a copy of a teacher's contract as that document is disclosable under Indiana Code section 20-6.1-4-3. If a selector disk or information either did not or no longer exists, and it was properly destroyed under Indiana Code article 5-15, the School Corporation did not violate the Access to Public Records Act. Public agencies may rely upon the attorney-client privilege to prohibit disclosure of communications concerning the representation and the redaction of such communications from public records is permissible under the Act. Finally, under federal law, specifically, the Family Educational and Right to Privacy Act, FERPA, 20 U.S.C. §1232g, schools are not required to make public directory information from education records, such as



names and addresses.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Robert Hebert  
School Corporation Attorney

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<sup>1</sup>While you filed six separate complaints, there is only one public agency involved. This opinion addresses all of the various issues raised in your complaints.

<sup>2</sup>The original due date for response by the School Corporation was October 8, 1999. The School Corporation asked for an extension of time to respond to your complaints and did respond on that date, October 15, 1999.

<sup>3</sup>In many cases, you delivered, sent or faxed the same request letters a number of times.

<sup>4</sup>Information concerning the playlist of radio stations.